IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

State of Tennessee,	)	
	)	**CAPITAL CASE**
v.	)	No. M1987-00131-SC-DPE-DD
	)	
Billy Ray Irick	)	**EXECUTION: August 9, 2018**

REPLY TO RESPONSE
MOTION TO VACATE EXECUTION DATE

In opposing Mr. Irick's motion to vacate the State resorts to procedural technicalities and broad conclusory language which is at odds with the facts developed at trial. The State's pleading is factually and legally wrong. Mr. Irick's motion should be granted.

I. Plaintiffs proved a feasible and readily implemented alternative.

The proof in the technical record and in the transcripts will show that the Plaintiffs in the *Abdur'Rahman* case pled and proved two feasible and readily available alternatives, as required by *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

A. The Two-Drug Alternative

The State does not deny that a two-drug alternative is feasible and readily available. Further, it does not dispute that a two-drug protocol will substantially reduce the risk of pain and suffering to Mr. Irick. For purposes of this motion, the Court should consider those facts admitted.

The record will show that Plaintiffs introduced the alternative of removing vecuronium bromide from the protocol in their original complaint and continued to stress the use of the dangerous paralytic as unnecessary and increasing pain and suffering throughout the litigation. The record will also show that the issues of the function and effect of the vecuronium bromide in the protocol, as well as removing the vecuronium bromide from the protocol were thoroughly tried and vigorously tested. The experts were questioned about this protocol.[i] They testified that the vecuronium bromide was not necessary to bring about the death of the inmate and caused significant additional terror because of the inmate's experiencing the sensation of being unable to breathe. Both Dr. Stevens and Dr. Greeblatt were expressly asked whether removal of vecuronium bromide would reduce the risk of pain and suffering and both replied that it would. The expert testimony established that a protocol without the paralytic would significantly reduce the substantial risk of severe pain. The State had the opportunity to challenge this testimony but did not. The Commissioner also testified that the State could carry out a two-drug protocol. Plaintiffs introduced the *First Amendment Coalition of Arizona v. Ryan*, 188 F. Supp. 3d 940 (D. Ariz. 2016) case as an exhibit and introduced proof that Arizona agreed to eliminate the paralytic from its protocol. Plaintiffs presented expert testimony that the law prohibits the use of a paralytic in animal euthanasia.

The proof will also show that the State continued to suggest that they could obtain pentobarbital up until 1:00 PM on July 5 (4 days before trial). On that same day, Plaintiffs affirmatively represented in their trial brief that a two-drug protocol

would be offered as a *Glossip* alternative at trial.[1] Under these circumstances, the appeal will show that the Chancellor abused her discretion in refusing to consider the two-drug alternative in her *Glossip* analysis.

At the close of the proof, Plaintiffs moved to conform the pleadings to the proof. Tennessee law requires that such motions be freely granted. Where, as here, the trial of this case proceeded at a breathtaking pace, ruling that the Plaintiffs failed to meet their burden under *Glossip* on such a technicality is grossly unfair and an abuse of discretion.

This Court has rejected such an overly cramped interpretation of Rule 15.02:

> [I]t is clear that Rule 15.02 seeks to place substance over form, and the real question before us is not whether the amendment was timely made, but whether or not the parties actually tried the issue delineated by the amendment. In short, the ultimate inquiry is whether there was implied consent from all parties in this case to try the issue of negligent misrepresentation, with the concomitant defense of contributory negligence.

Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888, 890 (Tenn. 1980). Further, "trial by implied consent will be found where the party opposed to the amendment knew or should reasonably have known of the evidence relating to the new issue, did not object to this evidence, and was not prejudiced thereby." *Id.* Here, there can be no question that the State knew or should have known that the *Abdur'Rahman* Plaintiffs proposed the two-drug alternatives: the Plaintiffs expressly told them so. The State does not deny this fact in its response.

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[1] *See* Attachment D to Motion to Vacate, Excerpt of Plaintiffs' Trial Brief.

Although it is true that this Court reviews the trial court's order for abuse of discretion, that standard does not mean that the trial court will never be reversed. Factors to be considered in an abuse of discretion review are: "undue delay, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments and futility of the amendments." *Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 741 (Tenn. 2013). Plaintiffs are guilty of none of these factors. The case was filed and tried in less than five months. Plaintiffs gave notice that they would try the fact that vecuronium bromide is unnecessary and causes severe suffering and pain from the original complaint. Plaintiffs were explicit that they relied on the two-drug alternative as a back up to the pentobarbital alternative in their trial brief. There was no bad faith. The amendment would not be futile.

B. The pentobarbital alternative.

Respectfully, the State's response fails to take responsibility for the doublespeak that took place throughout the chancery court proceedings (and before) respecting the availability of pentobarbital. The January 8, 2018 protocol contained two options, single drug pentobarbital and the three drug protocol. The State did not affirmatively allege that it was unable to obtain pentobarbital until July 5, 2018. The proof in the trial court raises serious issues as to whether the State simply choose not to purchase pentobarbital because of price or lack of reasonable effort. Just because the State does not possess pentobarbital, does not mean that

they cannot obtain it. Texas and Georgia continue to use pentobarbital with no apparent problems in the supply chain.

The appeal in this case also will raise serious questions of first impression regarding exactly what the burden of proof is in a case where the State could obtain drugs for a pentobarbital protocol but bypassed the option to bargain shop.

Further, the appeal will raise questions of first impression regarding the burden on plaintiffs to prove an alternative where the proof of availability of the drugs lies with persons shrouded in secrecy by the State and to whom plaintiffs are prohibited access. The State does not deny that the testimony the commissioner and Ms. Inglis regarding the availability of pentobarbital is rank hearsay. These sorts of evidentiary questions will be directly addressed by the United States Supreme Court this term in *Bucklew v. Precythe, et al.*, No. 17-8151. It is exceedingly unfair to execute Mr. Irick while these important legal issues remain unsettled.[2]

II. The trial record upends the factual predicate of *Glossip*.

The Chancellor erred by failing to engage the expert evidence presented by Plaintiffs, choosing instead to rely heavily on the conclusions made by *other* courts that midazolam-based protocols are constitutional on the basis of *different* factual records. As the Arizona district court held in the *First Amendment Coalition* case,

> *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

[2] The State's suggestion that justice is not being served while the appeal pends defied reality. Mr. Irick remains incarcerated on death row, as he has been for thirty-two years. He has served the equivalent of a life sentence. Incarceration is punishment. He continues to be punished.

> 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).

First Amendment Coalition, 188 F. Supp. 3d at 950.

In *Glossip*, the Supreme Court found that "[t]estimony from both sides supports the District Court's conclusion that midazolam can render a person insensate to pain." 135 S. Ct. at 2741. That could not be further from the reality of the evidence presented in this case. The evidence presented by the Plaintiffs shows that the state's expert in *Glossip*, Dr. Evans who testified here, repudiated key portions of his *Glossip* testimony that were central to the Supreme Court's holding. For instance, Dr. Evans now admits that midazolam has a ceiling effect, has no analgesic properties, and that the entirety of his speculation about midazolam's ability to induce a coma is based on a single anecdote of a 63 year old man who entered a coma after being administered a therapeutic dose of midazolam. In contrast, Plaintiffs here presented evidence that no other court has considered—namely that 85% of the autopsies done of inmates executed using midazolam show that the inmate suffered from pulmonary edema that likely aroused them from the inadequate sedation provided by midazolam and left them awake, sensate, and experiencing the sensations of drowning. Plaintiffs also presented persuasive expert testimony not presented to any court in this country regarding the ineffectiveness of midazolam. Plaintiffs' proof includes four extremely qualified experts—including the scientist who conducted much of the preliminary research used to get midazolam FDA approval in the 1980s—who collectively presented overwhelming

evidence that midazolam is not effective for rendering an inmate insensate to the extremely noxious stimuli presented in the protocol. Mr. Irick should have the opportunity to fully brief the expert testimony that was presented to this court.

Further, Plaintiffs presented unchallenged eyewitness testimony from witnesses in every single state that has used midazolam that collectively demonstrated widespread and significant problems with midazolam-based executions for the exact reasons the experts explained in great scientific detail—midazolam does not work in this context. This evidence is more than enough to establish a likelihood of success on the merits.

Failing to engage with Plaintiffs' overwhelming evidence the Chancellor created an entirely new Eighth Amendment standard whereby it is constitutionally acceptable for an inmate to be aware and able to feel pain, as the Chancellor found here, as long that suffering lasts 10-18 minutes. There is no supporting case law for this ruling. Our state and federal constitutions prohibit torture, even if it only lasts 10-18 minutes. The Chancellor's ruling ignores *Baze v. Rees*, 553 U.S. 35 (2008), and every other court that has held that if an inmate is able to feel and experience the second two drugs the constitution is violated. The chancellor's order is at odds with the Chief Justice of the United States Supreme Court. "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. A stay is warranted.

III. Conclusion.

Mr. Irick is not to blame for the State's choice of a protocol that relies on a drug that is clearly ineffective for preventing constitutionally impermissible suffering during an execution. This Court has recognized his right to challenge the State's ever-changing method of execution. He should not be denied his right to appeal where he has diligently and expeditiously pursued his claim.[3]

Respectfully submitted,

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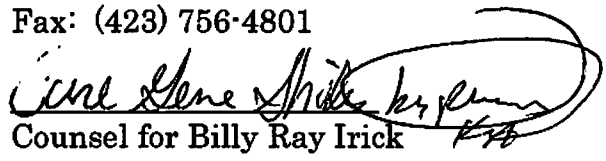
BY: 
Counsel for Billy Ray Irick

CERTIFICATE OF SERIVCE

I hereby certify that a true and correct copy of the foregoing document was sent to the following via email on this the 3rd day of August, 2018, to:

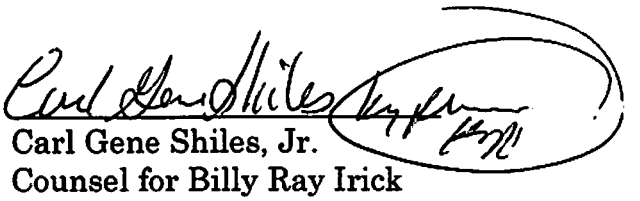
Ms. Andree Blumstein
Solicitor General

Ms. Jennifer Smith
Associate Solicitor General
P.O. Box 20207

[3] *See*, July 30, 2018 Order, *Abdur'Rahman, et al. v. Parker, et al.*, Tenn. Ct. App. No. M2018-01385-COA-R3-CV ("all interested parties are advised that this court will not have sufficient time to render a decision concerning the complaint for a declaratory judgment on or before Mr. Irick's scheduled execution.")

Nashville, TN 37202

Hard copies will follow in the United States Mail.



Carl Gene Shiles, Jr.
Counsel for Billy Ray Irick

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[1] For example, the amended complaint alleges:

96. Vecuronium bromide is not necessary to execute Plaintiffs.

97. The pain and suffering caused by vecuronium bromide is not necessary to execute Plaintiffs.

153. There exists a substantial risk that the use of midazolam in new Protocol B will not prevent Plaintiffs from experiencing pain, suffering, and the terror of suffocation caused by vecuronium bromide.

[Heading on p. 33] **The use of vecuronium bromide in Protocol B increases the risk of unnecessary and serious pain and suffering.**

160. Vecuronium bromide is the second drug used in Protocol B.

161. Vecuronium bromide is a neuromuscular blocking agent that produces paralysis, including paralysis of respiratory muscles.

162. A neuromuscular blocking agent blocks the receptor sites in muscle tissue that receive nerve impulses.

163. When these sites are blocked, the nerve impulses have no effect on the muscle tissue, which means that the muscle tissue will no longer contract causing paralysis.

164. A neuromuscular blocking agent has no effect on the central nervous

system, and consequently it has no effect on consciousness or the sensation of pain and suffering.

165. When the diaphragm and other muscles that control breathing are paralyzed, Plaintiffs will experience the sensation of suffocation without being able to respond.

166. Plaintiffs will not be able to respond by breathing, or by moving, or by facial or vocal expressions.

167. This will cause a frantic, desperate sensation which, in turns, results in inhumane and constitutionally intolerable suffering.

168. Because of the way neuromuscular blocking agents function, Tennessee law prohibits their use, in any form (with or without anesthetics), in euthanizing non-livestock animals, and veterinary ethical standards prohibit their use in euthanizing any kind of animal. See the Nonlivestock Animal Humane Death Act, Tenn. Code Ann. § 44-17-303(c).

169. The use of vecuronium bromide under Protocol B will render Plaintiffs unable to move.

170. The use of vecuronium bromide under Protocol B will render Plaintiffs unable to breathe.

171. The pain and terror caused by suffocation, if felt by Plaintiffs, is unconstitutional.

172. The use of vecuronium bromide will likely prevent any pain responses from being observed.

173. Midazolam, as used in Protocol B, will not prevent Plaintiffs from experiencing the serious constitutionally intolerable pain and suffering of suffocation.

174. When a human being experiences suffocation the biological response is an immediate and extreme spike in adrenaline and other stress hormones.

175. Vecuronium bromide is a noxious stimuli.

176. A human beings' biological response to the administration of vecuronium bromide is sure or very likely to overcome the sedative effect of midazolam.

177. The use of vecuronium bromide is unnecessary.

230. The inclusion of vecuronium bromide in new Protocol B needlessly

increases the risk that an execution will continue even as Plaintiffs are sensate to the severe pain, and suffering caused by suffocation but will show no outward indications of such pain.

231. The inclusion of vecuronium bromide in new Protocol B needlessly increases the risk that an execution will continue even as Plaintiffs are sensate to the severe pain, and suffering caused by potassium chloride, but will show no outward indications of such pain.

[Heading on p. 46] **C. Available Alternative**

302. The second drug utilized in Protocol B, vecuronium bromide, causes paralysis and severe mental anguish and terror.

303. The second drug utilized in Protocol B, vecuronium bromide, causes suffocation and severe mental anguish, terror, and pain.

308. The absence from Protocol A of vecuronium bromide and potassium chloride significantly reduces the substantial risk under Protocol B of severe pain caused by vecuronium bromide and potassium chloride.