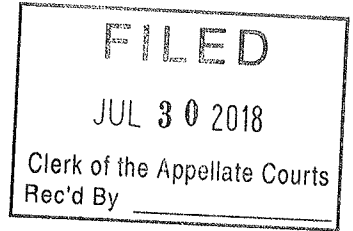


IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE



State of Tennessee, )

v. )

Billy Ray Irick )

) **CAPITAL CASE**

) No. M1987-00131-SC-DPE-DD

) **EXECUTION: August 9, 2018**

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**MOTION TO VACATE EXECUTION DATE**

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Billy Ray Irick, by counsel, moves this Court to vacate the order setting his execution for August 9, 2018 to permit the timely and expeditious adjudication of the appeal challenging the July 5, 2018 lethal injection protocol which utilizes compounded Midazolam, vecuronium bromide, and compounded potassium chloride. This motion is made pursuant to Eighth and Fourteenth Amendments to the United States Constitution, Article 1, § 16 of the Tennessee Constitution, and Tenn. S. Ct. R. 12.4(E). In support of his motion, Mr. Irick states the following:

**I. Procedural Background**

Mr. Irick is a plaintiff in the case of *Abdur'Rahman v. Parker*, No. 13-183-III (Davidson County Chancery Court, filed February 20, 2018), a declaratory judgment action challenging the constitutionality of Tennessee's January 8, 2018 lethal injection protocol. That protocol provided the option of using pentobarbital as Option A or, alternatively, a three-drug Midazolam/vecuronium bromide/potassium protocol as Option B. The claims that proceeded to trial alleged that the Midazolam-based protocol provided as Option B constitutes cruel and unusual

punishment; that the protocol violated Plaintiffs' procedural due process rights, as it required no notice to Plaintiffs of which method the State would use to execute them or standards by which that decision would be made; that the protocol violated their substantive due process rights, as the State's decision to use Midazolam in its three-drug protocol despite its knowledge of its ineffectiveness shocks the conscience and constitutes deliberate indifference; and that the protocol violates their rights to counsel and access to the courts, as it does not provide their counsel with access to a telephone to reach the courts during the execution.

On July 2, 2018, Plaintiffs filed a Second Amended Complaint alleging that Option B constitutes cruel and unusual punishment as the three-drug protocol will cause unnecessary and severe pain and suffering.<sup>1</sup> Plaintiffs also alleged that Option A, the one-drug pentobarbital protocol, constituted a feasible and readily available alternative to the three-drug protocol.

On July 5, 2018, Defendants adopted a new lethal injection protocol, removing Option A (Plaintiffs' pled alternative), designating former Option B, the three-drug Midazolam protocol, as the sole method of lethal injection in Tennessee, and making other substantial changes. On that same day, July 5, 2018, Plaintiffs filed their trial brief. In that brief, Plaintiffs asserted that, notwithstanding Defendants' recent refusal to procure pentobarbital for use in Option A, the one-drug pentobarbital protocol remained a feasible and readily available alternative to Tennessee's three-drug Midazolam protocol. Plaintiffs also added that a viable

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<sup>1</sup>The second amended complaint added allegations regarding the use of compounded Midazolam and potassium chloride.

alternative method of execution for purposes of the second prong of *Glossip* would be the removal of the second drug, vecuronium bromide. The removal of that paralytic drug is clearly available and readily implemented, and it would substantially reduce pain and suffering by hastening Plaintiffs' deaths and because it would spare Plaintiffs the horrifying experience of suffocation brought on by vecuronium bromide. Plaintiffs had earlier pled that the use of vecuronium bromide as part of Tennessee's three-drug protocol was unnecessary and that its inclusion created additional severe pain and terror.

On July 7, 2018, Defendants answered Plaintiffs' Second Amended Complaint, denying for the first time that the one-drug pentobarbital protocol constituted a feasible and readily available alternative to their three-drug protocol.<sup>2</sup>

Trial began on July 9, 2018. The Chancery Court heard from 23 witnesses over the course of 10 trial days. More than 139 exhibits were introduced into the record. That evidence is discussed in more detail below. However, Mr. Irick notes that Plaintiffs elicited testimony during the trial that the 2-drug alternative is feasible, available, and substantially reduces the risk of pain and suffering,

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<sup>2</sup> Theretofore, on April 11, 2018, counsel for Defendants stated in open court and upon the record that his clients would not state whether the one-drug protocol was available and/or would be available for Mr. Irick's execution. Defendants persisted in their refusal notwithstanding the trial court's express warning that Plaintiffs could not determine whether to plead another alternative without such information and that Defendants' refusal would create the need for extensive discovery. On May 5, 2018, in their answer to Plaintiffs' First Amended Complaint, Defendants continued in their refusal, stating that they were without sufficient knowledge to admit or deny whether Option A constituted feasible and readily available alternative. It was not until the June 20, 2018 deposition of Department of Correction Commissioner Tony Parker that Defendants stated in this proceeding that they had not been able to obtain pentobarbital. Commissioner Parker, even then, stated Defendants were continuing to search for pentobarbital and that the one-drug protocol would be used if it were found. *See generally* Attachment A, April 11, 2018 Transcript Excerpt; Attachment B, May 2, 2018 Transcript Excerpt; Attachment C, May 21, 2018 Transcript Excerpt.

including testimony from Commissioner Parker and Plaintiffs' expert witnesses whom the Chancellor described as "well-qualified" and "[e]minent." Attachment E, Order, p. 21.

At the close of the evidence, Plaintiffs made an oral motion pursuant to Rule 15.02 asking the court to allow the amendment of the pleadings to conform to the evidence based on Plaintiffs' evidence that the State had a feasible, readily available alternative which would substantially reduce the risk of pain to Mr. Irick and other Plaintiffs, *i.e.*, a two-drug protocol. As established by the evidence, elimination of the paralytic (which is not necessary to kill the inmate) eliminates the chemical veil and speeds up the execution by at least four minutes. The trial court denied Plaintiffs' motion.<sup>3</sup>

Plaintiffs presented extensive testimony of four leading expert witnesses. Although the Chancellor went to some length describing the impressive credentials of plaintiffs' experts, and never questioned their expertise or credibility, she offered no meaningful description of their testimony or conclusions.

Plaintiffs first presented the testimony of Dr. Craig Stevens a neuropharmacologist who has published extensively, including co-authoring a leading textbook in his field, Pharmacology.<sup>4</sup> Dr. Stevens presented detailed

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<sup>3</sup> The Chancellor had previously denied a motion to amend the complaint to add an as-applied claim challenging the State's new plan to compound some or all of the lethal injection chemicals needed for Option B, which presents many additional dangers, which are even further exacerbated by the State's decision to use a compounding pharmacy and pharmacist who are unlicensed in this state, have a history of disciplinary infractions in their home state, and who only received approval to compound in their home state on June 26, 2018..

<sup>4</sup> Brenner, G.M. and Stevens, C.W., Pharmacology, 4th edition. Pharmacology textbook for medical and health professional students, Saunders/Elsevier, Philadelphia/London, 2013.

scientific testimony regarding the limitations of Midazolam in the lethal injection context. Dr. Stevens explained that Midazolam's mechanism of actions prevents it from ever rendering a human in a state of being where the person is insensate. Because of its inherent limitations, Dr. Stevens explained that persons administered Midazolam may be initially sedated, and can even pass a consciousness check. But once noxious stimuli is applied, those persons will be roused from their sedated state and will be aware and able to feel the noxious stimuli. Dr. Stevens further explained that the excitatory neurotransmitters in the body will overwhelm the limited sedative effects of Midazolam. Dr. Stevens explained why barbiturates such as pentobarbital are capable of rendering inmates in a state of being that will make the inmate insensate to noxious stimuli and which will also act on the excitatory neurotransmitters.

Dr. David Greenblatt is an M.D. and clinical pharmacologist. He is the leading expert in the country on benzodiazepines. He was part of the team that conducted the seminal research on the efficacy of Midazolam. His publications in the area are authoritative. Dr. Greenblatt echoed Dr. Stevens testimony regarding the limitations of Midazolam. Not only does Midazolam not protect the inmates from feeling pain, it is incapable of keeping them in a state of unawareness. Dr. Greenblatt testified that the inmates will be aroused from sedation by the noxious stimuli of pulmonary edema, the paralytics suffocating effects and the burning of potassium chloride. Dr. Greenblatt testified that the pH of Midazolam is so acidic that in the amount administered under the protocol it will destroy the lining of the

lungs, causing the inmate to experience pulmonary edema which will rouse them. Dr. Greenblatt's testimony on this point is corroborated by Dr. Mark Edgar. Dr. Edgar reviewed all available autopsies of inmates executed with Midazolam and found 85% to have suffered pulmonary edema.

Dr. Greenblatt explained that as the inmates experience the feeling of drowning from pulmonary edema, the paralytic will take effect and that will be followed by the burning of potassium chloride. Dr. Greenblatt testified that Midazolam is incapable of prevent the awareness and sensation of all of the noxious effects.

Dr. David Lubarsky, co-author of the chapter in Miller's Anesthesia on the Use of Intravenous Anesthetics, explained the limitations of Midazolam from a real world perspective. Dr. Lubarsky is an internationally renowned expert on pain management. While Dr. Lubarsky's testimony was couched in terms of his industry, i.e. general anesthesia, what he explained is equally applicable in the execution setting. General anesthesia simply equates to the state of being where a person is insensate and unaware. Defendants have adopted a medical procedure and Plaintiffs brought the top medical expert who explained why that medical procedure will not work. Midazolam simply is not an equivalent substitute for a barbiturate.

Dr. Lubarsky testified that under the Midazolam protocol, inmates will not be in a state of general anesthesia and will feel as if they are "locked in a box and someone has covered [their] mouth and [their] lungs and [their] brain are screaming." Dr. Lubarsky further testified that the feeling of the potassium chloride

will be as if every nerve in the body has been “set on fire.” The pain and terror will be excruciating.

The chancellor did not discredit a single aspect of Plaintiffs’ experts’ scientific testimony. The court’s July 26, 2018 judgment fails to engage with the Plaintiffs proof.

Mr. Irick is contemporaneously filing his notice of appeal. To proceed on appeal, the technical record must be prepared and the transcripts finalized.<sup>5</sup> The appeal cannot proceed to a full adjudication prior to Mr. Irick’s August 9, 2018 execution date. Absent a stay from this Court, Mr. Irick will be denied his right to appeal and executed under a protocol using compounded Midazolam and compounded potassium chloride. Only one other state (Virginia) has used this protocol. This Court’s precedent demands a full state court adjudication, including the right to appeal, before an inmate can be executed under a new execution protocol. *See State v. West*, No. M1987-000130-SC-DPE-DD, Nov. 29, 2010 Order (vacating execution date to permit a full adjudication, including a full appeal) (hereinafter “*West* 2010 Order”).

The appeal in this case will present numerous and nuanced claims of legal and constitutional error – including the Chancellor’s refusal to permit Plaintiffs to allege that the Tennessee Department of Corrections (“TDOC”) has a feasible readily available alternative which substantially reduces the risk of pain and suffering: a two-drug protocol utilizing Midazolam and potassium chloride and

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<sup>5</sup> Transcripts for four of the ten days of trial are to be delivered by close of business Monday, July 30, 2018. The other transcripts are in process. Transcripts of the pre-trial hearings have been completed.

eliminating the paralytic. All of the expert witnesses testified that the paralytic is unnecessary and increases the risk of pain and suffering by causing and prolonging suffocation. This evidence is uncontroverted.

For the reasons that follow, the motion should be granted.

**II. The proof in the record establishes that a two-drug protocol is feasible and readily available to Defendants. The appeal will also demonstrate that the Chancellor erred in failing to permit a Rule 15.02 Amendment.**

- A. Other courts have recognized that a two-drug protocol meets the Glossip alternative requirement

In *First Amendment Coalition of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940 (D. Ariz. 2016), the district court considered the constitutionality of a three-drug protocol similar to Tennessee’s Midazolam-based protocol. The Arizona protocol used (1) 500 mg of Midazolam, (2) 100 mg of vecuronium bromide, rocuronium bromide, or pancuronium bromide, and (3) 240 mEq of potassium chloride. *Id.* At 949. The district court held that the inmates’ proposed alternative to “remov[e] the paralytic from the protocol, which will ‘eliminat[e] the substantial likelihood of awareness of suffocation-through-paralysis” satisfied *Glossip*. *Id.* The Court further observed:

The inmates counter that the holdings in *Glossip* and *Baze* are not dispositive. They note that *Glossip* did not consider a challenge to the paralytic, while *Baze* considered the paralytic in the context of a different sedative—sodium thiopental, a barbiturate, which the petitioners conceded would “eliminate any meaningful risk” of pain from injection of the subsequent drugs. *Baze*, 553 U.S. at 49, 128 S. Ct. 1520. Noting the posture in which the case reached the Supreme Court, the inmates also contend that *Glossip* “did not enshrine one court’s findings after an emergency injunction hearing as scientific fact beyond challenge, let alone endorse Midazolam’s constitutionality in all cases.” (Doc. 102 at 3–4.)



The inmates' arguments are well taken. Neither *Baze* nor *Glossip* is dispositive of their Eighth Amendment claims. The inmates challenge Protocol C, alleging that Midazolam is not reliable as a sedative, which means the paralytic will mask the inmate's pain. In *Baze*, by contrast, there was no dispute that the first drug, sodium thiopental, would render the inmate insensate to pain caused by the paralytic and the potassium chloride. 553 U.S. at 49, 128 S.Ct. 1520.

*Glossip* does not foreclose relief. *Glossip* held only that the district court did not clearly err in denying a preliminary injunction based on the evidence before it. Here, the inmates indicate they will present substantial new evidence challenging Midazolam's efficacy as a sedative. (Doc. 102 at 4.) *Glossip* underscores that this is a fact-based inquiry, and the inmates are entitled to present evidence in support of the allegations. *See Glossip*, 135 S. Ct. at 2740 (explaining that "an inmate challenging a protocol bears the burden to show, *based on evidence presented to the court*, that there is a substantial risk of severe pain") (emphasis added).

The inmates have stated an Eighth Amendment claim that is plausible on its face. Assuming the alleged material facts as true and construing them in the light most favorable to the inmates, Claim 1 adequately alleges that Protocol C, by calling for a paralytic after an ineffective sedative, is very likely to cause serious illness and needless suffering. *Baze*, 553 U.S. at 50, 128 S. Ct. 1520. The inmates have also adequately alleged that removing the paralytic from the three-drug protocol is a feasible, readily implemented alternative that would significantly reduce a substantial risk of severe pain. *Id.* at 52, 128 S.Ct. 1520. They also allege that alternatives to Midazolam, such as pentobarbital, are readily available. (Doc. 102 at 4 n.4.)

*Id.* at 950–51. Under this analysis, Mr. Irick met the second prong of *Glossip* through the pleadings and the proof. The Chancellor's denial of Mr. Irick's Rule 15.02 motion to amend was error.<sup>6</sup>

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<sup>6</sup> The proof in the record also shows that after the district court entered the order in the *First Amendment Coalition* case, the State of Arizona agreed to never again use a paralytic or Midazolam in their lethal injection executions. After these two agreements, the case was settled and dismissed. Exhibits 30-33.

- B. The proof in the record establishes that a two-drug protocol eliminating the paralytic is feasible, readily available, and substantially reduces the risk of severe pain presented by the three-drug Midazolam protocol.

A two-drug protocol is easy to implement. The State has access to the drugs. There is no difference in the administration of the chemicals, except that there are three fewer syringes to push. Pushing fewer syringes means that the length of the execution will be cut by one-third, which the evidence shows roughly equates to four minutes. That reduction in time is significant when one considers that the time spent prior to the administration of the potassium chloride is spent with the inmate feeling as if he is “buried alive,” “suffocating,” *as well as* “drowning” from pulmonary edema.

Furthermore, the uncontroverted evidence is that vecuronium is not used to hasten death. Instead, vecuronium is intended, and does in fact, act as a chemical veil making it appear as if death is brought about peacefully while hiding the violence occurring inside the inmate who cannot scream out in pain because his vocal chords are paralyzed. The Defendants’ protestations that vecuronium ensures a “dignified” procedure is truly Kafkaesque - “sanitizing” the final images of death for the public while the inmate suffers an agonizing death muted by paralysis.

- C. Plaintiffs gave adequate notice of intent to amend.

As early as April 11, 2018, Plaintiffs gave notice that they would amend their complaint to add additional alternatives depending on the outcome of discovery. See Attachment A, April 11, 2018 Transcript, pp. 5, 19-32; Attachment B, May 2, 2018 Transcript pp. 5, 81-82; Attachment C, May 21, 2018 transcript, 15-24, 44-45.

Because of the extraordinary speed with which the case was brought to trial, discovery did not end until the week before the trial. Further, Defendants did not abandon pentobarbital as an alternative in the protocol until July 5 – 4 days before trial. On that same day, Plaintiffs gave notice of their intent to elicit evidence and proof regarding the two-drug protocol. Attachment D, Excerpt of Plaintiffs' Trial Brief. Under these circumstances, the court abused its discretion by denying Plaintiffs' motion to amend their complaint to conform to the evidence.

- D. The proof in the record establishes that pentobarbital is available to Defendants.

The trial court relied in large part, directly or indirectly, upon the testimony of Commissioner Parker and Ms. Inglis on whether pentobarbital was available to the State. Neither witness has personal knowledge of this fact. Plaintiffs were prohibited from deposing the only two people with direct knowledge of Defendants' access to pentobarbital - the staffer to whom the job of finding the drugs was delegated (the "Drug Procurer") and the for-profit pharmacist to whom the staffer abdicated his responsibility.) The testimony of Commissioner Parker and Ms. Inglis was, in fact self-serving, inadmissible hearsay. Nevertheless, their testimony was contradicted by the Drug Procurer, whose notes and PowerPoint indicate that of the pharmacies the Drug Procurer contacted, 80% were willing to sell the TDOC pentobarbital. Ex. 105. Further, the notes indicate that the TDOC was quoted a price of \$27,500 per pentobarbital execution. The trial record further demonstrates that Texas and Georgia continue to obtain supplies of pentobarbital. This is compelling proof that the drug is available to Defendants.

Finally, Mr. Irick submits that it is fundamentally unfair and a denial of his constitutional rights for Defendants to hide behind a secrecy statute, T.C.A. § 10-7-504(h), and produce nothing but hearsay in an attempt to insulate a purely administrative decision to not seek pentobarbital but instead to substitute Midazolam for matters of convenience and/or continued secrecy.

**III. The proof in the record establishes a significant risk that Plaintiffs will experience pain and suffering as a result of the use of Midazolam in place of sodium thiopental in a three-drug protocol.**

- A. The law is clear, if an inmate establishes that he will experience the effect of a paralytic and potassium chloride, the inmate has proven a “constitutionally unacceptable risk.” *Baze v. Rees*, 553 U.S. 35, 53 (2008).

Tennessee’s three-drug protocol substitutes Midazolam (a benzodiazepine) for sodium thiopental (a barbiturate) for the express and sole purpose of preventing pain.<sup>7</sup> This Court previously held, “Proper administration of an adequate amount of sodium thiopental is essential to the constitutionality of Tennessee’s three-drug protocol.” *West*, 2010 Order, p. 2. The Court’s holding echoed the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). In the plurality opinion, Chief Justice Roberts wrote, “It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, **constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.**” *Id.* at 53 (emphasis added).

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<sup>7</sup> The protocol also substitutes the paralytic vecuronium bromide for the similar paralytic pancuronium bromide. These two drugs are equivalents.

Under this binding Supreme Court precedent, where—as here—an inmate can feel and experience the suffocation and pain of the second two drugs, the lethal injection protocol is unconstitutional. Mr. Irick therefore has a meritorious appeal which he is entitled to pursue.

- B. The record establishes, and the Chancellor found, that Midazolam has no pain relieving properties. Moreover, Midazolam will not render an inmate unaware of the pain and suffering caused by the administration of drugs under the protocol.

Midazolam's sole intended purpose in the July 5, 2018 protocol is to provide pain relief from the administration of the second and third drugs which this Court has already recognized *will* cause severe pain without an effective analgesic used first. See, Attachment E, Order, p. 4. Yet, the proof in the record – established by every expert who testified - is that Midazolam is not an analgesic and *cannot* provide pain relief. Dr. David Greenblatt who participated in the research which later led to FDA approval for Midazolam's uses as a *sedative* established that Midazolam's absence of analgesic properties is not seriously debated within the scientific/medical community. In fact, as the expert witnesses testified, the leading textbook in this area, Miller's Anesthesia states quite clearly that drugs like Midazolam "lack analgesic properties and must be used with other anesthetic drugs to provide sufficient analgesia." Miller, R., *et al.* eds., Miller's Anesthesia, Vol. 1, p. 842 (8th ed. 2015).<sup>8</sup> Dr. Lubarsky plainly stated, "there simply is no debate" about

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<sup>8</sup> Plaintiffs' expert Dr. David Lubarsky co-wrote the chapter on the use of intravenous anesthetics for a number of years. His work is acknowledged in the most current edition.

Midazolam's limitations. Instead the use of Midazolam in pain-producing procedures is *always* accompanied with a pain-relieving opioid such as fentanyl.

Additionally, the Chancellor's decision failed to address Plaintiffs' proof that the administration of Midazolam alone causes severe pain which will overcome any limited sedative effect of the drug. Plaintiffs provided uncontested proof that 23 out of 27 inmates executed using a Midazolam-based lethal injection protocol suffered pulmonary edema. The testimony in the record is that the pulmonary edema is a noxious stimuli which will of rouse inmates sedated with Midazolam. The finding of pulmonary edema is similar to findings with persons who have drowned or suffered sarin gas attacks.

Dr. Greenblatt testified that the most likely reason for the pulmonary edema is the acidic quality of the massive dose of Midazolam that will not be buffered until after it has passed through the lungs. The lungs will be assaulted with acid a second time with the subsequent massive dose of Midazolam. As a result, the lungs will fill with fluid, and the inmate will feel as if he is being drowned. One expert compared the experience to chemical waterboarding. The credible expert testimony established that the most likely cause of the pulmonary edema is the Midazolam, based on specific findings made in the vast majority of autopsies of inmates executed using Midazolam. The Chancellor's order fails to address this additional cause of pain and suffering, which no court, including the Supreme Court in *Glossip*, had ever heard before.

In summary, the uncontradicted evidence from Plaintiffs' experts (explicitly found by the trial court to be well qualified and eminent) when considered in light of *Baze* and this Court's ruling in the 2010 *West* opinion establishes that Plaintiffs proved that the use of Midazolam in the Tennessee protocol violates the Eighth Amendment in that "there is a substantial, constitutionally unacceptable risk of suffocation from the administration of [the paralytic] and pain from the injection of potassium chloride." *Baze*, 535 U.S. at 53. In addition, Midazolam alone will cause pulmonary edema and cause severe, unnecessary pain. Finally, Dr. Lubarsky's un rebutted testimony is that the protocol's consciousness check is (a) inadequate and (b) impossible to carry out given the way the inmate is strapped to the gurney. Moreover, the way that the inmate is restrained to the gurney prevents the warden and others from observing signs of awareness and sensation.

- C. Uncontested evidence demonstrates that inmates in every state that has used Midazolam have demonstrated physical signs of awareness and sensation following what prison officials call a "consciousness check."

Plaintiffs presented eyewitness proof that the science as described by Plaintiffs' experts has played out in real life in every jurisdiction to use Midazolam. Witnesses from these states witnessed inmates raising their arms, clenching their fists, trying to speak (the microphones are always turned off), moving their hands, moving their feet, straining against the straps, writhing, producing tears, struggling and choking. All of these observations were made after DOC employees declared the inmates "unconscious." Dr. Lubarsky confirmed that these physical reactions are proof that the inmates were not unconscious. Rather, with his

training and expertise, Dr. Lubarsky recognizes these physical actions as signs of awareness and pain.

The State did not produce a single witness to refute the testimony of Plaintiffs' imminently qualified experts or lay witnesses.

**IV. The appeal presents serious and nuanced issues of constitutional law.**

The appeal of this case presents facts and legal claims that go far beyond the Chancellor's order. Indeed, the Chancellor's order actually fails to do what this Court has instructed be done in challenges to the State's manner of execution. Despite a lengthy presentation of witnesses whose testimony the court accepted as credible and valuable, the Chancellor did not analyze that evidence at all. The appellate court must do what the Chancellor failed to do, analyze the proof in light of the applicable legal standards.

That analysis will involve questions of first impression in Tennessee, including, *inter alia*, what is the nature of the Plaintiffs' burden to prove an alternative under *Glossip*? Can a plaintiff rely on inference and proof from the Defendants' witnesses--an issue is likely to be addressed by the Supreme Court next term in *Bucklew v. Precythe, et al.*, No. 17-8151? Is the burden on Plaintiffs to prove an alternative altered in light of Tennessee's secrecy laws related to the State's procurers and suppliers of lethal injection chemicals? Did the Chancellor err in her interpretation of the Tennessee public records act secrecy provision? Is there a torture exception to *West/Glossip*?



**V. Precedent supports Irick's motion.**

This Court places importance on the full adjudication of execution protocol challenges.<sup>9</sup> In 2015, this Court acknowledged the importance of the appellate process when it stayed executions “pending the conclusion of [the declaratory judgment action], through appeal of the trial court’s final judgment.” See Order, *Abu-Ali Abdur’Rahman v. State*, No. M1988-00026-SC-DPE-PD (Tenn. Apr. 10, 2015); Order, *State v. Lee Hall*, No. E1997-00344-SC-DDT-DD (Tenn. Apr. 10, 2015); Order, *Donald Wayne Strouth v. State*, No. E1997-00348-SC-DDT-DD (Tenn. Apr. 10, 2015); Order, *State v. Nicholas Todd Sutton*, No. E2000-00712-SC-DDT-DD (Tenn. Apr. 10, 2015).

Tennessee Supreme Court Rule 12.4(E) provides that this Court will enter a stay of execution due to the pendency of state court collateral litigation where the plaintiff can “prove a likelihood of success on the merits.” The proof outlined above, and presented at the trial in Chancery Court, meets this standard.<sup>10</sup> Moreover, in light of the importance of the matter at hand, a stay of execution is warranted to permit thoughtful and studied review of the record and numerous legal issues

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<sup>9</sup> See Order Granting Defendant’s Motion to Vacate Execution Date, *State v. David Earl Miller*, No. E1982-00075-SC-DDT-DD (Tenn. Mar. 31, 2015); Order Granting Defendant’s Motion to Vacate Execution Date, *Charles Walton Wright v. State*, No. M1985-00008-DDT-DD (Tenn. Feb. 26, 2015); Order Granting Defendant’s Motion to Vacate Execution Date, *State v. Donnie Edward Johnson*, No. M1987-00072-SC-DPE-DD (Tenn. Dec. 22, 2014); Order Granting Defendant’s Motion to Vacate Execution Date, *State v. Stephen Michael West*, No. M1987-00130-SC-DPE-DD (Tenn. Nov. 24, 2014); Order Granting Defendant’s Motion to Vacate Execution Date, *State v. Edmund Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn. Oct. 22, 2014); Order Granting Defendant’s Motion to Vacate Execution Date, *State v. Billy Ray Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Sep. 25, 2014).

<sup>10</sup> Notably, the standard under the Tennessee rules is more lenient than the standard required to obtain a stay of execution of a state court judgment by a federal court.

presented and to promote public confidence in the administration of the death penalty and the judicial system.

**VII. Conclusion**

The state has adopted a new and controversial lethal injection protocol. Mr. Irick is not to blame for this change. Based upon the evidence in the record and existing law, it is more likely than not that Mr. Irick will prevail on appeal. Moreover, the other issues to be decided on appeal are weighty and should only be decided after a studied review of the voluminous record. Equity demands a stay of execution enter to prevent Mr. Irick's execution before the appellate process has even begun. Denial of this motion will deny Mr. Irick his right to appeal. Accordingly, the motion should be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was sent to the following via email on this the 30th day of July, 2018, to:

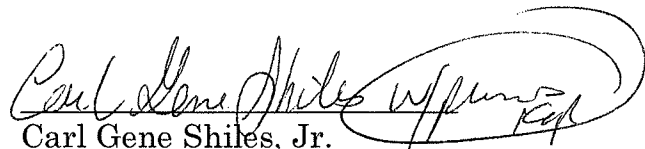
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# Attachment A



1 PROCEEDINGS

2 THE COURT: Good morning.

3 MS. HENRY: Good morning.

4 MR. SUTHERLAND: Good morning, Your Honor.

5 THE COURT: The Court has convened a  
6 Rule 16 conference in this case. This is a  
7 case which challenges the constitutionality of  
8 the lethal injection protocol in Tennessee.

9 Let me tell you-all how we're going to  
10 proceed, the topics that we're going to cover.  
11 And then I'm going to ask you if you will go  
12 around the room and state your name and whom  
13 you represent just so that I can become  
14 familiar, a face and a name, with counsel.

15 And so let's do that first, and then I'll  
16 go over the schedule, the matters that we're  
17 going to discuss. So let's start with  
18 plaintiffs' counsel, please.

19 MS. HENRY: Good morning, Your Honor. My  
20 name is Kelley Henry, and I'm here representing  
21 the vast majority of the plaintiffs in the case  
22 today, those clients from the Middle District  
23 of Tennessee.

24 Would you like for me to state all their  
25 names for the record?

1 MR. SUTHERLAND: And readily implemented.

2 THE COURT: And so in terms of pleading,  
3 you assert that the Court has to dismiss if  
4 they plead A is unavailable and, two, they  
5 don't allege an alternative to A and B?

6 MR. SUTHERLAND: That's correct,  
7 Your Honor.

8 THE COURT: All right.

9 MR. SUTHERLAND: That also does the second  
10 part of the element, which is, if the  
11 alternative, in fact, which I assume they would  
12 prove through expert testimony, substantially  
13 reduces the risk of injury.

14 THE COURT: Yes, I understand. Now, so  
15 that we don't -- aren't inefficient and are  
16 just playing semantics or using semantics so  
17 that we can do good competent work here,  
18 paragraphs 431 through 433 of the complaint, if  
19 the State were required to answer that, those  
20 allegations concern availability, if there  
21 is -- it is undisputed that the State cannot  
22 get A, then we've eliminated an issue in the  
23 case. And it would seem to make sense to get  
24 that done before we even go into the motion to  
25 dismiss phase.

1           Are you able to provide the Court  
2 information on the State's position concerning  
3 paragraphs 431 through 433 and the availability  
4 of the drug for Protocol A?

5           MR. SUTHERLAND: Well, I think what we  
6 have told the Tennessee Supreme Court in the  
7 motions to set execution dates that there has  
8 been difficulty obtaining the drugs for  
9 Protocol A. You know --

10          THE COURT: Well, you can understand --

11          MR. SUTHERLAND: Obviously the Department  
12 --

13          THE COURT: Excuse me for interrupting.  
14 But you can understand how that puts us, then,  
15 in an untenable position here in the trial  
16 court and all of the litigants, including the  
17 State.

18          Under Glossip, that is a fact that we need  
19 to know. So we've got to have a position on  
20 that. Either it's available or it's not.

21          MR. SUTHERLAND: I think -- I guess I  
22 would say today, Judge, that I think it would  
23 be somewhat premature because unavailability  
24 certainly --

25          THE COURT: It's not premature because we



1 have an August execution date. We need to know  
2 whether it will be available for that execution  
3 for the plaintiffs to be able to fulfill the  
4 condition of Glossip and for you to be able to  
5 argue to me they have not fulfilled their  
6 position under Glossip. So we need to know  
7 that. That is essential for the case --

8 MR. SUTHERLAND: I think --

9 THE COURT: -- or these proceedings are  
10 just futile and useless if we don't know that.

11 MR. SUTHERLAND: I think it's fair to say  
12 that today, today --

13 THE COURT: That wasn't my question.  
14 August 9th, or even before that, so we have  
15 notice what's going to be used.

16 What will be used for the August 9th --  
17 will it be available for the August 9th  
18 execution? That's the question.

19 MR. SUTHERLAND: I can't answer that  
20 question, Your Honor. I mean --

21 THE COURT: Well, if you can't answer it  
22 then our proceedings here are really  
23 meaningless. We've got to have the answer to  
24 that because then they can't allege -- know  
25 what alternative to allege.

1 MR. SUTHERLAND: Well, that's not our  
2 burden to tell them what's available. It's  
3 their burden to show that there isn't  
4 available.

5 THE COURT: You're right, it's not their  
6 burden. But in terms of facts, we have to know  
7 what the State has for that execution. I mean,  
8 that just is -- is --

9 MR. SUTHERLAND: Why -- why is it our -- I  
10 guess --

11 THE COURT: We are not talking about  
12 burdens. We are talking about what  
13 alternatives are available to them. And they  
14 don't know if that -- you haven't told them --  
15 that alternative is -- we don't know if it's  
16 available or not and no facts -- there's no  
17 trial that we could have, no evidentiary  
18 hearing that we could have, that would tell us  
19 one way or the other. I mean, the State needs  
20 to tell us.

21 Are you going to have enough for  
22 August 9th or not?

23 MR. SUTHERLAND: Respectfully,  
24 Your Honor --

25 THE COURT: Yes, sir.

1 MR. SUTHERLAND: -- the Glossip decision  
2 says that they must identify it. They must  
3 identify it. They must tell -- they must say  
4 if B doesn't work, that here's one that is  
5 available.

6 THE COURT: Yes.

7 MR. SUTHERLAND: It's not our -- it's not  
8 our responsibility to tell them what we have.  
9 It's their responsibility to identify something  
10 that is available.

11 THE COURT: I guess we just will have to  
12 respectfully disagree, Mr. Sutherland. I'm  
13 having a case management conference so I can  
14 plan.

15 MR. SUTHERLAND: Okay.

16 THE COURT: And you have told me as a  
17 matter of pleadings that they haven't plead the  
18 alternative.

19 MR. SUTHERLAND: Right.

20 THE COURT: And I said to you, how can  
21 they plead Protocol A as an alternative if we  
22 have facts in here that say it's not going to  
23 be available for the August 9th execution? And  
24 you won't tell us one way or the other whether  
25 it's going to be available or not.

1           That would eliminate -- if we knew that,  
2 then they could say, okay, we can't use A but  
3 you can use this and then we can have a trial  
4 about that.

5           MR. SUTHERLAND: Let me say it this way.  
6 The fact -- whether or not the Tennessee  
7 Department of Correction currently has lethal  
8 injection chemicals to perform Protocol A  
9 doesn't mean that they can't identify other  
10 sources. If they are saying that is an  
11 available alternative, then it seems to me  
12 under Glossip that they must identify that it  
13 is available.

14           THE COURT: What we are going to have,  
15 then, if we go down this road that you're  
16 talking about, we have this August 9th  
17 execution date that the State has set. And if  
18 we go down the road that you have just slated,  
19 then we're going to have to have discovery on  
20 availability and that is going to be very  
21 detailed and it's going to be very difficult  
22 for all sides to get that proof together  
23 because it will be -- you're saying we have to  
24 go to other sources and that discovery will  
25 take a very long time.

1           So as the State of Tennessee you have an  
2 August 9th execution date, what the Court is  
3 doing in the Rule 16 conference is to determine  
4 whether issues can be eliminated that are  
5 potentially not meaningful. And this is why  
6 I'm putting this to you.

7           MR. SUTHERLAND: I think --

8           THE COURT: And you have a choice here.

9           MR. SUTHERLAND: Sure.

10          THE COURT: You have the ability to  
11 eliminate and narrow some issues.

12          MR. SUTHERLAND: I think that what we can  
13 say is what we told the Tennessee Supreme Court  
14 and that is because we did not have -- we don't  
15 have -- did not have and don't have and have  
16 had no reasonable -- there's been no reasonable  
17 expectation of obtaining anything to perform  
18 Protocol A, that that's why Protocol B was  
19 added to the procedures.

20          THE COURT: And the Court would  
21 characterize that as constituting a statement  
22 that A is unavailable. So okay. That's --  
23 that informs me about your position and whether  
24 this is pleading or substantive will help me to  
25 plan.

1 MR. SUTHERLAND: I guess what I would say  
2 just to follow up is I hate to sound evasive  
3 but the Department certainly has a duty to  
4 carry out its statutory mandate and has been  
5 attempting to do that. Because for all the  
6 reasons stated in the Glossip decision, because  
7 anti-death penalty opponents have made it very  
8 difficult for states to obtain lethal injection  
9 chemicals, we've had to amend, adopt another  
10 protocol.

11 Certainly, if Protocol A were -- the  
12 Department has not been able to identify a  
13 source to accomplish Protocol A and that was  
14 the reason why Protocol B was adopted. Now,  
15 that doesn't mean at some day in the future.  
16 I'm just saying at this point there's no  
17 reasonable expectation that --

18 THE COURT: You used the word "evasive".  
19 I'll use, I guess, something from literature, a  
20 Catch 22. It makes it almost impossible to  
21 have a meaningful determination of what's  
22 before the Court --

23 MR. SUTHERLAND: I understand, Your Honor.

24 THE COURT: -- with the answer that you've  
25 given. And this Court is going to find a way

1 that we can address that because this process  
2 needs to be meaningful.

3 MR. SUTHERLAND: Yes, ma'am.

4 THE COURT: And it needs to be done  
5 correctly.

6 MR. SUTHERLAND: Yes, ma'am.

7 THE COURT: And we know what Glossip tells  
8 us and the answer that I have been given does  
9 not enable you, me, or the other side to do  
10 what we need to do in this case. And so I'm  
11 going to study that and I'm going to figure out  
12 a way to handle that.

13 There is no way that we can proceed in  
14 this matter without grappling with that and  
15 determining what to do.

16 So let me hear from the other side. I  
17 think maybe if I hear from them, that will help  
18 me come up with a way to help me with this.

19 MR. SUTHERLAND: May I ask a question?

20 THE COURT: Yes, sir.

21 MR. SUTHERLAND: Are you saying to me is  
22 the Department -- is there any possibility that  
23 the Department between now and August could  
24 get --

25 THE COURT: No, that's not what I'm

1 saying.

2 MR. SUTHERLAND: Okay.

3 THE COURT: I am not asking you that.

4 MR. SUTHERLAND: You're asking --

5 THE COURT: Excuse me. I asked you about  
6 your motion to dismiss, whether your challenge  
7 was one of pleading or substance. I then  
8 referred you to facts in the complaint which  
9 appear to be undisputed.

10 And where you and I have been talking  
11 here, it's been about the legal implication of  
12 the undisputed facts and when the legal  
13 implication is unavailability. And it is,  
14 where does that take us under Tennessee Code  
15 Annotated Section 40-23-114?

16 MR. SUTHERLAND: I guess my question is,  
17 unavailable today? Unavailable -- I mean,  
18 that's the thing.

19 THE COURT: No. It's really quite clear  
20 under Glossip. Unavailable for the August 9th  
21 execution. That's what we're looking at. And  
22 I understand logistically, you know, someone  
23 having to core down and make orders and look  
24 around the country and figure out do I buy it  
25 now, do I wait. I understand what you're



1 saying.

2 But, most respectfully, we're talking  
3 about that legal implication of the facts that  
4 we have here. Is it unavailable? And I  
5 don't -- I don't think it's as obtuse as it's  
6 being made here. So we'll just stop at that.

7 If you continue down this path, we're  
8 going to have to do discovery on that and  
9 that's going to take more than a couple or  
10 three months. So it's the State's -- it's the  
11 State's choice on that matter. If that one  
12 unavailable could be cleared up, then it makes  
13 a difference on whether we can make that  
14 August 9th execution date or not.

15 MR. SUTHERLAND: Okay. Are you saying  
16 that -- would you equate the State saying that  
17 it's unavailable with the commissioner under  
18 the statute having to certify to the governor  
19 that it's not -- we don't have it?

20 THE COURT: I'm not sure what that  
21 question means under Glossip. So I'm sorry.  
22 I'm unable to provide a response to that. I'm  
23 not sure what you mean.

24 MR. SUTHERLAND: All right.

25 THE COURT: At this time, I'm going to

1 hear from the other side. Talk with your  
2 co-counsel. You'll have an opportunity to  
3 reply.

4 MR. SUTHERLAND: All right. Thank you.

5 THE COURT: All right. Ms. Henry, let's  
6 start with you on this, please. If you'll come  
7 to the podium.

8 MS. HENRY: Thank you, Your Honor.

9 THE COURT: If you can tell me what your  
10 position is on this matter.

11 MS. HENRY: Your Honor, Plaintiffs'  
12 position on this matter is that the facts as we  
13 understand them is that pentobarbital -- the  
14 compound pentobarbital is available for the  
15 August 9th execution date.

16 THE COURT: Let me ask you. Is that  
17 Protocol A?

18 MS. HENRY: Yes, ma'am.

19 THE COURT: If you'll use that term for  
20 the Court. That will be helpful for the record  
21 too.

22 MS. HENRY: Yes, ma'am. It is our  
23 position that Protocol A is available for the  
24 August 9th execution date. We base that on the  
25 investigation that we have conducted for the

1 past five years, the representation of the  
2 Attorney General's Office in the previous  
3 litigation in West v. Scoffield that was  
4 conducted in front of Chancellor Bonnyman. At  
5 that time, the State produced a signed  
6 contract.

7 THE COURT: So we're here just on a  
8 planning conference.

9 MS. HENRY: Yes, Your Honor.

10 THE COURT: If it's your position that  
11 Protocol A is available, why hasn't that been  
12 pled as an alternative under Glossip?

13 MS. HENRY: Your Honor, it was. I will  
14 direct you to Count 1, page 46, beginning with  
15 paragraph 188. We plead Protocol A as an  
16 available alternative.

17 Count 16 is a separate alternative  
18 argument, Your Honor, anticipating that perhaps  
19 the State would choose to defend an argument  
20 that Protocol A is unavailable. However, they  
21 did not choose to defend in that way.

22 THE COURT: If the Court were to determine  
23 under Glossip that you have to allege an  
24 alternative and required you to amend or even  
25 today, would you be in a position to state that

1 you would amend to allege Protocol A as an  
2 alternative?

3 MS. HENRY: Yes, Your Honor.

4 THE COURT: Would you state that  
5 explicitly?

6 MS. HENRY: We would state that Protocol A  
7 is an available alternative, Your Honor, yes.

8 THE COURT: Thank you. Is that true of  
9 all of the other plaintiffs?

10 MR. MacLEAN: Yes, Your Honor.

11 THE COURT: Okay.

12 MS. MORRIS: Yes, Your Honor.

13 THE COURT: Okay. Thank you very much.

14 MS. HENRY: Thank you very much.

15 THE COURT: Anything else from the State?

16 MR. SUTHERLAND: I guess I would ask just  
17 for clarification, availability is not the only  
18 component of that element. So if you say are  
19 they prepared to amend to make an available  
20 alternative, are they prepared to amend to  
21 address the deficiency we've addressed in our  
22 motion? I guess that is my question.

23 THE COURT: I'm looking at Glossip to see  
24 what are the other two items they have to  
25 allege with respect to the alternative. You

# Attachment B

ABU-ALI-ABDUR'RAHMAN, ET AL. vs TONY PARKER, ET AL.  
Transcript of Proceedings on 05/02/2018

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART  
III

ABU-ALI-ABDUR'RAHMAN, LEE )  
HALL, a/k/a LEROY HALL, BILLY )  
RAY IRICK, DONNIE JOHNSON, )  
DAVID EARL MILLER, NICHOLAS )  
TODD SUTTON, STEPHEN MICHAEL )  
WEST, CHARLES WALTON WRIGHT, )  
EDMUND ZAGORSKI, JOHN MICHAEL )  
BANE, BYRON BLACK, ANDRE )  
BLAND, KEVIN BURNS, TONY )  
CARRUTHERS, TYRONE CHALMERS, )  
JAMES DELLINGER, DAVID DUNCAN, )  
KENNATH HENDERSON, ANTHONY )  
DARRELL HINES, HENRY HODGES, )  
STEPHEN HUGUELEY, DAVID IVY, )  
AKIL JAHI, DAVID JORDAN, )  
DAVID KEEN, LARRY MCKAY, )  
DONALD MIDDLEBROOKS, FARRIS )  
MORRIS, PERVIS PAYNE, GERALD )  
POWERS, WILLIAM GLENN ROGERS, )  
MICHAEL SAMPLE, OSCAR SMITH, )  
)  
Plaintiffs, )  
)  
vs. ) No. 18-183-II(III)  
)  
TONY PARKER, in his official )  
capacity as Tennessee )  
Commissioner of Correction, )  
TONY MAYS, in his official )  
capacity as Warden of )  
Riverbend Maximum Security )  
Institution, JOHN/JANE DOE )  
EXECUTIONERS 1-100, JOHN/JANE )  
DOE MEDICAL EXAMINER(S) 1-100, )  
JOHN/JANE DOE PHARMACISTS )  
1-100, JOHN/JANE DOE )  
PHYSICIANS 1-100, JOHN/JANE )  
DOES 1-100, )  
)  
Defendants. )  
)

1 P R O C E E D I N G S

2 THE COURT: Thank you. Good morning.

3 MS. HENRY: Good morning.

4 MR. SUTHERLAND: Good morning, Your Honor.

5 THE COURT: We are here for oral argument  
6 on two motions. We have the defendants' motion  
7 to dismiss, and then we also have the  
8 plaintiffs' motion to compel discovery. Let me  
9 tell you how we'll proceed with those motions  
10 this morning.

11 We'll start with the motion to dismiss.  
12 That will help me in relation to the motion to  
13 compel. But we'll start with oral argument on  
14 the motion to dismiss. And then after I have  
15 heard oral argument on that, we'll go to the  
16 motion to compel. I will not rule from the  
17 bench. I will take the matter under  
18 advisement. But I will issue a ruling by  
19 Friday on both motions.

20 I also have a few preliminary questions I  
21 want to ask the State before they start their  
22 argument on the motion to dismiss. But before  
23 the State takes the podium, let me just see,  
24 are there any preliminary matters that we need  
25 to take up? Plaintiffs, anything?

1 happen, because the Supreme Court doesn't take  
2 cases to decide individual cases. Yes,  
3 Mr. Bucklew has a specific as-applied challenge  
4 but the court took cert.

5 The court takes cert to announce rules of  
6 law, not to decide just one issue in one case.  
7 And so they are going to tell us what is the  
8 meaning of that Glossip requirement. And they  
9 may, as I'm sure they will be urged, eliminate  
10 that element of Glossip. That will be one of  
11 the issues addressed, and that will apply to  
12 facial challenges just as much as it applies to  
13 as-applied challenges.

14 But certainly the question here, the State  
15 has made perfectly clear through  
16 interrogatories, motion to dismiss, his  
17 requests for production, his request for  
18 admission, that they are going to focus heavily  
19 on that part of Glossip and what is our burden  
20 of proof, what do we have to prove.

21 If it turns out through discovery -- we  
22 don't believe it will. We believe we are going  
23 to be able to meet that element of Glossip.  
24 But should it turn out through discovery that  
25 the method of execution -- the alternative



1 method that we have proposed is not readily  
2 available or feasible or able to be  
3 implemented, then we would have the opportunity  
4 at that point to amend our complaint to allege  
5 another alternative or to amend our complaint  
6 to allege that because there is no ability to  
7 make an alternative, we're not required to and  
8 any such requirement would be unconstitutional,  
9 which is our Count 16.

10 So Bucklew has really put these issues up  
11 in the air. Those issues are not going to be  
12 resolved before out --

13 THE COURT: Would that continue to be a  
14 facial challenge or would it be an as applied?

15 MS. HENRY: We don't know, Your Honor.  
16 It's possible that the -- for example, if the  
17 U.S. Supreme Court is convinced that the  
18 standard in Glossip for as-applied  
19 challenges -- the as-applied challenges have  
20 that Glossip requirement. Their illustration  
21 of what that Glossip requirement is is relevant  
22 to facial and as applied.

23 Or the Supreme Court could be convinced in  
24 that case to eliminate that requirement in all  
25 circumstances. We don't know yet, but those

# Attachment C

ABU ALI ABDUR'RAHMAN, ET AL. vs. TONY PARKER, ET AL.  
Transcript of Proceedings on 05/21/2018

IN THE CHANCERY COURT  
FOR DAVIDSON COUNTY, TENNESSEE

ABU ALI ABDUR'RAHMAN, )  
et al, )  
 )  
Plaintiffs, )  
 )  
vs. ) NO. 18183II(III)  
 )  
TONY PARKER, et al, )  
 )  
Defendants. )  
 )

Transcript of Proceedings

Taken before the  
Honorable Ellen Hobbs Lyle

May 21, 2018

VOWELL, JENNINGS & HUSEBY  
Court Reporting Services  
207 Washington Square Building  
214 Second Avenue North  
Nashville, Tennessee 37201  
(615) 256-1935

1 think we have Dr. Stevenson on June 10th. We  
2 have Dr. Lalarski (Phonetic) on June 13th.  
3 We have Dr. Greenlack on June 14. We have  
4 Dr. Edgar on June 25th, which the State did  
5 accommodate giving us that Monday to do that  
6 and we appreciate it.

7           The State has not asked to take a  
8 deposition of Laura DePose. Frankly, she's  
9 barely an expert. She's a person with  
10 expertise, but her testimony is going to be  
11 about 10 minutes and it's just really in  
12 facts. We gave her as an expert really out  
13 of an abundance of caution.

14           Those are the ones that we have  
15 noticed. And then Dr. Li, Dr. Roswell, Lee  
16 Evans is scheduled for June the 21st.

17           THE COURT: Will there be any  
18 fact witness depositions? I know we've got  
19 in dispute Commissioner Parker and Warden  
20 Mays, but are there any fact witness  
21 depositions set?

22           MS. HENRY: We have scheduled  
23 fact deposition witnesses, Your Honor, for  
24 the 29th. That is the subject of letters  
25 that we received as we walked into court

1 today where the State is going to ask -- is  
2 objecting to the subpoenas that that we  
3 served.

4 At some point, it becomes -- if  
5 we're going to be allowed to move forward  
6 with depositions, which I understand the  
7 Court is going to decide that today, if  
8 that's going to happen, we're going to be  
9 asking for some relief one way or the other  
10 in terms of timing.

11 We have our responses to  
12 interrogatories due, like I say, next week,  
13 and expert reports due June 1st. We need to  
14 get these depositions done before we can  
15 respond to interrogatories.

16 And I should back up, Your Honor.  
17 Something else that we would want to probe  
18 with Commissioner Parker and Warden Mays is  
19 other drugs. Because, again, we can amend  
20 our complaint. So just because they want to  
21 come in now and say Protocol A is an  
22 available alternative, which is a new  
23 position, doesn't mean that there aren't  
24 other drugs that we could propose to meet our  
25 burden of available alternative or other

1 alternatives, which we will do.

2 THE COURT: Do you need to take  
3 those depositions to amend?

4 MS. HENRY: Yes, ma'am.

5 THE COURT: I'm talking about  
6 Commissioner Parker and Commissioner Mays.

7 MS. HENRY: Yes, ma'am.

8 THE COURT: So you need to take  
9 those two?

10 MS. HENRY: Yes, ma'am. Someone  
11 in the Department of Corrections has looked  
12 at getting Fentanyl and we don't know who  
13 that is. But based on what the Court's  
14 provided in your order, which, frankly, we do  
15 think that this has already been decided and  
16 we're here today to discuss the depositions  
17 of these two gentlemen.

18 THE COURT: Well, there were two  
19 parts to their objection to the deposition.  
20 One was the Morgan Doctrine. And then the  
21 other was relevancy.

22 So in addition to the experts,  
23 there will be some fact witness depositions.

24 The reason I was asking about the  
25 deposition schedule is wondering if we could

1 put Commissioner Parker and Commissioner Mays  
2 there at the end after June 14th. But if  
3 you're going to amend, you need that  
4 information.

5 MS. HENRY: We need to talk to  
6 them before we file our interrogatories. One  
7 option would be to enlarge the time in which  
8 we file our response to their interrogatories  
9 as well as our expert reports. We're  
10 certainly open to working with their  
11 schedules. We complied with the rule in  
12 terms of noticing their depositions and tried  
13 to do it as quick as possible to meet  
14 discovery deadlines that are in place. Of  
15 course, the Court can give us that relief.

16 I would also note, Your Honor,  
17 we're focusing on Counts 1 and 8, but we also  
18 have Counts 4 and 5. And Warden Mays, in  
19 particular, I don't know how much information  
20 Commissioner Parker will have about those  
21 counts. We can't know that until we ask  
22 questions. But Warden Mays, I do know, is  
23 going to have information relevant to Count 4  
24 and Count 5.

25 THE COURT: And I had not brought

1 those up, because I had focused on Paragraph  
2 4 of Commissioner Parker's affidavit saying  
3 that the Protocol 1 drugs are not available.  
4 And so we know that Count 4, the due process,  
5 focuses on if there's an alternative.

6 The right to counsel I had lumped  
7 in with Counts 1 and 8, because it so much  
8 has to do with the Midazolam. So I'll get  
9 more information from the other side about  
10 Paragraph 4 of Commissioner Parker's  
11 affidavit.

12 MR. HENRY: I'm sorry.

13 THE COURT: Yes.

14 MS. HENRY: With respect to this  
15 idea of our procedural due process in Count  
16 4, I want to refer back to the fact that,  
17 according to the State, they can't get  
18 Midazolam. So Count 4 has to do with which  
19 count are you going to choose and when are  
20 you going to choose it and how are you going  
21 to let us know. If they don't have Midazolam  
22 either, then Count 4 is still a valid choice  
23 if they're going to continue to try to get  
24 both drugs, which is what they've said.

25 THE COURT: I'm going to try to



1 get some clarity on that today, because we  
2 have about five different logics going here  
3 depending on which drug is available. If  
4 both are available, that takes us to certain  
5 legal claims. If one is available, that  
6 takes us another route. So we need to get  
7 some clarity on that.

8 MS. HENRY: Yes, ma'am. I also  
9 want to note that I think it's Pancuronium  
10 that expired on May 1st. Pancuronium  
11 Bromide, the second drug, also expired on May  
12 1st and we have no information available if  
13 they've been able to obtain that drug as  
14 well.

15 THE COURT: In terms of summary  
16 judgment, I'm going to ask the defendants  
17 about that, because they brought that up from  
18 day one. And I had the plaintiffs amend  
19 their pleadings to state clearly what the  
20 alternative was so we could have that in  
21 place.

22 MS. HENRY: Yes, ma'am.

23 THE COURT: It's your position,  
24 if I get clarity, that Protocol 1 is no  
25 longer an alternative that you would seek to

1 amend. So summary judgment would be futile  
2 or should be delayed, because you would seek  
3 to amend.

4 MS. HENRY: Yes, ma'am.

5 THE COURT: All right. Thank  
6 you. This has been very helpful. Let me get  
7 some more information from the defendants.  
8 Thank you.

9 MS. HENRY: Thank you.

10 THE COURT: General Sutherland.

11 MR. SUTHERLAND: Yes, Your Honor.  
12 Good morning.

13 THE COURT: Good afternoon.

14 MR. SUTHERLAND: Good afternoon.

15 THE COURT: I had to look at the  
16 clock myself. It's been that kind of day.

17 We need some clarity here.  
18 What's going on with the protocol? What are  
19 we using? Tell me about that.

20 MR. SUTHERLAND: Well, Your  
21 Honor, on February the 15th of this year, we  
22 filed motions. And I alluded to the first  
23 hearing we had, which the State stated to the  
24 Court as follows: Despite continuing efforts  
25 to identify alternatives to Pentobarbital,

1 currently the Department has none on hand and  
2 no known source to obtain more.

3 We have represented that. That  
4 is the State's position.

5 The plaintiffs have --

6 THE COURT: Let me ask you. What  
7 is the State's position on the drug that's  
8 going to be used on August 9th? That's what  
9 I need to know.

10 MR. SUTHERLAND: We continue to  
11 look for a source of both drugs. And we  
12 anticipate having some drug on August the  
13 9th.

14 THE COURT: So if that's the  
15 position that you're going to continue -- if  
16 you're going to continue to pursue the  
17 alternative, then that keeps in all of our  
18 claims here, due process, et cetera. So that  
19 answers my question.

20 The State is still proceeding  
21 under its protocol that it can use one or the  
22 other.

23 MR. SUTHERLAND: If I may?

24 THE COURT: Yes, please. Because  
25 let me just say that is definitely unique in

1 the case law and certainly complicates the  
2 discovery in the case. So go right ahead. I  
3 want to hear this, please.

4 MR. SUTHERLAND: The requirement  
5 to prove an alternative is not the State's.  
6 The State is not required to prove  
7 unavailability.

8 THE COURT: I understand that.  
9 We've got that clear.

10 MR. SUTHERLAND: The plaintiffs  
11 are required to prove availability. And they  
12 have pled in their amended complaint that  
13 Pentobarbital is available. We would -- if  
14 it were available, we would certainly not be  
15 before the Court right now. This litigation  
16 would be pointless if we had Pentobarbital or  
17 if we had a source of Pentobarbital.

18 We would love for the plaintiffs,  
19 having alleged that it is available, to tell  
20 us where we could get it and it would obviate  
21 the need for this proceeding.

22 We're here, obviously, because we  
23 don't have Pentobarbital. They are the ones  
24 that have the affirmative burden of proving  
25 it. We don't have to prove unavailability.

1 THE COURT: But we're talking  
2 today about discovery, calculated to lead to  
3 the discovery of admissible evidence. You do  
4 not want Commissioner Parker nor the warden,  
5 Mays, to be deposed and yet persisting with  
6 the alternative and pushing the position  
7 under the law that they have to prove that,  
8 calculated to lead to the discovery of  
9 admissible evidence that opens up your  
10 defendants to be deposed.

11 MR. SUTHERLAND: I don't know  
12 what -- the fact that they have what internal  
13 discussions they had about alternatives  
14 doesn't have anything to do with the  
15 plaintiffs' burden to prove.

16 THE COURT: No. But if they --  
17 remember. Under our Tennessee case law  
18 that's calculated to lead to the discovery of  
19 admissible evidence is one of the broadest  
20 scopes in the law when we're talking about  
21 discovery.

22 And if they have to prove the  
23 availability of the Pentobarbital, they then  
24 under that very broad standard are allowed to  
25 ask your folks what makes you say you can't

1 they're continuing to use it. We are at  
2 least entitled to engage in some discovery to  
3 determine whether or not it's available or to  
4 figure out how to find availability. We  
5 can't answer summary judgment without doing  
6 that.

7 Also, Your Honor, we can't take  
8 expert depositions. If we're going to need  
9 to amend, we're going to need to think about  
10 other potential drugs. And that will impact  
11 our expert depositions.

12 THE COURT: Are the plaintiffs  
13 completely reliant in their theories about  
14 the availability of the Pentobarbital? Are  
15 they completely reliant on facts from the  
16 defendants or do you have any independent  
17 information, facts that you can supply to the  
18 Court?

19 MS. HENRY: Not at this time, but  
20 I'm not saying we won't by July 9th. I think  
21 that we will continue to work as the State  
22 continues to work. If we're just going to go  
23 on positions that the State takes in courts  
24 and pleadings without anybody being deposed  
25 under oath, the way it stands right now is

1 the State of Tennessee has drugs, period.

2 So they're going to try to get  
3 some drugs. Mr. Sutherland just said they're  
4 going to keep trying to get drugs. So both  
5 of these protocols are available. And I  
6 think what the Tennessee Supreme Court wants  
7 is for us to litigate this as opposed to we  
8 come up on August the 8th and they say, oh,  
9 guess what, we have this or we have that.

10 We're here to engage in this  
11 process so there's fundamental due process  
12 provided to our clients. And the shelving of  
13 opaque representations without having to back  
14 it up and giving us documents that have  
15 nothing but black spaces is quite unfair to  
16 our plaintiffs. Just saying.

17 With respect to Dr. Li, we have a  
18 couple of different responses. First of all,  
19 this new revelation completely changes Dr. Li  
20 as a potential witness or certainly how we  
21 would approach any discovery deposition or  
22 deposition to preserve testimony.

23 I would note that the Tennessee  
24 Rules of Civil Procedure actually don't allow  
25 deposition testimony in lieu of live

# Attachment D



IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

ABU-ALI ABDUR'RAHMAN, et al.,	)	
	)	No. 18-183-III
Plaintiffs,	)	
	)	Death Penalty Case
V.	)	
	)	
TONY PARKER, et al.,	)	
	)	
Defendants.	)	

---

**PLAINTIFFS' TRIAL BRIEF**

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procure pentobarbital would violate criminal law. In addition, Plaintiffs submit, as a matter of law, they are not required to identify an alternative method when, as here: (1) the State's proposed method is essentially torture; and, (2) proposing an alternative method of execution violates the ethical obligations of Plaintiffs' counsel, who have no competence to make such a determination.

Plaintiffs further submit they cannot be subjected to a higher burden of proof than the one they have met because the United States Supreme Court is currently considering the proper burden of proof under *Glossip* in *Bucklew v. Precythe, et al.*, No. 17-8151—a case in which it recently granted certiorari. Finally, discovery in this case has revealed at least three other feasible and readily implemented alternatives to Protocol B as written:<sup>14</sup> (1) Defendants could eliminate the use of vecuronium bromide—according to their own witnesses it is unnecessary to cause death or preventing pain, is a noxious stimuli capable of overcoming any sedative effect of the midazolam, and prolongs Plaintiffs suffering by at least three minutes;<sup>15</sup> (2) Defendants could reduce the amount of midazolam to its maximum effective dose thus reducing the pain and suffering caused by injecting a bolus dose of an acidic chemical into the veins of Plaintiffs and eliminate the vecuronium bromide; or (3) Defendants could eliminate both vecuronium bromide and potassium chloride.

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<sup>14</sup> Plaintiffs do not endorse any of these methods, nor are they required to by *Glossip*.

<sup>15</sup> The proof will show that the State of Arizona has agreed to never again use a paralytic in an execution.

# Attachment E

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

ABU-ALI-ABDUR'RAHMAN, LEE )  
HALL, a/k/a LEROY HALL, BILLY )  
RAY IRICK, DONNIE JOHNSON, )  
DAVID EARL MILLER, NICHOLAS )  
TODD SUTTON, STEPHEN MICHAEL )  
WEST, CHARLES WALTON )  
WRIGHT, EDMUND ZAGORSKI, )  
JOHN MICHAEL BANE, BYRON )  
BLACK, ANDRE BLAND, KEVIN )  
BURNS, TONY CARRUTHERS, )  
TYRONE CHALMERS, JAMES )  
DELLINGER, DAVID DUNCAN, )  
KENNATH HENDERSON, ANTHONY )  
DARRELL HINES, HENRY HODGES, )  
STEPHEN HUGUELEY, DAVID IVY, )  
AKIL JAH, DAVID JORDAN, DAVID )  
KEEN, LARRY MCKAY, DONALD )  
MIDDLEBROOKS, FARRIS MORRIS, )  
PERVIS PAYNE, GERALD POWERS, )  
WILLIAM GLENN ROGERS, )  
MICHAEL SAMPLE, OSCAR SMITH, )

Plaintiffs, )

vs. )

No. 18-183-II(III)

TONY PARKER, in his official capacity )  
as Tennessee Commissioner of )  
Correction, TONY MAYS, in his official )  
capacity as Warden of Riverbend )  
Maximum Security Institution, )  
JOHN/JANE DOE EXECUTIONERS )  
1-100, JOHN/JANE DOE MEDICAL )  
EXAMINER(S) 1-100, JOHN/JANE )  
DOE PHARMACISTS 1-100, )  
JOHN/JANE DOE PHYSICIANS 1-100, )  
JOHN/JANE DOES 1-100, )

Defendants. )

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**ORDER DISMISSING WITH PREJUDICE PLAINTIFFS’  
CHALLENGE TO TENNESSEE LETHAL INJECTION  
PROTOCOL, AND MEMORANDUM OF FINDINGS  
OF FACT AND CONCLUSIONS OF LAW**

**Ruling**

The law of the United States requires that to halt a lethal injection execution<sup>1</sup> as cruel and unusual, an inmate must state in his lawsuit and prove at trial that there is another way, available to the State, to carry out the execution. That is, the inmate is required to prove an alternative method of execution. *Glossip v. Gross*, 135 S. Ct. 2726, 2732-33 (2015). Absent proof of an alternative method, an execution can not be halted.

This law at first seems odd: requiring an inmate to prove there is another way to execute him. Presumably the inmate does not want to be executed so why should he be required to prove there exists a method to do so. Yet, without this requirement, there is the potential that lawsuits contesting execution methods would render the death penalty a meaningless sanction, threatening, in the words of the United States Supreme Court, “to transform courts into boards of inquiry charged with determining best practices for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology” and “would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of

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<sup>1</sup> Tennessee law does provide a fall back method of execution. If the three-drug lethal injection protocol were held to be unconstitutional by this Court, Tennessee law provides the death sentence shall be carried out by electrocution. Tenn. Code Ann. § 40-23-114(e).

death.” *Baze v. Rees*, 553 U.S. 35, 51 (2008). Secondly, requiring inmates to prove in their challenges to a State’s execution method that the inmates have found another available method to execute them addresses the reality that drug companies are refusing to provide drugs to prisons for lethal injections and that there is a limited supply and choice of drugs for executions.

Thus, whether a lethal injection method is unconstitutional is a comparative analysis. To halt a lethal injection execution as cruel and unusual, an inmate must prove not only that there is a better drug for lethal injection but that the better drug is available to the State. That proof has not been provided in this case.

The Inmates who filed this lawsuit have failed to prove the essential element required by the United States Supreme Court that there exists an available alternative to the execution method they are challenging. On this basis alone, by United States law, this lawsuit must be dismissed.

It is therefore ORDERED that after considering the pleadings, studying the law and the evidence, and listening to arguments of Counsel, the Court finds that the Plaintiffs have failed to establish that Tennessee’s three-drug lethal injection protocol issued July 5, 2018, is unconstitutional and/or unlawful, and dismisses the Plaintiffs’ *Second Amended Complaint for Declaratory Judgment* with prejudice. Court costs are taxed to the Plaintiffs.

The findings of fact and conclusions of law on which this ruling is based are as follows.

## Case Summary

Lethal injection is the method adopted by the Tennessee Legislature to carry out the death penalty. TENN. CODE ANN. § 40-23-114. Devising the specific components of the lethal injection has been assigned by the Legislature to the Tennessee Department of Corrections (“TDOC”).

Prior to July 5, 2018, TDOC’s lethal injection protocol included the use of one drug, pentobarbital, as one of the methods of execution (trial exhibit 1). Inmates had previously challenged that method as unconstitutional, but in *West v. Schofield*, 519 S.W.3d 550, 565 (Tenn. 2017), the Tennessee Supreme Court held the method to be constitutional.

Thereafter, on July 5, 2018, TDOC revised its protocol to eliminate the alternative of one drug of pentobarbital, and to use a three-drug protocol which includes midazolam. TDOC asserts it had to eliminate using pentobarbital and use midazolam because TDOC is unable to locate a drug company that will supply pentobarbital. The United States Supreme Court has explained the diminishing supply of drugs used for lethal injections and the emergence of midazolam in lethal injections.

*Baze* cleared any legal obstacle to use of the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion. But a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.

\* \* \*

After other efforts to procure sodium thiopental proved unsuccessful, States sought an alternative, and they eventually replaced sodium thiopental with pentobarbital, another barbiturate.

\* \* \*



Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs. In October 2013, Florida became the first State to substitute midazolam for pentobarbital as part of a three-drug lethal injection protocol [citations omitted]. To date, Florida has conducted 11 executions using that protocol, which calls for midazolam followed by a paralytic agent and potassium chloride [citations omitted]. In 2014, Oklahoma also substituted midazolam for pentobarbital as part of its three-drug protocol. Oklahoma has already used this three-drug protocol twice: to execute Clayton Lockett in April 2014 and Charles Warner in January 2015. (Warner was one of the four inmates who moved for a preliminary injunction in this case.)

*Glossip v. Gross*, 135 S. Ct. 2726, 2733–34 (2015).

Having eliminated pentobarbital, Tennessee’s July 5, 2018 protocol now provides for a three-drug lethal injection for carrying out upcoming executions in this sequence and doses, quoting page 34 of the protocol (trial exhibit 2).

#### **CHEMICALS USED IN LETHAL INJECTION**

The Department will use the following protocol for carrying out executions by lethal injection:

<b>Midazolam</b>	100 ml of a 5mg/ml solution (a total of 500mg)
<b>Vecuronium Bromide</b>	100 ml of a 1mg/ml solution (a total of 100 mg)
<b>Potassium Chloride</b>	120 ml of a 2 mEq/ml solution (a total of 240mEq)

Chemicals used in lethal injection executions will either be FDA-approved commercially manufactured drugs; or, shall be compounded preparations prepared in compliance with pharmaceutical standards consistent with the United States Pharmacopeia guidelines and accreditation Departments, and in accordance with applicable licensing regulations.

The midazolam is to provide pain relief. Vecuronium bromide paralyzes the inmate.

Potassium chloride stops the heart within 30 to 45 seconds of injection.

By eliminating pentobarbital as an alternative, the July 5, 2018 protocol revised the analgesic (pain relief) of its lethal injection from pentobarbital to midazolam; invoked that part of the protocol which allows for the use of compounded midazolam instead of a commercial supply, and follows the midazolam with injections of vecuronium bromide and potassium chloride.

By notice of July 23, 2018, TDOC has stated that the three-drug protocol issued July 5, 2018 is to be used in an upcoming, scheduled execution. It is the July 5, 2018 protocol which is challenged as unconstitutional and ruled upon herein.

This lawsuit was filed by 33 Inmates who have been convicted of aggravated crimes and who have been sentenced to death in Tennessee. Three of the Inmates have executions scheduled in 2018. One of those is set for August 9. In this lawsuit the Inmates assert that Tennessee's three-drug lethal injection method of execution is cruel and unusual, and in that and in other ways violates the United States and Tennessee Constitutions. The Inmates assert that the one drug, pentobarbital, should be used for the executions as a faster, less painful method, and that TDOC's claims that it can not obtain pentobarbital is not true. The immediate effect of a ruling in the Inmates' favor would halt the upcoming and subsequent executions using this three-drug lethal injection.<sup>2</sup>

The trial of this case was conducted from July 9, 2018 through July 24, 2018. The Inmates were represented by the United States Public Defenders' Office and private

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<sup>2</sup> As cited above, Tennessee law does provide a fall back method of execution. If the three-drug lethal injection protocol were held to be unconstitutional by this Court, Tennessee law provides the death sentence shall be carried out by electrocution. Tenn. Code Ann. § 40-23-114(e).

Counsel. The Defendants were represented by the Office of the Tennessee Attorney General. In issue were portions of a complaint containing 764 paragraphs and 104 pages. 23 witnesses testified and 139 exhibits were admitted into evidence.

### **Inmates' Causes of Action**

The Inmates' causes of action stated in the July 3, 2018 *Second Amended Complaint for Declaratory Judgment* ("*Second Amended Complaint*") seeking to halt use of Tennessee's three-drug protocol as unconstitutional consist of the following:

1. Count I: Eighth and Fourteenth Amendments of the United States Constitution and Article 1, § 16 of the Tennessee Constitution prohibiting the use of cruel and unusual punishment,
2. Count IV: Fourteenth Amendment of the United States Constitution and Article 1, § 8 of the Tennessee Constitution of procedural due process,
3. Count V: First, Eighth and Fourteenth Amendments of the United States Constitution and Article 1, §§ 8, 16, 17 of the Tennessee Constitution of the right to counsel and access to the courts, and
4. Count VIII: Fourteenth Amendment of the United States Constitution and Article 1, § 8 of the Tennessee Constitution that the use of midazolam shocks the conscience.<sup>3</sup>

Addressed below first are items 1 and 4—the Inmates' claims at Count I and VIII—that Tennessee's three-drug protocol constitutes cruel and unusual punishment and shocks the conscience. After that item 2, Count IV of procedural due process, is addressed, followed by item 3, Count V of the right to counsel and access to the courts.

---

<sup>3</sup> These are the causes of action which remained for disposition after the May 4, 2018 ruling dismissing portions of the Plaintiffs' pleading.

## Count I: Cruel and Unusual Punishment

### Constitutional Law

The Tennessee Supreme Court has instructed this Court that it must examine two elements in deciding whether the three-drug lethal injection method in issue constitutes cruel and unusual punishment. These elements have been established by the United States Supreme Court and are explained by the Tennessee Supreme Court as follows.

To prevail on a claim that punishment is cruel and unusual,

First, the inmates must establish that the protocol “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 (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520) (internal quotation marks omitted). “To prevail on such a claim, ‘there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.’ ” *Id.* (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520) (internal quotation marks omitted). Second, the inmates “must identify an alternative [method of execution] that is ‘feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.’ ” *Id.* (quoting *Baze*, 553 U.S. at 52, 128 S.Ct. 1520); *see also Baze*, 553 U.S. at 61, 128 S.Ct. 1520 (stating that an inmate asserting an Eighth Amendment challenge to a state’s lethal injection protocol must establish “that the State’s lethal injection protocol creates a demonstrated risk of severe pain” and “that the risk is substantial when compared to the known and available alternatives”).

*West v. Schofield*, 519 S.W.3d 550, 563–64 (Tenn. 2017).

With respect to the second prong, the United States Supreme Court has adopted this requirement that, to contest a State’s method of execution, the inmate must not only prove the State’s method is cruel and unusual but must also prove that there is a known and available alternative method of execution. It is not enough, the United States

Supreme Court has held, for the inmate to claim that the State's method of execution is cruel and unusual. The inmate must also make a claim in the lawsuit he files and must prove at trial in his case that there is a known and available method to execute him that, in comparison to the State's execution method, significantly reduces a substantial risk of pain. *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1303 (11th Cir. 2016), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 725 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017) ("The State need not make any showing because it is Arthur's burden, not the State's, to plead and prove both a known and available alternative method of execution and that such alternative method significantly reduces a substantial risk of severe pain. *Glossip*, 135 S.Ct. at 2737, 2739."). "Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" *Glossip v. Gross*, 135 S. Ct. 2726, 2732–33 (2015).

Proof by the inmate in his case of an alternative method of execution is particularly significant with the developing circumstances, recognized by the United States Supreme Court, of unavailability of lethal injection drugs. Unlike the drugs used routinely and effectively for painless surgical and medical procedures, prisons do not have these options. With drug options narrowing for prisons to use in executions, there are limited choices. Requiring inmates to prove, when they challenge a State's execution method, that other alternatives exist to a State's lethal drug protocol addresses these realities of unavailable drugs. As an Arizona District Court has observed "The pharmaceutical manufacturers' withdrawal of the best drugs from use in executions does

not end capital punishment.” *First Amendment Coal. of Az. v. Ryan*, — F. Supp. 3d — , 2016 WL 2893413, at \*5 (D. Az. May 18, 2016).

Thus, the United States Supreme Court has been clear that the constitutional analysis of a lethal injection method is not done in a vacuum. Whether a lethal injection method is unconstitutional is a comparative analysis. It is not enough for an inmate to provide proof of the painfulness of a State’s method of execution. As the Tennessee Supreme Court has explained, the United States Supreme Court has held that in challenging a State’s execution method an inmate must also plead in his lawsuit and prove that there is an alternative execution method that can be used to execute him which is known, available and significantly reduces the risk of severe pain. *West v. Schofield*, 519 S.W.3d 550, 563-64 (Tenn. 2017).

#### No Proof of Available Alternative

The Court finds that in this lawsuit the Plaintiffs have failed to prove the essential element that there exists an available alternative. On this basis alone, by United States law, this lawsuit must be dismissed.

In so concluding the Court’s study of case law shows that unlike other cases where this element has been tried, the Inmates in this case presented none of their own witnesses to show that their proposed method of execution—pentobarbital—is available to the State of Tennessee. For example, in *Arthur v. Comm’r, Alabama Dep’t of Corr.*, 840 F.3d 1268, 1278–80 (11th Cir. 2016), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 725 (2017), *reh’g denied*, 137 S. Ct. 1838 (2017), the inmate’s expert witness testified that he

had expert knowledge of and had conducted internet searches and made personal contacts that demonstrated pentobarbital was available.

Dr. Zentner contended that there were “numerous sources” for both the active and inactive ingredients needed to compound pentobarbital, including professional drug sourcing services. He said that these ingredients were available for sale in the United States and could be found through an Internet search. For example, Dr. Zentner found pentobarbital sodium listed on a drug manufacturer's product listing, which listing indicated that the drug was produced in the United States. He stated that other manufacturers might offer it for sale or the drug could be synthesized in a lab. He said that he knew of one lab that would be willing to synthesize the drug and he suspected “all of them would be willing.”

Dr. Zentner stated that he conducted an Internet search of sterile compounding pharmacies in Alabama from the listing available on the Accreditation Commission for Health Care's Web site, and found 19 such pharmacies, although two were essentially the same company. Dr. Zentner gave his list to the ADOC. Dr. Zentner contacted two of these pharmacies, and they said that they did perform sterile compounding. Dr. Zentner admitted that he did not ask them whether they would be willing to compound pentobarbital for use in an execution by the ADOC. In his deposition, Dr. Zentner clarified that he did not ask these two pharmacies any questions whatsoever regarding compounded pentobarbital.

Accordingly, Dr. Zentner could only give his opinion that (1) pentobarbital sodium is available for purchase in the United States, and (2) there are compounding pharmacies that “have the skills and licenses to perform sterile compounding of pentobarbital sodium.”

On cross-examination, Dr. Zentner admitted that he had not contacted any drug companies at all about their willingness to sell pentobarbital to the ADOC for executions. He also admitted that he was unaware that the company that currently owned Nembutal had restrictions in place to keep that drug from being purchased for use in lethal injections. Dr. Zentner admitted that he had no knowledge of whether the pharmacies that he found would be able to procure pentobarbital, nor did he ever personally attempt to purchase the drug from a manufacturer. He stated that one drug synthesis company that he has a “long-term relationship” with was “willing to discuss” producing compounded pentobarbital. Dr. Zentner admitted that sodium thiopental is not listed in the FDA Orange Book, meaning it is not

an approved product in the United States, although he stated that it is “available offshore and conceivably could be imported.”

Although the inmates in the above quoted case did not prevail, the case shows that it is not an impossible burden to provide such proof.

In this case no such proof was offered. Of the four expert witnesses the Inmates retained in this case, none were retained to investigate sources of pentobarbital to report to the Court the results of their search, e.g. whether they were rebuffed, whether the sources exist, etc., and none were able to provide any information on this critical element of the trial.

The Inmates also claim that for them to provide such proof, they would break Tennessee law requiring the identity of lethal drug suppliers to be confidential and would violate federal law prohibiting the procurement of such drugs. These excuses are unavailing. Tennessee provides methods for keeping matters filed in court confidential. Those could have been implemented for such proof, if necessary. As to the federal law, it is not implicated because Inmates’ Counsel is not procuring drugs. No good reason was provided to the Court as to why the Inmates failed to provide such important proof. Instead, the Inmates’ attempted to prove their case solely by discrediting State officials. This was not persuasive.

There was the testimony of the TDOC Commissioner, Assistant Commissioner for Administration (the “Assistant Commissioner”), and the Warden. In evaluating this testimony the Court is required to start with the principle that “public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the



law.” *West I*, 460 S.W.3d at 131 (citing *Reeder v. Holt*, 220 Tenn. 428, 418 S.W.2d 249, 252 (1967); *Mayes v. Bailey*, 209 Tenn. 186, 352 S.W.2d 220, 223 (1961)). The Court finds that there was nothing in the demeanor of these witnesses nor the facts to which they testified to overcome this presumption. All of these individuals were credible in their testimony. They testified in cooperative, moderate tones. They were straightforward in their answers.

As to the Commissioner and Assistant Commissioner, they gave every appearance and indication that they have and would continue to discharge their duties of locating supplies of lethal injection drugs in good faith and in accordance with the law. Their testimony established that they proceeded reasonably as department heads to delegate the task of investigating supplies of pentobarbital to a member of their staff. From the work of that staffer, information was provided to them. Trial exhibit 105 in part is a PowerPoint presentation provided to the Commissioner and Assistant Commissioner on lethal injection drug supplies and the search for those.

The Court accredits the testimony of these TDOC officials and finds that their testimony is corroborated by the PowerPoint, which is quoted as follows, that TDOC does not have access to and/or is unable to obtain pentobarbital through ordinary transactional efforts. Trial Exhibit 105 contains the following PowerPoint text.

Tennessee Protocol:

Pentobarbital (Barbiturate) – compounded into an injectable solution. For each execution, there are 2 syringes, each containing a 5 gram compounded solution of Pentobarbital.

\* \* \*

Reached out to XXXXXXXXXXXX,<sup>4</sup> as it was understood that they had a source for Pentobarbital. XXXXXX was unwilling to either share the identity of their source, or provide our contact information to their source. XXXXXX was also unwilling to offer any guidance as to how XXXXXXXXXXXX was able to find its current source.

\* \* \*

- XXXXXXXXXXXX assigned with task of locating source of Pentobarbital
- First step was to search by contacting compounding pharmacies to determine if they: 1) Had an inventory of Pentobarbital; or 2) Had a source of Pentobarbital and were willing to compound the LIC for the department
- Several pharmacies declined to be involved in any way. Finally, a compounding pharmacy agreed to both compound the LIC and aid in the search for a source.
- Search involved cold calling U.S. based Active Pharmaceutical Ingredient (API) supply companies.

\* \* \*

Collectively, contact was made with close to 100 potential sources, including the 3 major U.S. chemical wholesalers. None of these worked for one or more of the following reasons:

- Company did not have an inventory of Pentobarbital – apprx. 70%
- Company did not have sufficient quantities of the needed form of Pentobarbital and no source to obtain sufficient quantities – apprx. 10%
- Company unwilling to supply Pentobarbital if it was to be used in lethal injection – apprx. 20%

\* \* \*

---

<sup>4</sup> “X” indicates text that has been redacted as required by Tennessee Code Annotated TENN. CODE ANN. § 10-7-504(h) (West 2018).

It appears there is no U.S. based source for Pentobarbital and so the search broadened into the possibility of importing the chemical from overseas:

- C.F.R. § 1312.13 grants the DEA the authority to issue permits for the importation of schedule II narcotics (i.e. Pentobarbital) when it is necessary to provide for a legitimate need of the U.S. and the domestic supply is inadequate
- At the meeting, the agents informed XXXXXX that XXXXXXXXXXXX because, according to them, there is a supply of pentobarbital available in the United States.
- When told that the companies who do have a supply would not sell their supply for use in lethal injection, the XXXXXX agents explained that it didn't matter and that it was an issue to take up with the companies themselves.

\* \* \*

In the course of researching the possibility of importation, XXXXXXXX became aware of a federal case in Texas where the FDA had seized a shipment of drugs/chemicals being imported by the Texas Department of Correction. The Texas DOC filed suit in federal district court for the release of the shipment. To this date there has not been any resolution to this case.

XXXXXXX is now researching FDA regulations as a result of this case to determine what if any process can be undertaken to obtain FDA approval for the importation of Pentobarbital. Thus far the approval process appears to be very cumbersome unless an exception can be claimed to lessen the burden.

\* \* \*

Other states have had similar difficulty/inability in locating a source for the LIC.

- Arkansas attempted to perform 7 executions in the span of 10 days because their current supply of LIC was set to expire and the State did not have a source for additional LIC chemicals. Arkansas has subsequently obtained a supply of midazolam.

- South Carolina has stated, in connection with the recent conviction of Dylan Roof, that they do not have a supply of LIC and have not been able to find a supply.
- Indiana DOC was reprimanded for not following proper procedure in unilaterally trying to change their protocol to a new LIC due [sic] their inability to locate a supply of the current drug.
- Texas, in the case mentioned before, attempted to import a different LIC chemical than they currently use in executions. Presumably due to the potential unavailability of Pentobarbital even on an international level.
- Some states are using LIC chemicals that have some under harsh scrutiny, such as Alabama's use of Midazolam in the recent execution of Robert Melson.
- Florida is using a drug, etomidate, that has never been used in the United States for execution.

\* \* \*

A few years ago approximately 13 states reached out to the Department of Justice seeking aid in locating a source for LIC chemicals and/or gaining access to any supply that the Federal Government currently had. This did not result in any action by DOJ.

There are circumstances where the Federal Government can step in and orchestrate the supply of chemicals in situations where supply is so low and the cost for the chemical so high as to make it virtually unavailable where there is a significant need.

In the face of this weighty evidence, the Inmates argue that a handwritten, undated note on bates numbered 36 of trial exhibit 105, indicating that an unknown supplier offered to sell pentobarbital, shows Tennessee had access to the drug. In the face of all the other information in trial exhibit 105 and the credible testimony of the Commissioner and the Assistant Commissioner, page 36 of trial exhibit 105 is not weighty evidence.

The Inmates further assert that Tennessee refused to purchase pentobarbital and, to use the words of Counsel, “began creating a record of unavailability” based on the following text message contained on bates numbered 19 in trial exhibit 105.

Me

I'm running around today so not sure when I'll be open for a call but in the meantime can u send me a list of all companies etc u reached out to about sourcing so I can have it for when we have to show it's unavailable?  
Thanks

8:49 AM

The Inmates argue this email shows TDOC was making up a record of unavailability of pentobarbital. Respectfully to Counsel, the Court finds the more likely inference – from the totality of the information in the PowerPoint and the credibility of the TDOC officials and that the note was handwritten – is that the note was a “lead”, a possibility, that did not work out. As to the page 19 text message, it shows the staffer delegated to research sources was putting together a PowerPoint presentation for the boss/superior and the staffer’s conclusion was there were no ordinary, transactional sources for pentobarbital. The Court finds that trial exhibit 105 and the testimony of the TDOC official establish that Tennessee does not have access to and is unable to obtain the drugs with ordinary transactional effort.<sup>5</sup>

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<sup>5</sup> The Eighth, Eleventh and Sixth Circuits have recognized the “available” element referred to in *Glossip* means, respectively, the ability to access, or to obtain the drugs with ordinary transactional effort. *See, In re Ohio Execution Protocol*, 860 F.3d 881, 891 (6th Cir. 2017), *cert. denied sub nom. Otte v. Morgan*, 137 S. Ct. 2238 (2017); *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017), *cert. denied*, 137 S. Ct. 1275 (2017); *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1300 (11th Cir. 2016), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 725 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017).

Another reason the Court accredits the testimony of these TDOC officials and that they convinced the Court that if pentobarbital were available the State would be using it is that the proof established the State has every reason to use pentobarbital. The pentobarbital protocol was upheld by the Tennessee Supreme Court and can clearly proceed. The pentobarbital is simpler in the sense that it involves only one drug. It defies common sense that the State would not make the effort to locate pentobarbital.

Additionally, with respect to the effort TDOC has to make, the term used by the United States Supreme Court, is “availability.” As noted in footnote 5, that has been construed to mean access in an ordinary transactional effort. The following case law is instructive.

Arthur would have us hold that if a drug is capable of being made and/or in use by other entities, then it is “available” to the ADOC. Arthur stresses that: (1) pharmacies throughout Alabama are theoretically capable of compounding the drug; (2) the active ingredient for compounded pentobarbital (pentobarbital sodium) is generally available for sale in the United States; and (3) four other states were able to procure and use compounded pentobarbital to carry out executions in 2015.

We expressly hold that the fact that other states in the past have procured a compounded drug and pharmacies in Alabama have the skills to compound the drug does not make it available to the ADOC for use in lethal injections in executions. The evidentiary burden on Arthur is to show that “there is now a source for pentobarbital that would sell it to the ADOC for use in executions.” Brooks, 810 F.3d at 820 (emphases added).

To adopt Arthur's definition of “feasible” and “readily implemented” would cut the Supreme Court's directives in Baze and Glossip off at the knees. As this Court explained in Brooks, a petitioner must show that “there is now a source for pentobarbital that would sell it to the ADOC for use in executions.” 810 F.3d at 820 (emphases added). This Arthur patently did not do. Arthur's own expert witness, Dr. Zentner, could not even identify any pharmacies that had actually compounded an injectable solution of compounded pentobarbital for executions or were willing to do so for the

ADOC. And when ADOC attorney Hill actually asked the pharmacies identified by Dr. Zentner if they would be willing to compound pentobarbital for the ADOC, they all refused. What's more, Hill contacted no less than 29 potential sources for compounded pentobarbital—including numerous pharmacies and four states' departments of corrections. All of these efforts were unsuccessful.

And while four states had recently used compounded pentobarbital in their own execution procedures, the evidence demonstrated that none were willing to give the drug to the ADOC or name their source. As we have explained, “the fact that the drug was available in those states at some point ... does not, without more, make it likely that it is available to Alabama now.” Brooks, 810 F.3d at 819. On this evidence, the district court did not clearly err in determining that Arthur failed to carry his burden to show compounded pentobarbital is a known and available alternative to the ADOC. An alternative drug that its manufacturer or compounding pharmacies refuse to supply for lethal injection “is no drug at all for Baze purposes.” Chavez v. Florida SP Warden, 742 F.3d 1267, 1275 (11th Cir. 2014) (Carnes, C.J., concurring).

\* \* \*

Under these record facts, we cannot fault at all the district court's finding that the procurement of compounded pentobarbital was not “feasible and readily implemented as an execution drug in Alabama, nor [was] it readily available to the ADOC.”

\* \* \*

Arthur also argues that the ADOC did not make a “good faith effort” to obtain pentobarbital. Glossip did not impose such a requirement on the ADOC. In Glossip, the Supreme Court upheld the district court's factual finding that the proposed alternative drugs were not “available.” See Glossip, 135 S.Ct. at 2738. It continued, “[o]n the contrary, the record shows that Oklahoma has been unable to procure those drugs despite a good-faith effort to do so.” Id. Nothing in Glossip changed the fact that it is not the state's burden to plead and prove “that it cannot acquire the drug.” Brooks, 810 F.3d at 820. The State need not make any showing because it is Arthur's burden, not the State's, to plead and prove both a known and available alternative method of execution and that such alternative method significantly reduces a substantial risk of severe pain. Glossip, 135 S.Ct. at 2737, 2739.

As an alternative, independent reason for affirmance, we also conclude that even if Glossip somehow imposes a good-faith effort on the State, the ADOC made such an effort here by contacting 29 potential sources for the drug, including four other departments of correction and multiple compounding pharmacies.

*Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1301–03 (11th Cir. 2016), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 725 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017) (footnotes omitted).<sup>6</sup>

The Court therefore finds that the greater weight and preponderance of the evidence is that pentobarbital is not available to the Defendants. Accordingly, the Inmates have failed to establish the grounds required by the United States Supreme Court to halt the executions using Tennessee's July 5, 2018 three-drug protocol. The Inmates have not demonstrated that there is an available alternative for carrying out their executions. The United States Supreme Court has stated that when "availability . . . of an alternative is more speculative, a State's refusal to discontinue executions under the current method is not blameworthy in a constitutional sense." *See Baze*, 553 U.S. at 67, 128 S. Ct. 1520 (Alito, J., concurring). Thus, in this case, except for electrocution which is not in issue in this case, the known and available method in Tennessee to carry out these executions is the July 5, 2018 three-drug lethal injection. On this basis alone, the Court dismisses the Inmates' claims.

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<sup>6</sup> The reasoning in *Arthur* also does away with the Inmates' attempt to prove the availability of pentobarbital by citing to the recent execution of Christopher Young in Texas on July 17, 2018 using pentobarbital (trial exhibit 140). As stated by the *Arthur* Court "the fact that the drug was available in those states at some point...does not, without more, make it likely that it is available to" the Tennessee Department of Correction now.



Because the Inmates have failed to establish the *Glossip* prong of an available alternative, it is not necessary for this Court to make a finding on whether the Plaintiffs have demonstrated the other *Glossip* prong: that Tennessee's three-drug protocol is cruel and unusual. Nevertheless, because so much of the proof at trial was provided on this element the Court will address it.

#### Attempt to Expand the Law

In addition to their attempt to discredit State officials to satisfy the essential elements of proof required by the United States Supreme Court of proving an available alternative execution method, the Inmates attempted to develop and expand the law that this case is an exception and they should not have to prove an alternative method of execution because Tennessee's three-drug lethal injection method constitutes torture akin to being dismembered or burned at the stake. This Court's study of decisions of the United States Supreme Court is that no such exception has yet been recognized, and as an inferior trial court, this Court cannot so expand the law. If, however, the law were to be so expanded, the evidence in this case established that Tennessee's three-drug lethal injection protocol is not a drastic, exceptional deviation from accepted execution methods so as to be found to constitute torture, 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.

## Midazolam—The Experts

The Inmates presented the testimony of four well-qualified and imminent experts.<sup>7</sup> The Court finds that these experts established that midazolam does not elicit strong analgesic effects and the inmate being executed may be able to feel pain from the administration of the second and third drugs.

The legal issue, then, is whether the United States Supreme Court would consider this finding to constitute torture and the deliberate infliction of pain so as to violate the

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<sup>7</sup> The Inmates provided testimony of: Dr. Stevens, Dr. Greenblatt, Dr. Edgar and Dr. Lubarsky.

Dr. Craig W. Stevens testified on behalf of the Plaintiffs in the field of pharmacology. Dr. Stevens obtained a Ph.D. in Pharmacology in 1988 from the Mayo Graduate School of Medicine in Rochester, Minnesota. Dr. Stevens is currently employed as Professor of Pharmacology in the Department of Pharmacology and Physiology for the Oklahoma State University Center for Health Sciences, College of Osteopathic Medicine.

Dr. David J. Greenblatt testified on behalf of the Plaintiffs in the field of clinical pharmacology and the effects of Midazolam. Dr. Greenblatt received his Bachelor of Arts degree from Amherst College in 1966 and his medical degree from Harvard Medical School in 1970. He also served as a research fellow in Pharmacology at the Harvard Medical School from 1972-1974. Dr. Greenblatt testified that he has authored 775 peer reviewed articles in his career and published 12 books. He further testified that he has a Google Scholar H Index of 160 with over 65,000 citations to his articles. Dr. Greenblatt is currently employed as a Professor of Medicine, Psychiatry, Pharmacology, Experimental Therapeutics, and Anesthesia at Tufts University School of Medicine in Boston, Massachusetts. Dr. Greenblatt has written the definitive article on midazolam (trial exhibit 40).

Dr. Mark Allen Edgar testified on behalf of the Plaintiffs in the field of Pathology. Dr. Edgar received a Bachelor of Science degree from Dalhousie University in Halifax, Nova Scotia, Canada in 1984 and a Medical Degree from Dalhousie University in 1988. Currently, Dr. Edgar serves as the Assistant Director of Emory Bone and Soft Tissue Pathology Service and as an Associate Professor of Pathology at Emory University School of Medicine. Dr. Edgar testified that since 2010, he currently performs approximately one to two autopsies a month.

Dr. David Alan Lubarsky testified on behalf of the Plaintiffs in the field of Anesthesiology. Dr. Lubarsky received a Bachelor of Arts degree from Washington University in St. Louis, Missouri in 1980 and then obtained his Medical Degree from Washington University in 1984. In 1999, Dr. Lubarsky obtained a Master of Business Administration from Fuqua School of Business at Duke University in Durham, North Carolina. Until recently, Dr. Lubarsky served as the Chief Medical and Systems Integration Officer for the University of Miami Health System and the Emanuel M. Papper Professor and Chairman of the University of Miami Leonard M. Miller School of Medicine, Department of Anesthesiology. Dr. Lubarsky testified at trial that he had just been appointed in May of 2018 as the vice chancellor of human health sciences and chief executive officer of UC Davis Health, which includes the School of Medicine, School of Nursing, UC Davis Medical Center, and Primary Care Network.

The Defendants' two experts, while qualified, did not have the research knowledge and imminent publications that Plaintiffs' experts did.

United States Constitution. This Court concludes that the United States Supreme Court would not find the facts established in this case to violate the Constitution for these reasons.

#### Midazolam—The Case Law

First, as reported by the United States Supreme Court, it has never invalidated a State's chosen method of execution.

While methods of execution have changed over the years, '[t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.'

*Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015).

Secondly, the United States Supreme Court has recognized and is aware of the risks of midazolam. Before the Supreme Court issued the *Glossip* decision, there were two horrible executions, using midazolam, where the death of the inmate was prolonged. The Supreme Court found those executions of limited probative value, citing to executions which were not prolonged.

Fourth, petitioners argue that difficulties with Oklahoma's execution of Lockett and Arizona's July 2014 execution of Joseph Wood establish that midazolam is sure or very likely to cause serious pain. We are not persuaded. Aside from the Lockett execution, 12 other executions have been conducted using the three-drug protocol at issue here, and those appear to have been conducted without any significant problems. See Brief for Respondents 32; Brief for State of Florida as *Amicus Curiae* 1. Moreover, Lockett was administered only 100 milligrams of midazolam, and Oklahoma's investigation into that execution concluded that the difficulties were due primarily to the execution team's inability to obtain an IV access site. And the Wood execution did not involve the protocol at issue here. Wood did not receive a single dose of 500 milligrams of midazolam; instead, he received fifteen 50-milligram doses over the span

of two hours. Brief for Respondents 12, n. 9. And Arizona used a different two-drug protocol that paired midazolam with hydromorphone, a drug that is not at issue in this case. *Ibid.* When all of the circumstances are considered, the Lockett and Wood executions have little probative value for present purposes.

*Glossip v. Gross*, 135 S. Ct. 2726, 2745–46 (2015) (footnote omitted).

Next, midazolam’s use in executions has never been held by the United States Supreme Court to be unconstitutional or pose an unacceptable risk of pain.

— The United States Supreme Court and several appellate courts have uniformly rejected challenges to lethal injection protocols that use midazolam as the first drug in a three-drug lethal injection protocol because the plaintiffs had not established that it poses a constitutionally unacceptable risk of pain. *See Glossip*, 135 S. Ct. at 2731; *Grayson v. Warden*, — Fed.Appx. —, 2016 WL 7118393, at \*4–5 (11th Cir. Dec. 7, 2016) (explaining that “Supreme Court and ‘numerous other courts’ have concluded that midazolam is an adequate substitute for pentobarbital as the first drug in a three-drug lethal injection protocol” (citing *Brooks*, 810 F.3d at 822–24))). Based on the evidence in the immediate case, the Court fails to discern any reason to conclude otherwise.

*Gray v. McAuliffe*, No. 3:16CV982-HEH, 2017 WL 102970, at \*11 (E.D. Va. Jan. 10, 2017), *appeal dismissed sub nom RICKY GRAY v. TERENCE MCAULIFFE* (Jan. 11, 2017).

Additionally, although dreadful and grim, it is the law that while surgeries should be pain-free, there is no constitutional requirement for that with executions.

- And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. *Ibid.* After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether. *Glossip v. Gross*, 135 S. Ct. 2726, 2732–33 (2015).

- An execution by lethal injection is not a medical procedure and does not require the same standard of care as one.

*Walker v. Johnson*, 448 F. Supp. 2d 719, 723 (E.D. Va. 2006), *aff'd*, 328 Fed. Appx. 237 (4th Cir. 2009).

- But while surgeries should be pain-free, there is no constitutional requirement that executions be painless. *Baze, supra, Fears, supra*. The goal of the anesthetist and anesthesiologist is to make patients unconscious, unaware, and insensate to pain—which is properly described as being in a state of General Anesthesia. But the Eighth Amendment does not require General Anesthesia before an execution.

*In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2017 WL 5020138, at \*17 (S.D. Ohio Nov. 3, 2017), *aff'd*, 881 F.3d 447 (6th Cir. 2018).

- The latter observation has little relevance in light of a passage from *Glossip* that does bind us here: “the fact that a low dose of midazolam is not the *best* drug for maintaining unconsciousness during surgery says little about whether a 500-milligram dose of midazolam is *constitutionally adequate* for purposes of conducting an execution.” 135 S.Ct. at 2742 (emphasis in original).

*In re Ohio Execution Protocol*, 860 F.3d 881, 887 (6th Cir. 2017), cert. denied sub nom. *Otte v. Morgan*, 137 S. Ct. 2238 (2017).

#### Midazolam—Official Documentation

The United States Supreme Court requires that inmates must demonstrate with respect to the State execution method they are contesting that there is an “objectively” intolerable risk of harm. *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015).

Part of the analysis of whether a method of execution poses a constitutionally unacceptable risk of severe pain has to do with the duration of the execution. That is because one of the aspects of cruel and unusual punishment relates to prolongation, i.e., needless suffering. In the Tennessee three-drug protocol, it is undisputed that once administered, the last drug injected, potassium chloride, stops the heart within 30 to

45 seconds. Time is expended before that with injection of midazolam and vecuronium bromide.

With respect to executions the Inmates' witnesses testified to, the Court finds that the official documentation of the executions (the "Timelines" trial exhibits 22, 23, 24) and demonstrative aids provided by both sides (trial exhibits 133 and 148) establish that the average duration from the time the midazolam is injected until the time of death is 13.55 minutes, with the longest time being 18 minutes and the shortest time being 10 minutes.

In more detail, the proof established that six states – Alabama, Arkansas, Florida, Ohio, Oklahoma, and Virginia – have conducted executions by lethal injection using a three-drug protocol with midazolam serving as the anesthetic first drug in the protocol. Since October 15, 2013, these states have conducted a combined total of 30 executions using midazolam as the anesthetic in a three drug lethal injection protocol. Of those 30 executions, 20 official timelines from the Department of Corrections of Florida, Arkansas and Ohio were entered into evidence. There were no official timelines from the Department of Corrections for the other 10 executions conducted in Alabama, Oklahoma and Arkansas, and therefore no official minutes are known, as indicated below.

From these official timelines and the two demonstrative exhibits provided by the Plaintiffs and the Defendants, the following chart was prepared showing the name of the inmate, the date of the execution, and the number of minutes it took from the time the first drug was injected until the time of death.

<b>Name</b>	<b>State</b>	<b>Date of Execution</b>	<b>Minutes To Death</b>
1. William Happ	FL	10/15/2013	14 minutes
2. Darius Kimbrough	FL	11/12/2013	18 minutes
3. Askari Muhammad (Thomas Knight)	FL	1/7/2014	15 minutes
4. Juan Chavez	FL	2/12/2014	16 minutes
5. Paul Howell	FL	2/26/2014	15 minutes
6. Robert Henry	FL	3/20/2014	12 minutes
7. Robert Hendrix	FL	4/23/2014	10 minutes
8. John Henry	FL	6/18/2014	12 minutes
9. Eddie Davis	FL	7/10/2014	12 minutes
10. Chadwick Banks	FL	11/13/2014	15 minutes
11. Charles Warner	OK	1/15/2015	UNKNOWN
12. Johnny Kormondy	FL	1/15/2015	11 minutes
13. Jerry Correll	FL	10/29/2015	11 minutes
14. Oscar Bolin, Jr.	FL	1/7/2016	12 minutes
15. Christopher Brooks	AL	1/21/2016	UNKNOWN
16. Ronald Smith, Jr.	AL	12/8/2016	UNKNOWN
17. Ricky Gray	VA	1/18/2017	UNKNOWN
18. Ledell Lee	AR	4/20/2017	11 minutes
19. Jack Jones	AR	4/24/2017	14 minutes
20. Marcel Williams	AR	4/24/2017	17 minutes
21. Kenneth Williams	AR	4/27/2017	13 minutes
22. Thomas Arthur	AL	5/26/2017	UNKNOWN
23. Robert Melson	AL	6/8/2017	UNKNOWN
24. William Morva	VA	7/16/2017	UNKNOWN
25. Ronald Phillips	OH	7/26/2017	12 minutes
26. Gary Otte	OH	9/13/2017	15 minutes
27. Torrey McNabb	AL	10/19/2017	UNKNOWN
28. Michael Eggers	AL	3/15/2018	UNKNOWN
29. Walter Moody	AL	4/19/2018	UNKNOWN
30. Robert Van Hook	OH	7/18/2018	16 minutes

It is the results of these 20 executions for which there is an official timeline from the State's Department of Corrections that stated above is the average minutes from the time the first drug is injected injection until the time of death of 13.55 minutes, with longest time being 18 minutes and the shortest time being 10 minutes.

Also significant from this chart is that 17 executions using a midazolam three-drug protocol have taken place since the United States Supreme Court decided *Glossip* on June 29, 2015, and none of those executions have been stopped from proceeding by the United States Supreme Court. Of the six states that have conducted an execution using a three-drug midazolam protocol, the United States Supreme Court has never held their protocol unconstitutional.

The Plaintiffs have pointed to the prolonged executions of Clayton Lockett and Joseph Wood<sup>8</sup> for proof that with the use of midazolam in a lethal injection protocol an inmate continues to feel pain and therefore an inmate will experience torture when administered the other two drugs vecuronium bromide and potassium chloride which inflict severe pain upon injection. But as discussed above, both the Wood and Lockett executions took place before the Supreme Court issued the *Glossip* decision. Despite the documented problems in these executions, the United States Supreme Court in *Glossip* found these executions were of little relevance.

#### Midazolam—Eye-Witnesses to Executions

There was also the testimony of attorneys who had witnessed their inmate clients' lethal injection executions in other states, including by use of midazolam. Eleven Federal Public Defenders and a law professor/self-employed attorney testified. These witnesses

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<sup>8</sup> In addition to Lockett and Wood, the Plaintiffs provided proof of the Dennis McGuire execution on January 16, 2014. For the same reasons that the United States Supreme Court found the Lockett and Wood executions of little probative value, the Court also finds the McGuire execution of little probative value. It is undisputed that Dennis McGuire was executed prior to the *Glossip* decision and with a different lethal injection cocktail than the three-drug protocol the Defendants intend to use in this case.



testified that there were signs such as grimaces, clenched fists, furrowed brows, and moans indicative that the inmates were feeling pain after the midazolam had been injected and when the vecuronium bromide was injected. These witnesses' calculations of the duration of the executions was within a plus one minute of the Official Documentation.

#### Midazolam—Application of the Law

Based upon

- the United States Supreme Court and other courts determining that the use of midazolam does not pose a constitutionally unacceptable risk of severe pain, even in light of the prolonged executions of Wood and Lockett,
- applying the context of an execution, not the standard of a medical procedure, that an execution is not required to be painless, and
- the 10 to 18 minute duration of most of the midazolam executions in evidence,

this Court concludes that the Inmates have not established the other *Glossip* prong that with the use of midazolam there is an objectively intolerable risk of harm, and, that, if the law were to be expanded to provide for a torture exception to the *Glossip* requirement for inmates to prove a known and available alternative method of execution, the Tennessee three-drug lethal injection protocol would not come within the exception.

## Midazolam—Deliberate Indifference

Lastly with respect to midazolam is that the Inmates contend that the State's use is deliberately indifferent because the State was warned in the procurement process of the risks of midazolam.

Hello XXXXX

That stuff is readily available along with potassium chloride. I reviewed several protocols from states that currently use that method. Most have a 3 drug protocol including a paralytic and potassium chloride. Here is my concern with Midazolam. Being a benzodiazepine, it does not elicit strong analgesic effects. The subject may be able to feel pain from the administration of the second and third drugs. Potassium chloride especially. It may not be a huge concern but can open the door to some scrutiny on your end. Consider the use of an alternative like Ketamine or use in conjunction with an opioid. Availability of the paralytic agent is spotty. Pancuronium, Rocuronium, and Vecuronium are currently unavailable. Succinylcholine is available in limited quantity. I'm currently checking other sources. I'll let you know shortly.

Regards,

Having found above that midazolam's propensity was known to the United States Supreme Court in *Glossip*, TDOC's decision to use the drug is not deliberately indifferent. "As for the alleged risk of severe pain in Alabama's current protocol, 'it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated.'" *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1303 (11th Cir. 2016), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 725 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017) (quoting *Baze*, 553 U.S. at 53, 128 S.Ct. at 1532.).

## Vecuronium Bromide

In addition to challenging the use of midazolam in the three-drug lethal injection protocol, the Inmates also contest use of the second drug: vecuronium bromide. This drug acts to paralyze the inmate after the sedation of the midazolam has been injected and before the heart-stopping potassium chloride is injected. The Inmates cite to the 2003 decision of this Court which upheld as constitutional the lethal injection method being used at that time but which found that the State had not demonstrated a reason for injecting a paralytic like vecuronium bromide and therefore its use was arbitrary. In the 15 years since this Court's decision in 2003, several changes have occurred which make the 2003 decision of minimal use. First, reasons have been stated in the case law for injection of a paralytic like vecuronium bromide, one being to hasten death, to show its use is not arbitrary.

- First, as already noted, the Supreme Court in *Baze* found that the paralytic, which was used in the three-drug execution protocol of at least 30 states, 553 U.S. at 44, 128 S.Ct. 1520, serves two legitimate purposes, maintaining the dignity of the procedure and hastening death. *Id.* at 57–58, 128 S.Ct. 1520. Administration of a paralytic as the second drug after an effective agent of unconsciousness in a three-drug lethal injection protocol is not so arbitrary that it shocks the conscience. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (“[O]nly the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’”) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)).  
*First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940, 958 (D. Ariz. 2016).

- We do, however, pause to note our agreement with the district court's reasoning concerning Chavez's claim that the forcible administration of vecuronium bromide would violate his due process rights under *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003), because it serves no medical purpose in the execution process. As the district court explained, the liberty interest in avoiding involuntary medical treatment that *Sell* identified does not apply in the context of

capital punishment because “by its nature, the execution process is not a medical procedure, and by design, it is not medically appropriate for the condemned.” Doc. 50 at 39. And “[u]sing drugs for the purpose of carrying out the death penalty does not constitute medical treatment.” *Id.* at 42.

*Chavez v. Florida SP Warden*, 742 F.3d 1267, 1269, n. 2 (11th Cir. 2014).

- In *Chavez v. Florida SP Warden*, 742 F.3d 1267, 1269 n. 2 (11th Cir.2014), the Eleventh Circuit rejected the prisoner’s argument that the forcible administration of the paralytic vecuronium bromide violated his due process rights because it served no medical purpose in the execution process. Affirming the district court, the court of appeals explained that “the liberty interest in avoiding involuntary medical treatment...does not apply in the context of capital punishment ‘because by its nature, the execution process is not a medical procedure, and by design, it is not medically appropriate for the condemned,’ and ‘[u]sing \*959 drugs for the purpose of carrying out the death penalty does not constitute medical treatment.’” *Id.* (quoting *Chavez v. Palmer*, No. 3:14-cv-110-J-39JBT, 2014 WL 521067, at \*22 (M.D.Fla. Feb. 10, 2014)); see *Howell v. State*, 133 So.3d 511, 523 (Fla.2014) (rejecting due process challenge to forced administration of paralytic).

*First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940, 958–59 (D. Ariz. 2016).

Secondly, this Court’s 2003 decision was prior to the United States Supreme Court decisions: *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross*, 135 S. Ct. 2726 (2015) which have been quoted extensively herein and which have decided the law in this area.

#### Other Challenges to Protocol

As to the other allegations of the Inmates that the July 5, 2018 three-drug lethal injection protocol creates a demonstrated risk of severe pain through: use of compounding, oral or written instructions from the compounder of the drug on handling and storage, and insufficient consciousness checks, the Court dismisses these based upon the following case law which has dismissed these claims under circumstances similar to this case.

- The experience of the U.S. Fifth Circuit Court of Appeals and a U.S. District Court in Virginia is that executions with compounded drugs have proceeded without incident.

The United States Court of Appeals for the Fifth Circuit recently rejected nearly identical arguments by a Texas death row inmate that “compounded drugs are unregulated and subject to quality and efficacy problems.” *Ladd v. Livingston*, 777 F.3d 286, 289 (5th Cir. 2015); *see also Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1264–66 (11th Cir. 2014) (rejecting similar challenge to a compounded drug). The court concluded that such arguments are “essentially speculative,” and “speculation cannot substitute for evidence that the use of the drug is *sure or very likely* to cause serious illness and needless suffering.” *Ladd*, 777 F.3d at 289 (quoting *Brewer v. Landigran*, 562 U.S. 996, 996 (2010)). The Fifth Circuit explained that to succeed, an inmate must “offer some proof that the state's own process—that its choice of pharmacy, that its lab results, that the training of its executioners, and so forth, are suspect.” *Id.* (citing *Whitaker v. Livingston*, 732 F.3d 465, 468 (5th Cir. 2013)). The court went on to observe that Texas was able to conduct its last fourteen executions with “a single-drug pentobarbital injection from a compounded pharmacy ... without significant incident.” *Id.* at 290. This Court previously refused to halt the execution of a Virginia inmate, Alfredo Prieto, whose lethal injection protocol used a compounded drug as its first ingredient. *See Prieto v. Clarke*, No. 3:15CV587–HEH, 2015 WL 5793903 (E.D. Va. Oct. 1, 2015). Prieto's execution using the compounded drug was completed without incident.

\* \* \*

Less than a year ago, the Eleventh Circuit held that a prisoner has no procedural due process right “to know where, how, and by whom the lethal injection drugs will be manufactured, as well as the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters.” *Jones v. Comm'r, Ga. Dep't of Corr.*, 811 F.3d 1288, 1292–93 (11th Cir.), *cert. denied sub nom. Jones v. Bryson*, 136 S. Ct. 998 (2016). The Fifth, Sixth, and Eighth Circuits have reached similar conclusion. *See Phillips v. DeWine*, 841 F.3d 405, 420 (6th Cir. 2016) (“Plaintiffs argue that HB 663 prevents them from bringing an effective challenge to Ohio's execution procedures. Specifically, they maintain that HB 663 ‘denies [them] an opportunity to discover and litigate non-frivolous claims.’ But no constitutional right exists to discover grievances or to litigate effectively once in court.” (internal quotation marks omitted) (citation omitted)); *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir.), *cert. denied*, 135 S. Ct. 2941

(2015) (“[T]he Constitution does not require such disclosure. A prisoner’s assertion of necessity—that [the State] must disclose its protocol so he can challenge its conformity with the Eighth Amendment—does not substitute for the identification of a cognizable liberty interest.” (internal quotation marks omitted) (citations omitted)); *Trottie v. Livingston*, 766 F.3d 450, 452 (5th Cir.), *cert. denied*, 135 S. Ct. 41 (2014) (“A due process right to disclosure requires an inmate to show a cognizable liberty interest in obtaining information about execution protocols .... However, we have held that an uncertainty as to the method of execution is not a cognizable liberty interest.” (citation omitted)). Likewise, this Court will adopt the same reasoning as the Fifth, Sixth, Eighth, and Eleventh Circuits in finding that Gray has no procedural due process right to discover information about Virginia’s lethal injection drugs. Therefore, because Gray is unlikely to succeed on the merits of his procedural due process claim, this factor weighs strongly against granting a preliminary injunction.

*Gray v. McAuliffe*, No. 3:16CV982-HEH, 2017 WL 102970, at \*20 (E.D. Va. Jan. 10, 2017), *appeal dismissed sub nom. RICKY GRAY v. TERENCE MCAULIFFE* (Jan. 11, 2017) (footnote omitted).

- It cannot be cruel and unusual punishment for the Department to fail to plan ahead for every minor contingency. If the inmates are challenging the Department’s ability to exercise discretion even for minor, routine contingencies, that challenge fails. But the inmates’ principal challenge is to the Department’s failure to commit to, and its deviation from, central aspects of the execution process once adopted. Those unlimited major deviations and claims of right to deviate threaten serious pain.

*First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940, 951 (D. Ariz. 2016).

- Moreover, to the extent any accidental mishandling might have occurred, “[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.” *Reid v. Johnson*, 333 F. Supp. 2d 543, 553 (E.D. Va. 2004) (quoting *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994)).

*Gray v. McAuliffe*, No. 3:16CV982-HEH, 2017 WL 102970, at \*14, n. 11 (E.D. Va. Jan. 10, 2017), *appeal dismissed sub nom. RICKY GRAY v. TERENCE MCAULIFFE* (Jan. 11, 2017).

Furthermore, as to the risk of compounding, Dr. Evans, the Defendants’ expert pharmacologist, established that if the July 5, 2018 protocol is followed as written, it

poses no risk. The Inmates' constitutional challenge being a facial one to the protocol, Dr. Evans' testimony on this issue is weighty.

#### Reiteration—Failure to Prove *Glossip* Alternative Prong

The foregoing findings concerning the use of midazolam must be considered as part of the comparative analysis required by the United States Supreme Court. The Court reiterates that for the death penalty to be an effective punishment, the United States Supreme Court requires inmates, challenging a State's method of execution as unconstitutional, to prove that there is a known and available alternative method of execution. With the realities of the supply of lethal injection drugs diminishing and drug options narrowing for prisons, requiring inmates, seeking to halt executions, to prove other alternatives exist addresses these realities. In this case the Inmates have not done this. They have not demonstrated that their proposed alternative of pentobarbital is available to the State of Tennessee for their executions. Under these circumstances, the law of the United States requires Count I of the *Second Amended Complaint* to be dismissed, and that use of the July 5, 2018 three-drug protocol may proceed.

#### **Count VIII: Substantive Due Process – Shocks the Conscience**

For the same reasons above for dismissal of the Count I claim, the Inmates' Count VIII claim is dismissed. That is because the following case law establishes that the Count VIII claim is subsumed and decided by the foregoing cruel and unusual punishment analysis.

- Because we have “always been reluctant to expand the concept of substantive due process,” *Collins v. Harker Heights, supra*, at 125, 112 S.Ct., at 1068, we held in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), that “[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.” *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 813, 127 L.Ed.2d 114 (1994) (plurality opinion of REHNQUIST, C.J.) (quoting *Graham v. Connor, supra*, at 395, 109 S.Ct., at 1871) (internal quotation marks omitted).

*Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

- To support a viable substantive due process claim against executive action, a plaintiff must ordinarily demonstrate an “abuse of power ... [that] shocks the conscience.” *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). But as a result of the amorphous nature of the case law in this area, the substantive due process framework is inappropriate where another constitutional amendment encompasses the rights asserted. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). The Supreme Court has explained that “[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing [the] claims.” *Lewis*, 523 U.S. at 842, 118 S.Ct. 1708 (first alteration in original) (quoting *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (plurality opinion)). Accordingly, when a claimant alleges that a state actor unreasonably seized her property, a court should generally apply the Fourth Amendment reasonableness standard governing searches and seizures, not the substantive due process standard of conscience-shocking state action. *See, e.g., Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

*Partin v. Davis*, 675 Fed. Appx. 575, 581–82, 2017 WL 128559 (6th Cir. 2017).

- Plaintiff has not shown a substantial likelihood of success on the merits of his Fourteenth Amendment claim with respect to the use of vecuronium bromide as the second drug in the three-drug protocol. The Supreme Court has “always been reluctant to expand the concept of substantive due process[.]” *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). Here, there is a particular Amendment, the Eighth Amendment, which “ ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior [.]” *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443



(1989)). Therefore, the guide for analyzing Plaintiff's claim must be the Eighth Amendment, not the "generalized notion of substantive due process [.]” *Id.* (citation and internal quotation marks omitted). To the extent Plaintiff is raising an Eighth Amendment claim, he has not shown a substantial likelihood of success on the merits of an Eighth Amendment claim with respect to the use of vecuronium bromide, a paralytic, in Florida's lethal injection protocol.<sup>28</sup>

*Chavez v. Palmer*, No. 3:14-CV-110-J-39JBT, 2014 WL 521067, at \*23 (M.D. Fla. Feb. 10, 2014), *aff'd sub nom. Chavez v. Florida SP Warden*, 742 F.3d 1267 (11th Cir. 2014) (footnote omitted).

- Before leaving this point on appeal, we must address the Prisoners' assertion that the Midazolam protocol violates the substantive component of article 2, section 8 of the Arkansas Constitution because the lethal-injection procedure using Midazolam entails objectively unreasonable risks of substantial and unnecessary pain and suffering. On this issue, the circuit court ruled that the Prisoners need not satisfy the requirement of offering a feasible and readily implemented alternative to the Midazolam protocol. We agree with ADC's contention that this claim must be analyzed under the two-part test we have herein adopted for method-of-execution challenges. “If a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.” *United States v. Lanier*, 520 U.S. 259, 272 n. 7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (citing *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). In applying this principle, courts have concluded that an Eighth Amendment claim that is conterminous with a substantive due-process claim supersedes the due-process claim. *Curry v. Fed. Bureau of Prisons*, No. 05-CV-2781, 2007 WL 2580558 (PJS/JSM) (D.Minn. September 5, 2007) (collecting cases); *see also Oregon v. Moen*, 309 Or. 45, 786 P.2d 111, 143 (1990) (recognizing that “if the imposition of the death penalty satisfies the Eighth Amendment, it also satisfies substantive due process”). This claim also fails because, as we have discussed, the Prisoners failed to establish the second prong of the *Glossip* test.

*Kelley v. Johnson*, 496 S.W.3d 346, 360 (Ark. 2016), *reh'g denied* (July 21, 2016), *cert. denied*, 137 S. Ct. 1067 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017) (footnote omitted).

- If a constitutional claim is covered by a specific constitutional provision, such as the Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S.Ct. 1708, 1715, 140 L.Ed.2d 1043 (1998) (citations omitted). Thus, substantive due process analysis is inappropriate if Plaintiff's claim is covered by another constitutional

amendment. *Id.* In the instant case, Plaintiff's claim is covered by the Eighth Amendment; therefore, his due process claim should be dismissed. *Gary v. Aramark Corr. Servs.*, No. 5:13-CV-417-RS-EMT, 2014 WL 3385119, at \*5 (N.D. Fla. July 10, 2014).

- A prisoner may not bring a substantive due process claim when another constitutional amendment “provides an explicit textual source of constitutional protection against” that claim. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Here, the Eighth Amendment clearly provides a source of protection for Plaintiff's claims. *See id.* Any due process claim thus fails.

*Norman v. Griffin*, No. 7:14-CV-185 HL, 2014 WL 7404008, at \*5 (M.D. Ga. Dec. 30, 2014).

- If he intended the former, the Court has analyzed his Eighth Amendment claims above. To the extent he intended the latter, substantive due process does not apply when another constitutional amendment explicitly provides a source of constitutional protection. *See Sacramento Cty. v. Lewis*, 523 U.S. 833, 842 (1998). A substantive due process analysis is appropriate only if Plaintiff's claims are not “covered by” the Eighth Amendment. *Id.* at 843. Because Plaintiff's claims are completely covered by the Eighth Amendment, his Fourteenth Amendment claims are superfluous.

*Niewind v. Smith*, No. 14-CV-4744 (DWF/HB), 2016 WL 3960356, at \*11 (D. Minn. May 24, 2016), *report and recommendation adopted*, No. 14-4744 (DWF/HB), 2016 WL 3962852 (D. Minn. July 20, 2016).

- Plaintiffs also argue that Mississippi's intention to execute them in a manner other than that described by § 99–19–51 “shocks the conscience” and that they are entitled to substantive enforcement of § 99–19–51 regardless of the state post-conviction relief procedures available to them. This argument sounds in substantive due process. According to the Supreme Court, “[t]he touchstone of due process is protection of the individual against arbitrary action of government.” *County of Sacramento*, 523 U.S. at 845, 118 S.Ct. 1708. The Court has held that executive action violates a citizen's substantive due process rights when the action “shocks the conscience.” *Id.* at 846, 118 S.Ct. 1708. The Court's test for the substantive component of the due process clause prohibits “only the most egregious official conduct,” *id.*, and will rarely come into play. At the same time that the Court announced the “shocks the conscience” test it counseled judges against “drawing on our merely personal and private notions [to] disregard the limits that bind judges in their judicial function.” *Rochin v. California*, 342 U.S. 165, 170–71, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

*Jordan v. Fisher*, 823 F.3d 805, 812–13 (5th Cir. 2016), *as revised* (June 27, 2016), *cert. denied*, 137 S. Ct. 1069 (2017).

#### **Count IV: Procedural Due Process**

In Count IV of the *Second Amended Complaint*, the Plaintiffs allege that the Lethal Injection Protocol violates the Fourteenth Amendment to the United States Constitution and Tennessee Constitution Article 1, § 8.

In support of this claim, the Plaintiffs argue that the protocol fails to provide the Defendants adequate notice of which method of execution will be used and provides insufficient notice that compounded midazolam will be used rather than manufactured midazolam. For the following reasons, the Court dismisses Count IV of the *Second Amended Complaint For Declaratory Judgment*.

On July 5, 2018, the Department of Correction issued a revised Lethal Injection Manual that eliminated a choice by TDOC. The July 5, 2018 revision removed Protocol A providing for use of pentobarbital and provided that the Department would use Protocol B for carrying out executions by lethal injection. Protocol B is the three-drug lethal injection protocol tried in this case. Additionally, the July 5, 2018 revision made explicit that “[c]hemicals used in lethal injection execution will either be FDA-approved commercially manufactured drugs; or, shall be compounded preparations prepared in compliance with pharmaceutical standards consistent with the United States Pharmacopeia guidelines and accreditation Departments, and in accordance with applicable licensing regulations.”

Thus, Plaintiffs’ allegations, in paragraphs 363-378 and 702-723 of the *Second Amended Complaint For Declaratory Judgment* that the January 8, 2018 lethal injection protocol violated the Plaintiffs’ procedural due process rights because “it does not

provide any standards for the selection of one protocol versus another, does not provide for any notice of the selection of any protocol and denies plaintiffs a meaningful opportunity to be heard,” are moot given the revisions in the July 5, 2018 Lethal Injection Manual. The July 5, 2018 revision explicitly provides that (1) Protocol B will be used and (2) commercially manufactured or compounded drugs may be used.<sup>9</sup>

Second, to the extent any portion of the Plaintiffs’ Count IV – Procedural Due Process claim asserts a lack of notice in the July 5, 2018 Lethal Injection Manual of the method by which they will be executed, this claim must also be dismissed. On July 10, 2018, the Tennessee Supreme Court issued an *Amended Order* in the cases of Plaintiffs Billy Ray Irick, Edmund Zagorski and David Earl Miller which provided a date certain by which the Warden was required to notify the inmate of the method that the Tennessee Department of Correction will use to carry out the executions.

Accordingly, under the provisions of Rule 12.4(E), it is hereby ORDERED, ADJUDGED AND DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the 9th day of August, 2018, unless otherwise ordered by this Court or other appropriate authority. **No later than July 23, 2018, the Warden or his designee shall notify Mr. Irick of the method that the Tennessee Department of Correction (TDOC) will use to carry out the executions and of any decision by the Commissioner or TDOC to rely upon the Capital Punishment Enforcement Act.**

*State of Tennessee v. Billy Ray Irick*, No. M1987-00131-SC-DPE-DD, p. 1 (Tenn. July 10, 2018) (*per curiam*) (emphasis added); *State of Tennessee v. Edmund Zagorski*, No. M1996-00110-SC-DPE-DD, p. 1 (Tenn. July 10, 2018) (*per curiam*) (“No later than

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<sup>9</sup> During the trial, Department of Correction General Counsel Debbie Inglis testified that the Department would use compounded midazolam in the upcoming executions.

September 27, 2018, the Warden or his designee shall notify Mr. Zagorski of the method that the Tennessee Department of Correction (TDOC) will use to carry out the executions and of any decision by the Commissioner or TDOC to rely upon the Capital Punishment Enforcement Act.”); *State of Tennessee v. David Earl Miller*, No. E1982-00075-SC-DDT-DD, p. 1 (Tenn. July 10, 2018) (*per curiam*) (“No later than November 21, 2018, the Warden or his designee shall notify Mr. Miller of the method that the Tennessee Department of Correction (TDOC) will use to carry out the executions and of any decision by the Commissioner or TDOC to rely upon the Capital Punishment Enforcement Act.”).

Additionally, TDOC has complied, and as of July 23, 2018 issued the Notice.

By the Tennessee Supreme Court providing these certain deadlines for the inmates that currently have execution dates set and with TDOC’s compliance, the Plaintiffs are provided sufficient notice of the method of execution while at the same time balancing the Commissioner’s right to modify the protocol based on changing circumstances. *West v. Schofield*, 468 S.W.3d 482, 492 (Tenn. 2015) (“Even assuming TDOC is unable to obtain pentobarbital, the Commissioner may choose to modify the lethal injection protocol and designate a more readily obtainable drug instead of making a certification to the Governor under the CPEA.”).

For all these reasons, the Count IV is dismissed with prejudice.

## Count V: Right to Counsel and Access to the Courts

The *Second Amended Complaint* contains 8 challenges to the set-up of the room where witnesses, including attorneys for the inmate being executed, view the execution.<sup>10</sup> These include challenges about the sight view and access of attorneys to a telephone, quoted as follows.

381. The official witness room does not provide Plaintiff's lawyer with the ability to view the injection site for signs of extravasation or infiltration.

382. The official witness room does not permit attorney observation of the syringes which is critical to ascertain the sequence and timing of the injection of the different syringes.

383. The official witness room does not provide Plaintiff's lawyer with sufficient ability to observe signs of unnecessary pain and distress.

384. The official witness room does not provide Plaintiffs with telephone access to the courts or co-counsel.

\* \* \*

386. Defendants have the ability to provide Plaintiffs' counsel visual monitoring of the IV injection site throughout the execution process.

387. Defendants have the ability to provide Plaintiffs' counsel visual observation of the operation of the syringes.

388. Defendants have the ability to provide Plaintiffs with appropriate visual monitoring of their client during the execution process.

389. Defendants have the ability to provide Plaintiffs' counsel with suitable telephone access to the courts and co-counsel during the execution process.

\* \* \*

726. During his deposition, Defendant Parker agreed to provide telephone access for Plaintiffs' during the execution process.

727. After his deposition, that agreement was rescinded.

728. During her deposition, Debbie Inglis agreed to consider allowing Plaintiffs' counsel to access the telephone adjacent to the Death Watch cells during the execution process.

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<sup>10</sup> The relief sought in this claim is not for the Court to order TDOC to allow the attorneys to have telephone access or to change the sight view. The Inmates' claim is that because these items are not provided, the Inmates do not have access to the courts and counsel, and this is unconstitutional. The effect of such a ruling is that the executions would be halted.

729. During his deposition, Defendant Parker agreed to inquire about the installation of a monitor in the Official Witness Room that would broadcast the visual feed from the pan-tilt-zoom camera that is focused on the IV sites.

Based upon the following law, these challenges do not rise to the level of unconstitutional conduct. As for the testimony at trial of the Commissioner and Assistant Commissioner that they would not object to Counsel having access to telephones, this Court as stated in footnote 8, does not have the authority in this case to order that. But even so, there is no legal bar to the State and the Inmates' Counsel reaching an agreement on this. As far as the constitutional ramifications, however, Count V must be dismissed based upon the following law.

First, as a matter of law, all of the claims alleged in this lawsuit – including the access to courts claim – are facial challenges to the constitutionality of the July 5, 2018 protocol. Under Tennessee law, a facial challenge is the most difficult constitutional challenge to make. In order to succeed on their access to courts claim, the Plaintiffs must prove that no set of circumstances exist under which the July 5, 2018 Lethal Injection Protocol would be valid. *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (“Likewise, it is well recognized that a facial challenge to a statute, such as that involved here, is ‘the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid.’ Thus, the plaintiffs in this appeal have a heavy legal burden in challenging the constitutionality of the statutes in question.”) (citations omitted).

Furthermore, “[t]he presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute. In such an instance, the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid.” *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (citations omitted).

In this case, the access to courts claim fails as a matter of law because it is premised and based on speculation that during the execution something will go wrong that would necessitate the need for access to courts. This type of speculation does not state a claim in a facial challenge as recognized by the Tennessee Supreme Court in *West v. Schofield*.

Initially, we note that the trial court allowed the Plaintiffs to adduce proof about a variety of things that might conceivably go wrong in a compounded pentobarbital lethal injection execution as well as proof about the consequences of the Protocol being carried out in accordance with the Protocol's specific provisions. For instance, the Plaintiffs elicited expert proof about the risks associated with the LIC if it was compounded, transported, or stored improperly, i.e., in contravention of the Protocol, including the Contract. However, we view this proof as more appropriate to an as-applied challenge to the Protocol because the Protocol, on its face, does not provide for the improper preparation, transportation, or storage of the LIC. As the United States Court of Appeals for the Sixth Circuit has recognized, “[s]peculations, or even proof, of medical negligence in the past or in the future are not sufficient to render a facially constitutionally sound protocol unconstitutional.” *Cooey v. Strickland*, 589 F.3d 210, 225 (6th Cir. 2009).

Certainly, there are risks of error in every human endeavor. Indeed, as the United States Supreme Court has recognized, “[s]ome 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.” *Baze v. Rees*, 553 U.S. 35, 47, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion). However, “ ‘accident[s], with no suggestion of malevolence’ [do] not give rise to an Eighth Amendment violation.” *Id.* at 50, 128 S.Ct. 1520



(citation omitted) (quoting Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947)).

Again, this lawsuit consists of a facial challenge to the Protocol. A facial challenge does not involve a consideration of the Plaintiffs' list of things that *might* go wrong if the Protocol is not followed. Therefore, we need not itemize the substantial amount of proof in the record before us that relates only to potential risks that might occur from a failure to follow the Protocol rather than the proof of risks that are inherent in the Protocol itself.

*West v. Schofield*, 519 S.W.3d 550, 555–56 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, 138 S. Ct. 476, 199 L. Ed. 2d 364 (2017), and *cert. denied sub nom. Abdur'Rahman v. Parker*, 138 S. Ct. 647, 199 L. Ed. 2d 545 (2018), *reh'g denied*, 138 S. Ct. 1183, 200 L. Ed. 2d 328 (2018); *see also Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 310 (Tenn. 2005) (rejecting the inmate's access to courts claim because "he has failed to show evidence that a scenario involving unnecessary pain and suffering is anything other than speculation.").

Additionally, the Count V claim is dependent upon the Inmates' succeeding on their Count I claim which they did not do. On this basis, as well, Count V is dismissed.

- The plaintiffs also have not satisfied the pleading requirements of a method-of-execution claim because they have not identified a "substantial risk of serious harm" from the lack of access. *See Glossip*, 135 S.Ct. at 2737 (quotation marks and citations omitted). The plaintiffs point to the possibility of "botched executions" that access to counsel could address, but that is just the kind of "isolated mishap" that is not cognizable via a method-of-execution claim. *See Baze*, 553 U.S. at 50, 128 S.Ct. 1520. Finally, because the plaintiffs have not succeeded in pleading an underlying claim, their access-to-the-courts assertion fails as well. *Whitaker*, 732 F.3d at 467.

*Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1172 (2018).

- Second, even if there was some delay because of uncertainty on the part of the state as to how it would proceed with executions, plaintiffs' access-to-the-courts

argument still hinges on their ability to show a potential Eighth Amendment violation. One is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation. Plaintiffs must plead sufficient facts to state a cognizable legal claim. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.... The plausibility standard ... asks for more than a sheer possibility that a defendant has acted unlawfully.). Therefore, plaintiffs must show some likelihood of success on the merits of the Eighth Amendment claim. A plaintiff cannot argue that if only he had infinite time—or even just a little bit more time—*then* he might be able to show a likelihood of success. To hold otherwise would be to eviscerate the first requirement of the standard for preliminary injunctions.

*Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013).

- Arthur's request for his counsel to take a cellular device into a prison while an execution is taking place is based on speculation that something might go wrong during the procedure. This theoretical basis for relief falls outside of the injury requirement stated in *Lewis*. *Cf. Whitaker v. Livingston*, 732 F.3d 465, 467 (5<sup>th</sup> Cir. 2013) (“One is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation.”).

*Arthur v. Dunn*, No. 2:16-CV-866-WKW, 2017 WL 1362861, at \*7 (M.D. Ala. Apr. 12, 2017), *aff'd sub nom. Arthur v. Comm'r, Alabama Dep't of Corr.*, 680 Fed. Appx. 894 (11th Cir. 2017), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 1521 (2017).

It follows, then, that because the Inmates' claims regarding cell phones and better sight views for Counsel while observing the executions, do not state a constitutional violation, this Court has no authority to order TDOC to make such changes. In an analogous area, Tennessee case law provides that courts generally give great deference to an agency's interpretation of its own rules because the agency possesses special knowledge, expertise, and experience with regard to the subject matter of the rule.

*BellSouth Adver. & Publ'g Corp. v. Tennessee Regulatory Auth.*, 79 S.W.3d 506, 514

(Tenn.2002) (quoting *Jackson Exp., Inc. v. Tennessee Pub. Serv. Comm'n*, 679 S.W.2d at 945).

The Tennessee Legislature has carefully regulated the persons who may attend an execution.<sup>11</sup> Security measures are delegated to TDOC. TENN. CODE ANN. § 40-23-

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<sup>11</sup> § 40-23-116. Capital punishment; procedure; witnesses

(a) In all cases in which the sentence of death has been passed upon any person by the courts of this state, it is the duty of the sheriff of the county in which the sentence of death has been passed to remove the person so sentenced to death from that county to the state penitentiary in which the death chamber is located, within a reasonable time before the date fixed for the execution of the death sentence in the judgment and mandate of the court pronouncing the death sentence. On the date fixed for the execution in the judgment and mandate of the court, the warden of the state penitentiary in which the death chamber is located shall cause the death sentence to be carried out within an enclosure to be prepared for that purpose in strict seclusion and privacy. The only witnesses entitled to be present at the carrying out of the death sentence are:

- (1) The warden of the state penitentiary or the warden's duly authorized deputy;
- (2) The sheriff of the county in which the crime was committed;
- (3) A priest or minister of the gospel who has been preparing the condemned person for death;
- (4) The prison physician;
- (5) Attendants chosen and selected by the warden of the state penitentiary as may be necessary to properly carry out the execution of the death sentence;
- (6) A total of seven (7) members of the print, radio and television news media selected in accordance with the rules and regulations promulgated by the department of correction. Those news media members allowed to attend any execution of a sentence of death shall make available coverage of the execution to other news media members not selected to attend;
- (7)(A) Immediate family members of the victim who are eighteen (18) years of age or older. Immediate family members shall include the spouse, child by birth or adoption, stepchild, stepparent, parent, grandparent or sibling of the victim; provided, that members of the family of the condemned prisoner may be present and witness the execution;
- (B) Where there are no surviving immediate family members of the victim who are eighteen (18) years of age or older, the warden shall permit up to three (3) previously identified relatives or personal friends of the victim to be present and witness the execution;
- (8) One (1) defense counsel chosen by the condemned person; and
- (9) The attorney general and reporter, or the attorney general and reporter's designee.

114(c) (West 2018) (“The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.”).

It is therefore the province of TDOC to use its special knowledge, expertise and experience, and if TDOC determines it is appropriate to allow the measures sought by the Inmates, TDOC may provide for that.

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(b) No other person or persons than those mentioned in subsection (a) are allowed or permitted to be present at the carrying out of the death sentence. It is a Class C misdemeanor for the warden of the state penitentiary to permit any other person or persons than those provided for in subsection (a) to be present at the legal execution.

(c)(1) Photographic or recording equipment shall not be permitted at the execution site until the execution is completed, the body is removed, and the site has been restored to an orderly condition. However, the physical arrangement of the execution site shall not be disturbed.

(2) A violation of subdivision (c)(1) is a Class A misdemeanor.

(3) The department shall promulgate rules that establish criteria for the selection of news media representatives to attend an execution of a death sentence in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. In promulgating the rules, the department shall solicit recommendations from the Tennessee Press Association, the Tennessee Associated Press Managing Editors, and the Tennessee Association of Broadcasters. For each execution of a death sentence, applications for attendance shall be accepted by the department. When the number of applications require, lots to select news media representatives will then be drawn by the warden of the state penitentiary at which the death sentence is to be carried out. All drawings shall be conducted in open meetings and notice shall be properly given in accordance with § 4-5-203.

(d) If the immediate family members of the victim choose to be present at the execution, they shall be allowed to witness the execution from an area that is separate from the area to which other witnesses are admitted. If facilities are not available to provide immediate family members with a direct view of the execution, the warden of the state penitentiary may broadcast the execution by means of a closed circuit television system to the area in which the immediate family members are located.

This concludes the findings of fact and conclusions of law from the trial of this case.

s/ Ellen Hobbs Lyle  
ELLEN HOBBS LYLE  
CHANCELLOR

cc by U.S. Mail, email, or efile as applicable to:

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Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/ Justin F. Seamon

Deputy Clerk  
Chancery Court

July 26, 2018