THIS IS A CAPITAL CASE
EXECUTION SET FOR OCTOBER 11, 2018 AT 7 PM

IN THE
SUPREME COURT OF THE UNITED STATES
No. 18-_____

EDMUND ZAGORSKI,
Petitioner,
v.

TONY PARKER, et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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October 9, 2018

QUESTIONS PRESENTED

"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."*

Baze v. Rees, 553 U.S. 35, 53 (2008) (emphasis added).

The Questions Presented are:

1. Where the credited, credible, and unassailable evidence at trial proves with certainty that a lethal injection protocol will inflict severe pain and mental anguish on an inmate by causing the inmate to feel and experience pulmonary edema (drowning in one's own fluids) from midazolam, suffocation and paralysis (described as being buried alive) from vecuronium bromide, and chemical burning (the severity of which has been described as being burned alive from the inside) from potassium chloride, does that protocol violate the Eighth Amendment regardless of whether the inmate has demonstrated a feasible readily implemented alternative?

2. Did *Glossip v. Gross*, 576 U.S. __, 135 S.Ct. 2726 (2015), hold that there are no methods of execution which are categorically prohibited by the Eighth Amendment, overruling centuries of precedent?

3. Did *Glossip* relieve states from any obligation under the Eighth Amendment to engage in a good-faith search for humane forms of execution and shift that burden to inmates, transforming the Eighth Amendment prohibition against cruel and unusual punishment of the Eighth Amendment into a conditional protection?

4. Is an inmate deprived of fundamental due process under the Fourteenth Amendment, when he is effectively prevented from establishing the existence of a feasible and readily implemented alternative by 1) state secrecy laws preventing discovery of willing drug suppliers, 2) the state's refusal to affirm or deny their ability to secure alternative drugs, 3) a rushed litigation schedule, which precludes full factual development, and 4) the Tennessee court's perverse and unworkable interpretation of *Glossip*.

5. Where the State deprives an inmate's attorney of telephone access during an execution for the express purpose of preventing the attorney from calling the court, does the State violate the inmate's constitutional right of access to the courts?

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Edmund Zagorski respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court.

OPINIONS BELOW

The divided opinion of the Tennessee Supreme Court is published. *Abdur'Rahman, et al. v. Parker, et al.*, No. M2018-01385-SC-RDO-CV (Tenn. 2018). Apx A, A001-A34. The opinion of the Davidson County Chancery Court is unpublished. *Abdur'Rahman, et al. v. Parker, et al.*, No. 18-183-III. Apx B, A035-85.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Tennessee Supreme Court issued its denial of relief on October 8, 2018. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the First, Eighth and Fourteenth Amendments to the United States Constitution:

The First Amendment provides in pertinent part: "Congress shall make no law…abridging…the right of the people…to petition the government for redress of grievances."

The Eighth Amendment provides in pertinent part: "[N]or [shall] cruel and unusual punishments [be] inflicted."

The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The record below was developed expeditiously. In less the seven months, the case moved from the initial complaint (February 20, 2018), to the Tennessee Supreme Court's final opinion (October 8, 2018). Along the way, the inmates filed two amendments to the complaint, secured four experts and eleven eye-witnesses, took nine depositions (ranging from Tulsa, Oklahoma to Boston, Massachussets),

conducted a ten day trial, and prosecuted a full appeal on a 15,000+ page record. A comparatively brief synopses of that record, follows.

I. "It's been described by experts for the Plaintiffs very well." T.E. 2070.[1] The factual predicate of *Glossip* is conclusively repudiated by the record in this case. The "expert" relied upon by this court changed his testimony in the court below and now agrees with the science as presented by Zagorski and the other plaintiffs.

a. The unassailable and credited proof from four eminent experts and eleven witnesses to execution establish the certainty that Tennessee's lethal injection protocol will cause severe pain, mental anguish and needless suffering.

Collectively, Dr. Stevens, a neuropharmacologist with a PhD from the Mayo Graduate School of Medicine, Dr. Greenblatt, the most cited researcher on benzodiazepines and midazolam in the country, Dr. Mark Edgar, an associate professor of pathology at Emory University, and Dr. Lubarsky a practicing anesthesiologist directly responsible for countless administrations of anesthetics and the co-author on the leading anesthesiology treatise, explained the scientific reasons why Tennessee's three drug lethal injection protocol will cause severe pain, mental anguish, and needless suffering. Through research, studies, and published literature they explained that midazolam cannot prevent the inmates from feeling and experiencing the effects of the second and third drugs in the protocol, no matter the size of the dose administered. Their credited and credible scientific testimony was ratified by testimony from eleven eye-witnesses to executions in every state that has used midazolam in a lethal injection protocol (Alabama, Arizona, Arkansas, Florida, Ohio, Oklahoma and Virginia). Each witnessed the symptoms of suffering predicted by the experts.

This proof established that an execution under Tennessee's protocol will cause an inmate to experience (1) pulmonary edema from 100 ml of acidic midazolam which destroys the lining of the lungs, (2) suffocation and air hunger from vecuronium bromide, which is described as feeling as if one is buried alive, and (3) extreme burning pain from potassium chloride which has been described as the chemical equivalent of being burned at the stake. Due to midazolams' inadequacy, the inmates will endure this suffering over a period of ten to eighteen minutes. Apx. B, 23-28.

The four experts were recognized by the trial court as "well-qualified and eminent;" with greater "research knowledge" and more "eminent publications" than the government experts. Apx. B, 21, 21 fn. 7. Their explanation of how midazolam works and affects the human body was ratified by government expert, Dr. Roswell Evans.[1] However, their testimony was found to be irrelevant by the Tennessee Supreme Court, which held that the Eighth Amendment does not prohibit the infliction of "severe pain" absent satisfaction of pleading prerequisites. Apx. A, 11, 17, 23. Zagorski's application for certiorari, however, relies on the facts and the science.

i. Dr. Craig Stevens and the fundamental principles of neuropharmacology.[2]

[1] A key expert witness in *Glossip,* whose revised opinions will be discussed, below.
[2] For the Court's convenience the transcripts of Plaintiff's expert testimony is reproduced at Apx H-K, pp. A207-856.

Dr. Stevens introduced the fundamental concept of mechanism of action;[3] which describes how a drug produces an effect. XXIV, 215-16.[4] Benzodiazepine drugs, such as midazolam, have a single, limited mechanism of action: they enhance the efficacy of the inhibitory neurotransmitter, GABA. *Id.* 104-110. The more robust barbiturates, such as pentobarbital and sodium thiopental, have three mechanisms of action: (1) they enhance (to a greater extent) the efficacy of GABA, (2) they produce an inhibitory effect, when GABA is not present, and (3) they block the excitatory neurotransmitter, glutamate. *Id.* 108-09, Ex. 14, Vol. 3, 358.[5]

Dr. Stevens explained the 86 billion neurons in the human brain are constantly "summating" the messages of countless billions of inhibitory and excitatory neurotransmitters; at the neuronal level, it is this summation that determines whether a neuron "fires" or remains quiet. XXIV 90-96. Degrees of sedation are produced when, on a large scale, the overall volume of inhibition outweighs the contrary volume of excitation. The deepest level of sedation, where a person is "not rousable, even by painful stimulation" is labelled the plane of general anesthesia. *Id.* 84, 86. Due to midazolam's single, limited mechanism of action, it is incapable of bringing a person to the plane of general anesthesia, regardless of dose.

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[3] A significantly more in-depth discussion of Dr. Stevens' science, with full-color diagrams of relevant principles, can be found in the inmate's brief to the Tennessee Supreme Court, at pp. 43-65.

[4] Citations to the state court record will be by Volume Number and Page number. The Exhibits are separately numbered and will be referred to by Exhibit Number.

[5] The halogenated anesthetic gases that we experience during routine surgeries have five different mechanisms of action, including three separate actions that block three different excitatory neurotransmitters. *Id.* 115-19, Ex. 15, Vol. 3, 359.

Id. 121-22, 161, 164. By definition, a patient who is not brought to the plane of general anesthesia will be rousable by noxious stimuli. XXIV 86.[6]

Dr. Stevens explained a fundamental property of many medications: the ceiling effect. XXIV 123-27. Due to their mechanism(s) of action, many drugs have a maximum level of effect, and once this effect is reached, greater doses will have no greater effect (outside of unintended side-effects). *Id.* 127-28. Two or three aspirin can treat the pain of a headache, but no quantity of aspirin can relieve the pain of a severed leg. *Id.* Other drugs do not have ceiling effects. Opioids, such as morphine can (a) relieve the pain of an involuntary amputation, if given in sufficient quantity, but (b) also cause a fatal overdose, as their depressant effect on respiration has no ceiling. *Id.* Midazolam with its single, limited mechanism has a ceiling, and that ceiling is below general anesthesia; barbiturates (with three mechanisms) and anesthetic gases (with five) do not have any ceiling and can bring humans to ever deeper levels of sedation, all the way to death. *Id.* 121-22.

ii. Dr. David Greenblatt, the nation's leading researcher on midazolam made clear that inmates will experience severe pain and needless suffering under the Tennessee midazolam-based protocol.

Dr. David Greenblatt corroborated and expanded on Dr. Stevens testimony. XXVIII 471-497; XL 1534-35. Dr. Greenblatt is one of the most-published researchers in the country on benzodiazepines and midazolam. XXVIII 474-76. He

[6] This crucial distinction was recognized by Drs. Greenblatt and Lubarsky, as well. XXVIII 498 (Greenblatt: "A drug-induced loss of consciousness during which patients are not rousable, even by painful stimulation."); XLII 1743-44, 1771-72 (Lubarsky).

participated in the initial research on midazolam in the 1980s—research that was used by the manufacturer of midazolam when seeking F.D.A. approval. *Id.* 480-81.[7]

Based on his over-thirty-years of research, Dr. Greenblatt was unequivocal that midazolam cannot render a human insensate to pain, regardless of dose. XXVIII 498-99. He pointed to numerous studies done by himself and/or his colleagues, which established that midazolam has a maximum sedative effect, known commonly as a ceiling effect. *Id.* 521-529, Ex. 43, 44. This maximum effect is inadequate to protect a human from the suffering caused by vecuronium bromide or the pain caused by potassium chloride. *Id.* 508-11.

Dr. Greenblatt discussed four studies of intentional benzodiazepine overdoses that resulted in hospitalization. XXVIII 513-522, Ex. 42. In all cases, where benzodiazepines were taken alone the patients were sleepy, but rousable; and did not suffer any problems with respiration: "benzodiazepines alone do not produce serious overdosage." *Id.* 515. In no case, were the subjects able to be brought to the plane of general anesthesia. *Id.* 519-20.

Dr. Greenblatt, however, identified one negative consequence of a large dose of midazolam: pulmonary edema. XXVIII 540-543. The delicate capillaries in the lung membrane are very sensitive to acid, and will begin to leak following the injection of midazolam. *Id.* 541. As the lungs fill with fluid "air exchange [becomes]

[7] Defendants' expert, Dr. Evans, cited Dr. Greenblatt's papers and acknowledged that he was one of the "leading scholars" on benzodiazepines in the country. XLVI 2163-64, 68.

difficult if maybe not even possible." *Id.* 542. Dr. Greenblatt expected that someone would be "gasping for breath" as a result. *Id.*

A subsequent dose of vecuronium bromide would increase pain and suffering through its paralytic effect, while doing nothing to hasten death. XXVIII 542-43. This conclusion is consistent with Dr. Stevens' opinion that vecuronium bromide only increases the extent of an inmate's suffering. XXV 162-63.

The sensations of edema from acidic midazolam, suffocation from vecuronium bromide and burning from potassium chloride will each be "noxious stimuli," and 500 mg of midazolam will not protect an inmate from experiencing those stimuli. XXVIII 547-48. In other words, the sedated inmate will wake up during the execution to the horrific experience of drowning, suffocation, and burning. Dr. Greenblatt's perspective as a doctor and medical researcher, confirms Dr. Stevens' neuropharmcological conclusion that inmates will suffer "severe pain and terror" under Tennessee's lethal injection protocol. XXV 161, 219.

iii. Dr. Mark Edgar corroborates Dr. Greenblatt and establishes the certainty that inmates injected with midazolam will experience pulmonary edema.

Dr. Greenblatt's conclusion that 100 ml of acidic midazolam would cause pulmonary edema was confirmed by the scientific research and testimony of Emory University pathologist, Dr. Mark Edgar who reviewed the autopsies of twenty-seven inmates executed using midazolam protocols. XXXIX 1386, 1455. He observed two

unusual findings. First, all twenty-seven inmates had heavy lungs upon autopsy,[8] which was inconsistent with a rapid death. *Id.* 1390. Secondly, twenty-three autopsies revealed that the inmates experienced pulmonary edema. [9] *Id.* 1455, Ex. 28, Vol. 4; Ex. 49-64. Vol. 7; Ex. 65-74, Vol. 8; Ex. 118, Vol. 12. In fifteen cases, the autopsy identified "fulminate pulmonary edema" which is characterized by fluid and froth in the upper airways. *Id.* 1395-96. This form of pulmonary edema is "sudden and severe." *Id.* However, the ill-effects of all forms of pulmonary edema are similar: "when it begins, the patients are short of breath…As it gets worse, they may have the sense of air hunger and be gasping for air. As it gets even worse, they may have a sense of terror, panic, drowning, asphyxiation. It's a medical emergency and it's a state of extreme discomfort." *Id.* 1394-95.

Dr. Edgar conclusively connected the fulminate pulmonary edema to the injection of midazolam. XXXIX 1398-1401. Such a form of pulmonary edema is a "whipped up mixture of air, fluid and some kind of protein" that is produced by "the action of breathing." *Id.* 1400-01. The bubbles and froth cannot be produced in a person who is not breathing (such as someone paralyzed by vecuronium). *Id.* at 1401.

iv. Eye-witnesses confirmed that inmates executed with midazolam suffered pulmonary edema.

[8] A normal human lung weighs 350-400 grams. Dr. Edgar found that pairs of lungs at autopsy weighed no less than 430 and 600 grams (Torrey McNabb). While, Jack Jones' lungs weighed 835 and 735 grams. No autopsy contained even a single lung within the normal range. XXXIX 1390-92; Ex. 118.
[9] It is impossible for a reviewer to know whether there was pulmonary edema in the four cases where it was not identified. Did that particular medical examiner look for pulmonary edema, or consider it a relevant finding? Dr. Edgar testified that post-mortem changes could make identifying pulmonary edema difficult. XXXIX 1401-02.

Multiple eye-witnesses to execution corroborate Dr. Edgar and Dr. Greenblatt's conclusions that a bolus dose of midazolam results in pulmonary edema. Inmate Woods gasped and gulped for nearly two hours, XXV 265-66, XXVII 391-93, 404-12; inmate Phillips gulped like a fish; XXX 688; inmate Otte's stomach moved violently up and down, XXX 698; inmate Brooks had rapid and breathing and his chest heaved XXX 722; inmate Melson had labored breathing and exaggerated chest movements, XXX 738-39; inmate McNabb was breathing like a fish, XXX 759; inmate Smith barked like a seal, and had labored deep breathing, XXXI 776-77; inmate Moody had very heavy breathing, noticeably different from his pre-injection breathing, XXXI 790; inmate Williams' chest pumped and he gasped, choked and heaved, XXXI 824-25; inmate Gray's breathing was heavier and he made a snoring sound, XXXI 840-41. None of these inmates had any reason for such dramatic breathing, prior to being injected with midazolam. Obviously, all inmates stopped such labored breathing once the paralytic took effect.[10] Thus, the science of Drs. Greenblatt and Edgar is confirmed by real world observations.[11]

v. "There is no debate about midazolam." Dr. David Lubarsky ratified the prior expert testimony: inmates will suffer severe pain and needless suffering.

[10] Of the listed executions only Woods (which lasted two-hours) did not involve use of a paralytic. Significantly, Woods exhibited signs of pulmonary edema throughout his nearly two-hour execution. The unrebutted record in this case shows that Woods only stopped breathing for 20 seconds after the execution had gone on for an hour. Additionally, the EKG strip shows he was not dead when death was declared.

[11] While some of these executions preceded the *Glossip* decision, at that time there was no scientific explanation for WHY the inmates would be responding to a midazolam protocol in such a manner. With Drs. Greenblatt and Edgar, we now understand that their lungs were filling with fluid.

Dr. Lubarksy, both as a practicing anesthesiologist, and as the former director of the largest training program for anesthesiologists in the country[12], has been responsible for the administration of over 1.5 million anesthetics. XLII 1719. Dr. Lubarsky, despite his administrative and teaching responsibilities, continues to provide direct patient care one-day a week. *Id.* 1720.

Additionally, Dr. Lubarsky has published 116 peer-reviewed journal articles in the field of anesthesiology, and co-authored a chapter in *Miller's Anesthesia* to which defendants' expert Dr. Evans cited. XLII 1727-35; XLVI 2164-65.[13] His research science confirmed the conclusions of Drs. Stevens and Greenblatt: midazolam cannot render an inmate insensate to pain, an inmate will be roused by noxious stimuli, and midazolam has an absolute ceiling effect. XLII 1753-56, 1796-98. Like Drs. Stevens and Greenblatt, Dr. Lubarsky explained the basic scientific principles that separate general anesthetics with multiple mechanisms of action, from hypnotic-sedatives like midazolam. *Id.* 1745-51, 1797-98. Midazolam can do what it is designed to do, put someone to sleep; however, it cannot prevent them from being roused by pain. *Id.* 1771-72. 1797-98. The cascade of excitatory neurotransmitters set off by pulmonary edema, suffocation, and burning will overwhelm the inhibitory effect of midazolam, essentially cancelling it out, turning

[12] During trial he took a new position as the CEO of U.C. Davis Health Systems and Vice Chancellor of U.C. Davis Medical School

[13] Lubarsky's co-authors are each experts in the field of injectable anesthesia and include Dr. Reves. Lubarsky worked in research labs alongside Dr. Reves at Duke University. Reves is the co-author with Dr. Greenblatt of the seminal research paper on benzodiazepines,

the protocol into an effective two drug protocol of paralytic and potassium chloride with the super-added pain and anguish of pulmonary edema.

Dr. Lubarsky confirmed the opinions of Drs. Stevens and Greenblatt: only when a human is brought to the plane of general anesthesia are they rendered insensate to pain and unarousable by noxious stimuli. XLII 1743-42, Ex. 131, Vol. 14, 2069-70.

Dr. Lubarsky described what a patient experiences when vecuronium bromide or potassium chloride is a0dministered without being in a plane of general anesthesia. XLII 1774-81, 1817, 1821. Dr. Lubarsky, who uses vecuronium bromide in his practice, compared the sensation of vecuronium bromide being "buried alive"—patients lose

> the ability to communicate their distress. They lose the ability to breathe. They still have the air hunger. It's as if you're basically locked in a box and someone now has basically covered your mouth and you can't [breathe] and your lungs and brain are screaming.

Id. 1774. Whereas, improperly anesthetized patients who are injected with "extremely small amounts" of potassium chloride "scream out in pain." *Id.* 1776. Having witnessed the (mal)administration of potassium chloride, he did not know of another drug that is more painful. *Id.* 1779-80. He equated the level of pain to that of "burning alive." *Id.* 1776, 1780.

Dr. Lubarsky provided additional confirmation of pulmonary edema. XLII 1813, 1822. He has attended patients who had pulmonary edema, and he has observed that the inability to breathe induces anxiety and terror. *Id.* 1822. He identified the sensation as being noxious and torturous. *Id.* He testified that the

eye-witnesses who described barking, coughing, and choking had witnessed pulmonary edema. XLIII 1848.

Dr. Lubarsky, and other practicing anesthesiologists, would never use midazolam to protect a patient from pain, such as that caused by pulmonary edema, vecuronium bromide, or potassium chloride. XLII 1750-51, 1775, 1798. Midazolam cannot make a person insensate and unresponsive to those noxious stimuli. *Id.* 1810.

vi. The eleven eye-witnesses to execution all observed clear signs that inmates were sensate, awake and aware.

Dr. Lubarsky was able to review the symptoms described by the eleven eye-witnesses to execution, and he explained that the inmates in those executions had clearly shown signs of consciousness (prior to the paralytic removing all further evidence):

- Eyes opening after the consciousness check (Brooks-Alabama, XXX 718, 729; Smith-Alabama, XXXI 780; Howell-Florida, XXXI 804-7): "that says they're conscious." XLIII 1848;
- Grimacing (McNabb-Alabama, XXXI 760): "that's a sign that they're reacting to the [external] stimuli." XLIII 1848;
- Raising their arm after the consciousness check (McNabb-Alabama, XXXI 758; Smith-Alabama, XXXI 780): "They're awake." XLIII 1849;
- Fingers fluttering (Moody-Alabama, XXXI 791): "they're trying to let you know that they're awake." XLIII 1849;
- Lifting head off the table (Wood-Arizona, XXVII 390): "They're awake." XLIII 1849;
- Clenched fist (Melson-Alabama, XXX 738-9; Smith-Alabama, XXXI 780): "They are awake." XLIII 1850;
- Turning their head (McNabb-Alabama, XXXI 760; Gray-Florida, XXXI 845): "They are awake." XLIII 1851;

- Licking their lips (Smith-Alabama, XXXI 776-77): "They are probably awake." XLIII 1851;
- Writhing (Otte-Ohio, XXX 696; Lockett-Oklahoma, XXXI 861): "They're experiencing pain and discomfort and they're probably awake." XLIII 1851;
- Mouthing words (Phillips-Ohio, XXX 688; Lockett-Oklahoma, XXXI 860-1): "Absolutely awake." XLIII 1851;
- Tearing (termed lachrymation) (Wood-Arizona, XXVII 401; Otte-Ohio, XXX 699): "You are close to being awake or awake" XLIII 1852.

vii. The eleven eye-witnesses were not impeached, and cast significant doubt on reports that executions were free of problems.

The eleven eye-witnesses who provided factual confirmation of the four experts' scientific testimony came from diverse backgrounds. Dale Baich was the supervisor of the Capital Habeas Unit for the Federal Public Defender in Arizona, and in that capacity he witnessed a dozen executions, prior to that of Joseph Woods. XXVII 327, 334. Until witnessing Woods' nearly two-hour long execution with 750 mg of midazolam (50% more than called for in Tennessee), and 750 mg of hydromorphone, Mr. Baich had never tried to stop an execution (he tried and failed to stop that of Woods). XXVII 335. Sonya Rudenstine was a former "death clerk" for the New Jersey Supreme Court, and law school professor. XXXI 795-96. Leslie Smith is a Lieutenant Colonel in the United States Army Reserve, who has been deployed to combat zones. XXX 730. No eye-witness was impeached with evidence of bias, or improper motive. Despite the dozens of corrections officers, administrators and observers present at the various executions, the defendants did not call any witnesses to rebut the eye-witness testimony.

viii. Midazolam is not the functional equivalent of sodium thiopental or pentobarbital.

Drs. Stevens, Greenblatt and Lubarsky all compared the efficacy of properly administered barbiturates such as sodium thiopental and pentobarbital with that of midazolam. XXIV 102-12; Ex. 14, Vol. 3, 358 (Stevens); XXVIII 543-44 (Greenblatt); XLII 1796-98 (Lubarsky). All three agreed that properly administered barbiturates would render an inmate insensate to pain, and in sufficient quantities they would stop breathing and cause death. XXIV 115, 125; XXVIII 544; XLII 1797-98. Dr. Stevens demonstrated how the three robust mechanisms of action possessed by barbiturates can and will produce a state where an inmate is insensate to pain—a state no benzodiazepine can achieve. XXIV 108-09, Ex. 14, Vol. 3, 358. Dr. Lubarsky explained that pentobarbital and sodium thiopental do not have a ceiling effect, and can be used as general anesthetics. XLII 1796-98.

ix. A summary of the findings of the four experts, supported by the eleven eye-witnesses: severe pain, mental anguish and needless suffering is certain.

Ultimately the four experts and eleven eye-witnesses established a certainty that inmates executed using Tennessee's three-drug protocol will suffer severe pain, mental anguish and needless suffering. Midazolam will cause pulmonary edema, choking, coughing, gasping, and a struggle to breathe; this sensation will rouse the inmate from a state of sleep; then they will be paralyzed causing them to lose the ability to express any suffering, while concurrently causing them to experience the terror of air hunger—a sensation and form of mental anguish that midazolam is incapable of protecting them from; finally, while fully aware, but immobile, they will be injected with a massive dose of potassium chloride, one of the most painful

drugs used in medicine. The experts were in agreement, inmates killed with the three-drug protocol would suffer "severe pain and terror," XXV 161, 219 (Stevens); they would suffer pulmonary edema, suffocation and burning pain, which midazolam could not protect them against, XXVIII 546-47 (Greenblatt), XLII 1821-22 (Lubarsky). The use of vecuronium bromide was entirely unneeded, and only added an additional form of suffering and distress. XXV 162-63, 218 (Stevens); XXVIII 542-43 (Greenblatt); XLII 1818-21 (Lubarsky).

b. Dr. Roswell Lee Evans (1) concedes the validity of the inmate's science, and (2) retreats from his opinions in *Glossip*.

After hearing the testimony of Drs. Stevens, Greenblatt and Lubarsky, the government's expert, Dr. Roswell Lee Evans, conceded that they had described how midazolam works and affects the human body, "very well." XLV 2070. He agreed that their science was "accurate." XLVI 2164. He recognized Dr. Greenblatt as "one of the leading scholars in area of benzodiazepines in this country." XLVI 2168, He affirmed their opinion that midazolam was not capable of bringing inmates to a plane of surgical anesthesia. XLVI 2162.

In *Glossip*, Dr. Evans had disputed this very same science. Previously, he claimed that "a 500–milligram dose of midazolam would make it 'a virtual certainty' that any individual would be 'at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from application of the 2nd and 3rd drugs;" *Glossip v. Gross*, 135 S.Ct.1226, 2740-41. In reaching his *Glossip* conclusion, Dr.

Evans claimed that midazolam's ceiling effect is limited to the spinal cord[14] and that it has a linear, and ever-increasing dose-response at the "higher level of the brain." *Id.* at 2784 (Sotomayor, J. dissenting).

Here, having conceded the validity of the inmates' science, Dr. Evans could not advance those *Glossip* hypotheses[15]; rather, he revised his opinion to focus on midazolam's alleged "toxic effect," a theory which was debunked on cross-examination as it lacked all scientific foundation.[16] Moreover, to the extent that any court credited his opinions for any purpose[17] his memory and/or truthfulness were also cast into great doubt.[18]

Thus, the expert who was relied upon by the District Court in *Glossip*,[19] has now conceded that the science presented by Dr. Lubarksy in *Glossip* was accurate. His toxic effect hypothesis is baseless. His honesty and/or memory are suspect. This

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[14] In this trial, he made no mention of the spinal cord, at all.

[15] Similarly, he did not advance his scientific misunderstanding from *Glossip* that midazolam produces sedation by blocking GABA from binding at the GABA receptor. *See Glossip*, 135 S.Ct. at 2784 (Sotomayor, J. dissenting).

[16] Evans relied on a single study of a single death involving a 63 y.o. man who died after a trivial 10 mg dose of midazolam; he admitted that other studies that he relied upon for the proposition that midazolam causes respiratory depression reached the exact opposite conclusion, while another article he cited suggested that central nervous system depression, including lethargy, slurred speech or coma was possible, but in 30 to 120 minutes (well outside the time frame of Tennessee's protocol).

[17] The Chancery Court only referenced him for his opinion on compounding drugs; while otherwise making no mention of his testimony. Apx. B 33-34. He is entirely ignored in the Tennessee Supreme Court's opinion.

[18] When deposed in this case, he claimed that, since last testifying in Tennessee, he had not provided any declarations in any other lethal injection cases, and that he had only worked as a consulting expert. XLVI 2127-29. In fact, he had provided two sworn declarations in the Thomas Arthur case, which he admitted on cross-examination, XLVI 2132. He also provided a video deposition in the Arthur case, on December 8, 2015, which he claimed to have forgotten about (though he later identified some of his testimony from the transcript). XLVI 2133-37. Previously, he swore under oath to materially inconsistent positions; claiming in Montana that Pentobarbital was an "ultra-fast acting drug;" while disavowing that position in subsequent Tennessee litigation. XLVI 2191-95.

[19] This court accepted Dr. Evans science "to the extent that the reliability of [his] testimony is even before us," under the "deferential 'abuse of discretion' standard." *Glossip*, 135 S.Ct. at 2744-45.

Court, the District Court and the 10th Circuit Court of Appeals were all materially misled in *Glossip*. To the extent that *Glossip* has been misapplied by lower courts to stand for the factual conclusion that Dr. Evans' testimony established that midazolam would protect an inmate from pain and suffering in the same manner as sodium thiopental, such a conclusion is no longer valid and certiorari should be granted to correct this error from being repeated by the lower courts.[20]

c. The proof is clear: there is a certainty of severe pain, mental anguish, and needless suffering.

The science, the witnesses and the reality all align: Tennessee's three-drug protocol produces a certainty of severe pain, mental anguish and needless suffering.

II. The Tennessee Supreme Court's holding: The 8th Amendment does not categorically forbid States from imposing cruel and unusual punishments. Rather, the 8th Amendment is only triggered if the citizen meets the "prerequisite" of showing the availability of a different method. The State has no burden, the lower court holds.

The Tennessee Supreme Court found that the challenged three-drug protocol was constitutional solely based on the perceived failure of the inmate's to satisfy the alternative requirement of *Glossip* with direct evidence. Apx. A, pp. 22, 24. The court held that "availability" is "a prerequisite for a method-of-execution claim." *Id.* 11. Finding that "availability" of a two-drug protocol had not been properly pled, *Id.* 17-19, nor, in the case of a one-drug protocol, proven, *Id.* 19-22, the court found that whether the three-drug protocol caused severe pain was "moot." *Id.* 23.

[20] This Court very clearly limited its holding, and warned other courts that it was engaging in "clear error" review. *Glossip*, 135 S.Ct. at 2731. However, multiple courts, including the chancery court and the Tennessee Supreme Court in this cause, have misinterpreted *Glossip* to represent an affirmative finding by this Court that midazolam-based executions do not cause severe pain and needless suffering. For this reason alone, certiorari should be granted.

In reaching its factual/legal conclusions regarding availability, the Tennessee court accepted the defendants' contention that even if they knew of an alternative source for pentobarbital they did not have to purchase pentobarbital from this source, or tell the inmates about this source—rather, according to defendants' counsel at oral argument, the burden rests entirely on the inmates to find this source entirely on their own.[21]

a. A history of pentobarbital and Tennessee.

Until July 5, 2018, four days before trial commenced, the State of Tennessee had one-drug pentobarbital protocol ("Option A"). Up to that date, the defendants maintained that they might use pentobarbital in the August 9, 2018 execution of Billy Ray Irick, or in other future executions. In a lengthy colloquy with the Chancery Court on April 11, 2018, the state's attorney refused to announce which protocol would be used for the August 9, 2018 execution of Billy Ray Irick. As the dissenting Tennessee Supreme Court Justice wrote:

> [A]t the first pretrial hearing on April 11, 2018, counsel for the State dodget the trial court's questions about the availability of pentobarbital. The trial court, acutely aware of the time constraints, zeroed in on the problem and repeatedly questioned counsel about the availability of pentobarbital. The trial court emphasized that the availability of Protocol "A" was "essential to the case," and if that question could not be answered, the trial court proceedings would be "futile and useless," putting the court as well the parties in an "untenable position." The State's response to the trial court's direct question—"will [Protocol A] be available for the August 9th execution?"—was "I can't answer that question, Your Honor." The trial court then correctly observed that "if you can't answer [that question] then our proceedings here are really meaningless" and that it created a "Catch 22" dilemma for the court and the litigants.

[21] This argument was most clearly articulated at oral argument by counsel for defendants. The recording of that argument will be released on October 24, 2018.

Dissent, pp.4-5. The State continued to equivocate and evade the question until the eve of trial.

Given the state's evasiveness, the inmates sought discovery but were blocked by the state's secrecy law. The inmates were forbidden from deposing the two pharmacists who agreed to compound pentobarbital. They were not allowed to know the identities of any individuals who had advised or assisted Tennessee in securing lethal injection drugs. Most importantly they were not allowed to depose, question or call the "Drug Procurer."

The "Drug Procurer" was the person assigned the task of obtaining lethal injection drugs for Tennessee. Despite his[22] identity being known to counsel for the inmates, he was completely shielded by Tennessee's (interpretation) of strict secrecy laws. In his place, the inmates were only permitted to depose, and call at trial. individuals who had no personal knowledge of what efforts had been made to secure pentobarbital: the Commissioner and Deputy Commissioner of the Tennessee Department of Corrections.

What the Drug Procurer knew, and what he did, was only revealed through (a) a 17-page PowerPoint presentation prepared by the Drug Procurer, dated August 31, 2017, (b) 5-pages of excerpts from text message conversations between the Drug Procurer and one or more suppliers in April of 2017, (c) 10-pages of heavily redacted e-mails sent and received between February 15, 2017 and July 20, 2017

[22] He/him/his will be used in a gender-neutral sense. Counsel makes no representation as to the gender of the Drug Procurer.

(all but two e-mails were sent in April 4-6, 2017), and (d) 14-pages of very heavily redacted hand-written notes (four pages are entirely blacked out, the majority of the other pages are redacted as well). Trial Exhibit 105, Vol. 10-11, 1468-1514.

The Drug Procurer's August 31, 2017 PowerPoint presentation indicated that "collectively contact was made with close to 100 potential sources."[23] Apx. E, Ex. 105 Excerpts, A193. Of those sources, 10% "did not have sufficient quantities of the needed form of Pentobarbital and no source to obtain sufficient quantities." *Id.* Only 20% of the 100 sources were unwilling to sell for use in lethal injection.[24] *Id.* The term "sufficient quantity" is given definition by an unredacted portion of one email, where the Drug Procurer stated that he needed "at least 100 grams" and "would be interested in pricing for bulk orders." Apx. E, A194. That is, with each lethal dose of pentobarbital being 5 grams under the since-repealed protocol, the Drug Procurer wanted to purchase sufficient drugs for 10 to 20 executions. Undated handwritten notes indicate that a supplier quoted $24,000 per 10 grams of pentobarbital and $35,000 (or $3,500, the note is difficult to read) to compound 10 grams, while providing a "bulk $ option." Apx. E, A197.

Neither the Commissioner nor Deputy Commissioner knew who the supplier was, who offered 10 grams for $24,000. Neither knew the identity of the approximately 10 suppliers who had some quantity of pentobarbital for sale.

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[23] The 17-pages of heavily redacted hand-written notes do not appear to have room to contain notes of conversations with the "close to 100 potential sources." If other records were made regarding these contacts they were not provided in discovery.

[24] This is the only case to present evidence regarding the popular myth that death penalty abolitionists are to blame for the state's inability to obtain drugs. The State's Attorney conceded at oral argument that death penalty abolitionists are not to blame. Clearly, 80% of suppliers contacted were willing to sell.

Neither could explain why this pentobarbital was not purchased when offered. Instead, contrary to the notes that the State of Tennessee had offered into evidence, the commissioners broadly maintained that the Drug Procurer had failed to find any available pentobarbital. [25]

On April 5, 2017 at 8:59 a.m., the Drug Procurer texted a supplier: "can u send me a list of all companies etc u reached out to be about sourcing so I can have it for when we have to show it's unavailable, Thanks." Vol. 10, 1486. This list of "unavailability," was not provided by Defendants. Why, just seven days after the Tennessee Supreme Court had approved of pentobarbital for use in lethal injection executions,[26] the Drug Procurer was trying to prove he could not secure pentobarbital was not explained.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. There is an unconstitutional certainty that inmates executed under Tennessee's three-drug protocol will suffer suffocation from vecuronium bromide, pain from potassium chloride, and suffering from pulmonary edema in violation of *Baze, Wilkerson, Kemmler* and *Graham*.

In *Baze* it was "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." *Baze v. Rees*, 553 U.S. 35, 53 (2008). However, in *Baze*, the parties agreed that the "proper administration of the

[25] As the dissent, below, noted: "The Department's Commissioner testified on June 5, 2018, that the Department would 'search out all options to obtain pentobarbital,' but the Department's records tell a different story." Apx. A, A30.

[26] *West v. Schofield,* 519 S.W.3d 550 (Tenn. March 28, 2017).

first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from [the second two drugs]." [27] *Id.* at 49. Instead, the issue in *Baze* was the inmates' claim that there was a "significant risk" that "sodium thiopental will not be properly administered." *Id.* While in *Glossip*, the issue was defined by this court as: "Prisoners sentenced to death…contend[ ] that the method of execution now used by the State…creates an unacceptable risk of severe pain." *Glossip*, 135 S. Ct. at 2731.

Mr. Zagorski does not contend there is a <u>risk</u> of severe pain, rather—as the facts establish—there is a <u>certainty</u> of severe pain, mental anguish and needless suffering. He has proven that midazolam is not the equivalent of sodium thiopental, and it will not protect him from the second two drugs (while, it will cause additional suffering on its own). The Tennessee Supreme Court declined to address these contentions, holding that all issues of pain and suffering were "rendered moot" by their holding that the inmates had failed to plead and prove a feasible alternative. Apx. A, A023. The court viewed the issue of "availability as a prerequisite for a method-of-execution claim." *Id.* at A012.

However, this court in *Baze* and again in *Glossip,* cited to the original Eighth Amendment method of execution precedents: *In re Kemmler*, 136 U.S. 436 (1890) and *Wilkerson v. Utah*, 99 U.S. 130 (1879). Meanwhile, in the post-*Baze* decision of *Graham v. Florida*, their fundamental holding was reiterated: "The Cruel and

[27] While, in *Glossip* it was accepted by all sides that "pentobarbital, like sodium thiopental, can reliably induce and maintain a comalike state that renders a person insensate to pain caused by administration of the second and third drugs in the protocol." *Glossip*, 135 S. Ct. at 2733.

Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." 560 U.S. 48, 59 (2010) (emphasis added).

Neither explicitly, nor by implication did this court overrule the precedents of *Wilkerson, Kemmler,* or *Graham* in *Baze* or *Glossip*. The Tennessee Supreme Court's refusal to engage with these precedents and failure to strictly construe the fundamental protections of the Eighth Amendment warrant the grant of certiorari.

a. *Baze*, *Glossip* and the 8th Amendment have been misinterpreted by the Tennessee courts to overrule *Wilkerson, Kemmler* and *Graham.*

In *Baze* and *Glossip* this court addressed the issue of risk in methods of execution challenges. Those opinions did not alter the original meaning of the 8th Amendment which is specifically designed to protect against the governments infliction of cruel and unusual punishments on one of its citizens. In the context of risk assessment, where a properly conducted execution would not be cruel and unusual, and only in the case of error would an inmate suffer, this court required a party challenging the method of execution to provide a better method. Unfortunately, those narrow holdings were radically misinterpreted by the Tennessee courts to mean that the 8th Amendment's protections are conditional. Despite Justice Roberts clear direction in *Baze*, the Tennessee Court found that a certainty of severe pain would be constitutional, if the alternative pleading requirement was not met[28] : "It is not enough for an inmate to provide proof of the

[28] The Tennessee Supreme Court found that the pleading requirement was not met due to technical requirements under the Tennessee Rules of Civil Procedure. Apx A., A018-20. Thus, Mr. Zagorski's proposed two-drug alternative was not examined on its merits, despite being clearly feasible and readily available.

painfulness of a State's method of execution." Apx. B, A045. The ban on torturous forms of punishment enunciated in *Wilkerson*, *Kemmler* and *Graham* (and recognized by the majority of justices in *Baze*) was affirmatively disregarded by the lower court as an "unrecognized exception:"

> [T]he 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' 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.

Id., A056.

Clearly, such an "exception" predates *Glossip* by well over a century. *In re Kemmler*, 136 U.S. 436, 446 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 136, (1879). Under those precedents certain punishments are *per se* cruel and unusual: "burning at the stake, crucifixion, breaking on the wheel, or the like." *Kemmler*, 136 U.S. at 446. Justice Kennedy made clear one-hundred and twenty years after *Kemmler*, and two years after *Baze,* that "punishments of torture…are forbidden." *Graham v. Florida*, 560 U.S. 48, 59 (2010) *as modified* (July 6, 2010).

Most troubling was the Chancery Court's conclusion that "although dreadful and grim, it is the law that while surgeries should be pain-free, there is no constitutional requirement for that with executions." A059. It is true that "some risk of pain" is inherent in all executions and is constitutional. *Glossip*, 135 S. Ct. at 2732-33 (emphasis added). However, the Tennessee courts took this truth outside of its logical place, to stand for the proposition that a certainty of "dreadful and grim" pain lasting 10-18 minutes, would be constitutional. A059-64. Respectfully,

this court has never held that a certainty of "dreadful and grim" pain, over many minutes, is permitted under the 8th Amendment.

Meanwhile, in upholding the Chancery Court's opinion, the Tennessee Supreme Court declined to address the level of suffering that the three-drug protocol would inflict, at all. Apx. A, A024.

Tennessee's courts have misunderstood *Baze* and *Glossip.* This court's desire to facilitate the adoption of more humane methods of execution, *Glossip*, 135 S. Ct. at 2745, has been erroneously transformed by the Tennessee courts into a requirement that inmates provide an alternative to dismemberment, burning at the stake, or other "dreadful and grim" methods of execution.

b. A majority of this court recognizes that the 8th Amendment categorically prohibits certain methods of execution; indeed it appears that no less than seven justices have condemned methods of execution that would be torturous.

In *Baze v. Rees*, the plurality opinion reiterated the precedent of *In re Kemmler*: "'Punishments are cruel when they involve torture or lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.'" *Baze v. Rees*, 553 U.S. at 49 (quoting *In re Kemmler*, 136 U.S. at 447). However, the plurality explained: "Petitioners do not claim that…the proper administration of the particular protocol…constitute[s] the cruel or wanton infliction of pain…Instead, petitioners claim that there is a significant risk that the procedures will *not* be properly followed." *Baze*, 553 U.S. at

49. It was in this context of risk or possibility, that this Court articulated the alternative requirement.

Justice Thomas, joined by Justice Scalia, concurred in the result in *Baze,* but refused to "subscribe to the plurality opinion's formulation of the governing standard." *Baze*, 553 U.S. at 94, (Thomas, J., concurring in result). He submitted that the "Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment." *Baze,* 553 U.S. at 99. "It strains credulity to suggest that the defining characteristic of burning at the stake, disemboweling, drawing and quartering, beheading, and the like was that they involved risks of pain that could be eliminated by using alternative methods of execution." *Baze*, 553 U.S. at 101-02.

In *Glossip* four more Justices advocated for a categorical approach to Eighth Amendment challenges. Justice Sotomayor, joined by Justices Breyer, Ginsburg and Kagan, wrote in dissent: "This Court has long recognized that certain methods of execution are categorically off-limits." *Glossip v. Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting). These four justices submitted that the 8th Amendment prohibits "'inherently barbaric punishments *under all circumstances*." *Glossip*, 135 S. Ct. at 2793 (quoting *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011 (2010)).

Thus, five members of this court have reaffirmed the holdings of *Wilkerson, Kemmler* and *Graham* and made clear that the Eighth Amendment categorically prohibits certain methods of punishment. Moreover, aside from grossly misreading the plurality decision in *Baze,* that opinion by the Chief Justice, joined by Justice

Alito, makes clear that killing a sensate inmate with a paralytic and potassium chloride would be "constitutionally unacceptable." *Baze*, 553 U.S. at 53.

While this Honorable Court can count justices more accurately than petitioners, it appears that seven members of this Court have already opined that certain methods of execution are categorically prohibited.[29] Where the Tennessee Supreme Court has read into the 8th Amendment an interpretation not supported by this Court's precedent, certiorari should be granted.

c. *Certiorari* is proper to address the misapplication of *Baze* and *Glossip*, and to establish the proper Eighth Amendment analysis that should be applied to claims that there is a certainty of severe pain, mental anguish and needless suffering.

The Chancery Court found the inmates' four "well-qualified and eminent 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." Apx, A, A021 The lower court concluded that 10-18 minutes of "dreadful and grim" pain was constitutionally acceptable. *Id.* A023-28. Through exclusive reliance on the alternative "prerequisite" the Tennessee Supreme Court tacitly accepted this conclusion. Apx. A, A012, 024. Both courts simply ignored Justice Roberts' opinion in *Baze* that if the first drug in a three-drug cocktail does not work, then that protocol is constitutionally unacceptable. There is no debate in this record that the inmates' experts testified "accurately" and that the

[29] Justice Gorsuch, while a member of the Tenth Circuit, joined the majority in *The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1109–10 (10th Cir. 2016), *cert. denied sub nom. Lockett v. Fallin*, 137 S. Ct. 2298, 198 L. Ed. 2d 751 (2017) which held "the Eighth Amendment [disallows] punishments of torture…and all others in the same line of unnecessary cruelty." Counsel has not succeeded in finding an opinion, concurrence or dissent by Justice Kavanaugh on this issue.

first drug does not work. There is no debate that the first drug super-adds to the suffocation and burning that this Court has already found constitutionally unacceptable, or that vecuronium bromide super-adds three-minutes of needless suffering.

The grant of *certiorari* is appropriate to address what level of pain and suffering must be shown before the categorical prohibition on barbaric punishments becomes applicable. Clearly, Zagorski believes that the "dreadful and grim" reality of 10 to 18 minutes of pulmonary edema, paralysis and suffocation, culminating in the pain of potassium chloride would meet any categorical standard.

Justice Thomas has written: "[t]o the extent that there is any comparative element to the inquiry, it should be limited to whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad." *Baze,* 553 U.S. at 107 (Thomas, J., dissenting). In *Baze* in voting to uphold the sodium thiopental three-drug protocol, he concluded that it would produce a "swift and painless death" and thus met this standard. *Id.*

This case, with its compelling proof that the condemned will certainly suffer for 10-18 minutes, provides an ideal opportunity to define the proper standard. This case, where the certainty of severe pain, mental anguish and needless suffering is shown, begs for further review, so that the misapplication of *Glossip* and *Baze* can be corrected. "This is true particularly when the State was warned by its drug supplier that Midazolam will not work the same as a barbiturate. Apx C, Email from Drug Supplier, A086

In state court, Mr. Zagorski proved, "that the State's execution protocol of midazolam, vecuronium bromide, and potassium chloride will cause the inmate being executed to feel severe pain and terror. This is because midazolam has no analgesic effects and will not render the inmate insensate to pain." *Abdur'Rahman, et al. v. Parker, et al.*, No. M2018-01385-SC-RDO-CV (Tenn. 2018) (Lee, J., dissenting).

II. Secrecy, misdirection, equivocation by state actors, and the inherent unworkability of *Glossip,* denied Zagorski fundamental due process in the development of his proof of a feasible and readily implemented alternative to the 3-drug midazolam based protocol.

The Tennessee lethal injection protocol is "a moving target." *Abdur'Rahman,* Lee, J., dissenting, p. 2, Apx A, A022. As shown, Tennessee maintained an execution protocol with pentobarbital until four days before trial[30] and dodged the issue of whether it could obtain pentobarbital throughout the pretrial litigation in this case. As the dissenting Tennessee Supreme Court Justice wrote:

> [A]t the first pretrial hearing on April 11, 2018, counsel for the State dodged the trial court's questions about the availability of pentobarbital. The trial court, acutely aware of the time constraints, zeroed in on the problem and repeatedly questioned counsel about the availability of pentobarbital. The trial court emphasized that the availability of Protocol "A" was "essential to the case," and if that question could not be answered, the trial court proceedings would be "futile and useless," putting the court as well the parties in an "untenable position." The State's response to the trial court's direct question—"will [Protocol A] be available for the August 9th execution?"—was "I can't answer that question, Your Honor." The trial court then correctly observed that "if you can't answer [that question] then our proceedings here are really meaningless" and that it created a "Catch 22" dilemma for the court and the litigants.

[30] Pursuant to contract, Tennessee continues to pay a pharmacist a retainer to compound pentobarbital.

Dissent, pp.4-5, A025-26. On month prior to the trial, Tennessee entered into a contract with Pharmacist B, who was willing to violate distribution controls to provide the lethal chemicals. Apx. G, A202. The task of searching for pentobarbital was delegated to a delegated to a mid-level employee of the Department of Correction who is referred to in the record as the "Drug Procurer." The drug procurer enlisted Pharmacist B in the pursuit of drugs. Only those individuals have direct knowledge of the efforts to obtain API to compound pentobarbital and/or manufactured pentobarbital.

Though the inmates were denied all requests to depose or interview either the pharmacy or the Drug Procurer, the proof in the record established that pentobarbital was available to Tennessee – just not in the bulk quantities the Drug Procurer sought. Contrary to hyperbole about guerrilla tactics making pentobarbital unavailable, the proof at trial established that of one-hundred pharmacies contacted, only twenty refused to sell drugs for use in executions. Apx. E, A193. The record does not explain why the Drug Procurer bypassed the opportunity to acquire pentobarbital from the sources he identified – and the inmates were prevented from discovering the sources so to interview or depose them. Instead, the record contains a September 7, 2017 email from Pharmacist A warning that midazolam may not work as the first drug in a 3 drug cocktail and suggesting alternative drugs. Apx. C, A086. That email is followed by an email that says "the higher ups" have decided to

go with midazolam. No explanation is provided as to who the "higher ups" are or the basis for their decision.

On July 5, 2018, the Thursday before trial, the Department of Correction modified its protocol again, this time eliminating the pentobarbital protocol.[31] The record reflects that Texas and Georgia are able to obtain pentobarbital for use in executions and have done so many times in 2018, including during the trial of the case and two times the week before oral argument.

The only witnesses from the department of correction that Plaintiffs were allowed to depose and present at trial had no personal knowledge of the efforts made to obtain pentobarbital. Instead they relied on the word of the mid-level employee whose records reflect a) a lack of effort to obtain pentobarbital; and b) that pentobarbital is available to Tennessee. Despite this record, the state court credited the conclusory testimony of the Commissioner that he would use pentobarbital in an execution if he could get it.

a. *Glossip* fails to define "feasible" and "readily implemented" which has led to confusion.

In *Glossip*, this Court held that an inmate raising a challenge to the administration of a lethal injection protocol must plead and prove that there exists

[31] Plaintiffs responded to this eleventh hour tactic by explicitly stating that they would also propose three additional alternatives. At trial, plaintiffs proved that a two drug protocol which eliminates the paralytic is feasible and readily implemented and would substantially reduce severe pain and suffering as compared to the three drug protocol because 1) it eliminates the horrifying experience of suffocation; 2) hastens death by 3 minutes by eliminating the time necessary for the administration of that drug; and three removes at least one of the noxious stimuli which triggers excitatory neurotransmitters that overcome the sedative effect of midazolam and rouse the inmate. The State Court refused to consider this alternative because of newly created (in this case) pleading requirements. This failure is an independent due process violation particularly in light of the extreme diligence of Zagorski and the other inmates.

a feasible and readily implemented alternative to the state's protocol which will significantly reduce pain and suffering as compared to the existing protocol. The Court did not define the terms "feasible" or "readily implemented." Nor did the court define what would quantify what is meant by "significantly reduce." That the rule is ambiguous is unsurprising as it was promulgated in a case where the inmates never attempted to show an available alternative and the district court found that midazolam would render the inmates unable to feel pain from the second and third drugs. Neither of those situations is present here.

Merriam-Webster defines feasible as "capable of being done or carried out." https://www.merriam-webster.com/dictionary/feasible (last checked October 8, 2018). "Readily implemented" seems to mean that the alternative could be accomplished without much difficulty. The Sixth Circuit holds that the feasible and readily implemented prong of *Glossip* does not require inmates to prove that the state has the drugs on hand, merely that the drugs can be obtained through ordinary transactional effort. *In Re: Ohio Execution Protocol, 860 F.3d 881 (6th Cir. 2017).*

Here, the inmates proved that the department is capable of carrying out a single-drug protocol. They have practiced it. The administration is simpler than a three-drug protocol. The prison is not required to modify equipment or build a special execution chamber or conduct additional or different training. The only question is whether they can purchase pentobarbital. The evidence in the record shows that they had multiple opportunities and willing sources.

b. **Tennessee's holding that inmates' burden cannot be fulfilled through indirect proof is imposes new limitations on Eighth Amendment protections.**

The State maintains, and the Tennessee Supreme Court held, that the inmates cannot rely on indirect proof that their less painful alternative is feasible and readily available. Rather, the Tennessee courts have extended *Glossip* to require the inmates to identify a willing supplier and provide the supplier's contact information to the State. *Glossip* holds no such thing. The state has perverted *Glossip* into a bring-your-own-drug requirement. There is no other area of civil litigation where a court has held that a party cannot prevail because their proof is indirect. Such a rule flies in the face of due process.

c. **Plaintiffs were prohibited from discovering and presenting direct proof of the availability of pentobarbital because of state secrecy laws**.

Application of Tennessee's novel interpretation of *Glossip* is grossly unfair in this context. Here, the inmates diligently and vigorously litigated their right to discovery. At every turn, the inmates were blocked by application of the State's secrecy law. The State maintained, and the court agreed, that the state's interest in protecting the identities of the individual who procured the drugs and the pharmacist who agreed to provide the drugs was paramount. In fact, when the inmates discovered the identity of pharmacist B and filed pleadings to complain about the use of that particular pharmacist, the State was apoplectic. Even though the inmates had used the utmost care to protect the identity of the pharmacist—even redacting the identifying information from pleadings under seal—the state filed a motion for protective order and derided the inmates' "dogged" investigation.

Though the court found that the inmates had not acted inappropriately, she nevertheless placed a restraining order on counsel. It strains credulity to contend that the inmates were free to contact any pharmacist that had been contacted by the state in light of the court's ruling. Indeed, the state court went so far as to extend the state's secrecy laws to the names of pharmacies who did not enter into any business arrangement with the state.

d. State-created obstacles to direct proof modifies and/or relieves inmates of their burden to prove a feasible and readily implemented alternative.

The obstacles placed in the way of the Tennessee inmates were not present in *Glossip*. The inmates there did not contest that Oklahoma was unable to obtain pentobarbital. The factual scenario here complicates the second prong of *Glossip*. Under the Tennessee Supreme Court's decision, the state can make it impossible for Plaintiffs to meet the second prong and the state would then be free to use whatever method it chooses, no matter how torturous. This cannot be the intention of this Court. An inmate faced with these obstacles should be subject to a different standard of proof under *Glossip*, or be relieved of that burden altogether.

e. Glossip did not define nature of the proof

In *Glossip*, this Court described the inmates' burden in an Eighth amendment challenge as "heavy," but did not define the nature of the proof required to meet that heavy burden. The State court faults the inmates for not presenting expert witnesses to offer testimony about where the department can purchase pentobarbital. An expert witness is not appropriate for this type of evidence. The Court does not need an expert to tell it how to buy drugs. Rather, the witnesses who

should have been presented were the pharmacists who are willing to buy the drugs and the Drug Procurer. But the inmates were forbidden contact with those individuals and the State chose not to call them, even though these witnesses were uniquely available to the State.

A similar issue is presented in *Bucklew v. Precythe*. Though *Bucklew* concerns the nature and quantum of proof necessary in an as-applied challenge to a lethal injection protocol, to answer that question this Court must first define the same concepts for a facial challenge to a protocol for comparison. Thus, the fact that a related issue is pending in this Court indicates that the question presented in this petition is cert-worthy. This Court should either grant certiorari or hold the case for the outcome of *Bucklew*.

f. **State court finds that *Glossip* relieves the State of any obligation to search for a suitable first drug**

Finally, the Tennessee Supreme Court unconstitutionally expands this Court's decision in *Glossip* to hold that the State has no obligation (good faith or otherwise) to search for a suitable drug or combination of drugs to carry out a lethal injection. The clear implication of that holding is that the State could eliminate the first drug altogether and proceed with combination of a paralytic and potassium and, if the inmate fails to provide the first drug for his execution, then such a protocol is tolerated by the Eighth Amendment. Surely this is not the law. Theinmates do not believe it was the intent of this Court to create an insurmountable procedural roadblock preventing merits litigation. Such a ruling turns the Eighth Amendment on its head.

III. Where Tennessee Courts have tethered access to the courts to successful challenge under the Eighth Amendment, this Court must grant certiorari to clarify that inmates' right to access the courts is a fundamental right.

The Tennessee court found the inmates' access to the courts claim to be pretermitted by the denial of their Eighth Amendment claim. Where this Court has repeatedly emphasized the fundamental nature of the right to access the courts under the First, Eighth, and Fourteenth Amendments certiorari should be granted.

"It is clear that prisoners have a constitutional right to have meaningful access to the courts . . . ." *Lewis v. Casey*, 518 U.S. 343, 347 (1996). For "one convicted of a serious crime and imprisoned," "the right to file a court action stands . . . as his most fundamental political right, because preservative of all rights." *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring in the judgment). Thus, "inmate access [must be] adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). Prison officials may only limit inmates' access to courts if the restriction "is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Below, the state did not dispute that the refusal to allow the inmate's counsel to have access to a telephone during their executions interferes with the inmate's access to courts, but instead argued that the access-to-courts claim can only succeed if their method-of-execution claim succeeds.

As a prisoner retains his Eighth Amendment rights until the State takes his life, he also retains his right of access to the courts. *See In re Kemmler*, 136 U.S. 436, 447 (1890) (holding that the Eighth Amendment protects individuals from "a

lingering death"); *Arthur v. Comm'r, Alabama Dep't of Corr.*, 680 F. App'x 894, 916-17 (11th Cir.), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 1521(2017) (Wilson, J., dissenting) ("The right of access to the courts is a fundamental right that exists until a death row prisoner's life is taken."); *McGehee v. Hutchinson*, No. 17-00179, slip op. at 57, 2017 WL 1381663 (E.D. Ark. Apr. 15, 2017) ("[A prisoner's Eighth Amendment] right[s] attach[ ] until his successful execution." (quoting *Coe v. Bell*, 89 F.Supp.2d 962, 966 (M.D. Tenn.), *vacated as moot by* 230 F.3d 1357 (6th Cir. 2000))). "[A]n inmate will have no access to the courts—much less meaningful access—if [the State] bars 'telephonic access to the courts,' then straps him to a gurney and begins to subject him to a cruel and unusual execution process." *Arthur*, 680 F. App'x at 918 (Wilson, J., dissenting).

The Tennessee courts pretermitted the inmates' access to the Courts claim, finding that the issue was disposed of with reference to *Abdur'Rahman v. Bredesen*, where the Tennessee court found that use of a paralytic in and of itself did not deny access to the courts. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 310–11 (Tenn. 2005). The evidence here established the necessity of telephone access during an execution, and the Tennessee courts' unwillingness to reach the merits of this claim requires this Court's intervention. As shown above, the inmates proved that they will suffer if the protocol is carried out as intended. Counsel must have access to a telephone to alert a court to an Eighth Amendment violation during an execution. Appellants' eye-witnesses to midazolam-based executions established the harm that befell their clients, because counsel were prohibited access to a telephone in the

execution chamber. XXV 222-290; XXV-XXVI 291-311; XXVII 325-468 (Hall, Baich, Konrad regarding Joseph Wood); XXX 698-99 (Wright regarding Otte).[32] Inmates have no alternative way to access the courts in the middle of an execution other than a telephone call made by counsel either directly to the court or to co-counsel who can contact the court. Trial testimony established that by the time an attorney witnessing an execution in Tennessee makes her way through the long maze of locked doors and gates to reach the parking lot to make a call to the court—easily a fifteen minute journey—the attorney has no meaningful way to report what is currently happening in the execution chamber or what has occurred in the interim. XXXIV 1121-25.

Tennessee prison officials have "offered no legitimate reason—penological or otherwise—to prohibit [the inmate's] counsel from possessing a phone during the execution, particularly in light of the demonstrated risk that midazolam will fail." *Arthur v. Dunn*, 137 S. Ct. 1521, 1522 (2017) (Sotomayor, J.) (dissenting from denial of stay of execution). Commissioner Parker testified that he had no opposition to providing a telephone to attorneys. V 645-46 (under seal). In contrast, TDOC's general counsel Debbie Inglis testified that TDOC does not permit attorneys to have

[32] Further, six of the other seven jurisdictions that have used Midazolam allow more than one attorney witness, unlike Tennessee, so that if one attorney leaves to contact the court, another remains to witness the execution. *See generally*, XXVII 325-468 (Arizona); XXI 766-793 (Alabama); XXXI 794-816 (Florida); XXXI 816-30 (Arkansas); XXXI 830-48; XXXI 850-70 (Oklahoma). The remaining jurisdiction, Ohio, has a telephone placed in a position where the attorney can continue to view the execution chamber while on the phone with the Court. XXX 670.

a phone because it *affirmatively does not want attorneys to access the courts*. XL 1648-49.[33] This startling admission lays bare Appellees' motives.

Appellants respectfully request that this Court grant *certiorari* to consider whether Tennessee courts erred in holding that their right to access to courts does not require their counsel to have telephone access to courts during their execution. Without that, when a Tennessee inmate "enters the execution chamber [], he will leave his constitutional rights at the door." *Arthur*, 137 S. Ct. at 1521 (Sotomayor, J., dissenting); *accord Arthur*, 680 F. App'x at 917 (Wilson, J., dissenting) ("Without the right of access to the courts, the execution chamber would become a black box shielded from constitutional scrutiny.").

CONCLUSION

WHEREFORE, the petition should be granted. Alternatively, the Court should hold the case for the outcome of *Bucklew*.

Respectfully submitted,

/s/ Kelley J. Henry
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[33] When asked what problems she saw with allowing the inmates' attorneys to have use of a telephone, Ms. Inglis testified: "I mean, there's not to be any photographing or recording. That's one. The other would be interruption of an execution without knowing sort of – the Court not having enough information to make a decision about what would happen if an execution was staying in the middle of it." XL 1648-49.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari, and accompanying appendix, were served upon counsel for Respondent, Jennifer Smith, Assistant Solicitor General, 425 Fifth Avenue North, Nashville, Tennessee, 37203, via email and United States Mail, this 9th day of October, 2018.

/s/ Kelley J. Henry
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