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

IN RE:
BILLY RAY IRICK,
Movant,

APPLICATION FOR STAY OF EXECUTION

THIS IS A CAPITAL CASE
EXECUTION SET FOR AUGUST 9, 2018 AT 7 PM

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August 7, 2018

To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the Sixth Circuit:

Movant, Billy Ray Irick respectfully moves for an order staying his execution which is set for August 9, 2018, 7 p.m. CDT, in the above-entitled proceeding, pending the adjudication of the appeal in the underlying state court action challenging Tennessee's new lethal injection protocol.

Pursuant to Supreme Court Rules 23.1, 23.2, and 28 U.S.C. § 1651(a), the stay may lawfully be granted.

The All Writs Act gives your Honor and this Court the power to issue a stay to maintain its jurisdiction of the underlying matter. "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Here, a stay is necessary because the lower court will be deciding novel constitutional questions that involve interpretation of this Court's decision in *Glossip v. Gross*, 135 S.Ct. 2726 (2015) and overlap with issues raised in *Bucklew v. Precythe*, No. 17-8151.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), superseded on other grounds by 28 U.S.C. § 2253(c), this Court held that a stay may be granted when there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; ... a significant possibility of reversal of the lower court's decision; and ... a likelihood that irreparable harm will result if that decision is not

stayed." *Barefoot*, 463 U.S. at 895. Further, a stay should be granted when necessary to "give non-frivolous claims of constitutional error the careful attention that they deserve" and when a court cannot "resolve the merits [of a claim] before the scheduled date of execution to permit due consideration of the merits." *Id.* at 888–89.

The appeal below raises the following important constitutional questions:

- The plurality in *Baze v. Rees*, 553 U.S. 35 (2008), held: "It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, **constitutionally unacceptable risk** of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.* at 53 (emphasis added). At trial, the Plaintiffs presented proof from four preeminent experts and a dozen eye-witnesses to Midazolam executions, who collectively established that Midazolam cannot and does not render inmates insensate, so that they will experience suffocation from the paralytic (described as being buried alive) and excruciating pain from the potassium chloride (described as being burned from the inside). Based on this proof, the trial court concluded 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." Attachment C, July 26, 2018 Order, p.23, *Abdur'Rahman, et al. v. Parker, et al.*, No. 18-183-III

(Davidson County Chancery Court).[1] Pursuant to *Baze,* did plaintiffs demonstrate a **constitutionally unacceptable** risk, so that the three-drug Midazolam protocol is unconstitutional under the 8th Amendment?

- Did the proof presented by plaintiffs establish that the three-drug protocol amounts to constitutionally unacceptable torture, as it will first cause pulmonary edema from the injection of 500 mg of pH 3.0 acid, leading inmates to drown in their own bodily fluids, secondly it will cause suffocation from vecuronium bromide, which paralyzes the inmate's face, body and lungs, and finally it will inflict excruciating pain from the injection of 100 times the necessary dose of potassium chloride?
- Was Plaintiffs' proof elicited on cross-examination of State officials that drug suppliers could have provided pentobarbital to Tennessee in when the state was seeking drugs in 2017 sufficient to satisfy Glossip's requirement that a feasible and readily available alternative be shown?" This question is related to Questions Presented in *Bucklew v. Precythe*, No. 17-8151.
- What should an inmate's burden of proof be to show a feasible and readily available alternative when the state bypassed the opportunity

[1] The trial proof shows that the drug supplier warned in an email dated September 7, 2017, "Here is my concern with Midazolam. Being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs." Exhibit 114.

to purchase alternative drugs due to negligence, bureaucratic ineptitude and/or an desire to secure the lowest possible price? This question is related to Questions Presented in *Bucklew,* No. 17-8151.

- Must an inmate provide the drugs for his own execution?
- Does the state waive *Glossip's* feasible and readily available alternative requirement when it relies on State secrecy laws to affirmatively prevent inmates from learning the identity of some 80 drug suppliers who—according to redacted and protected State records--expressed willingness to sell the alternative drug, pentobarbital, including the identity of 10 suppliers who claimed to have supplies of pentobarbital on hand? Does the State similarly waive *Glossip's* alternative requirement, when it chooses to delegate the procurement of lethal injection drugs to a person who is outside of the power of plaintiffs to interview, depose or subpoena, again due to State secrecy laws?
- The plurality in *Baze v. Rees*, 553 U.S. 35 (2008), held: "It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, **constitutionally unacceptable risk of** suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.* at 53 (emphasis added). Here, the Plaintiffs established the Midazolam does not work like sodium thiopental and

that the inmates will experience suffocation from the paralytic and excruciating pain from the potassium. Given those facts, is an inmate required to meet the second prong of *Glossip*?

- Can a state court use a procedural technicality to exclude from consideration an alternative that the evidence supports and which meets the second prong of *Glossip*?
- Is *Glossip* binding on the state court where the factual underpinnings of that opinion have now been fully repudiated by the expert upon which this Court relied? That is, in this case, the primary expert from *Glossip*, Dr. Roswell Lee Evans, conceded that (a) plaintiffs' four experts' correctly explained the science, and (b) Midazolam does not and cannot render a human being insensate to pain or bring them to a plane of general anesthesia.

Mr. Irick sought a stay of execution from the Tennessee Supreme Court which is the only state court empowered to issue a stay of execution under Tennessee law. The Tennessee Supreme Court denied his motion on August 6, 2018. Appendix A, Order, *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. 2018). Justice Sharon Lee issued a strong dissent. Appendix B. In her dissent, Justice Lee wrote:

> If an appellate court determines that the State's lethal injection protocol, adopted on July 5, 2018, is unconstitutional, the harm to Mr. Trick is irreparable. Yet a brief delay in the execution until after appellate review is concluded causes only minimal, if any, harm to the State. By denying Mr. Irick's motion to vacate his August 9 execution, the Court deprives Mr. Irick of his right to appellate review of his

> challenge to the State's lethal injection protocol. I will not join in the rush to execute Mr. Irick and would instead grant him a stay to prevent ending his life before his appeal can be adjudicated.

Appendix B, p. 1.

I. Procedural Background

Mr. Irick is a plaintiff in the case of *Abdur'Rahman v. Parker*, No. 13-183-III (Davidson County Chancery Court, filed February 20, 2018), a declaratory judgment action challenging the constitutionality of Tennessee's January 8, 2018 lethal injection protocol. That protocol provided the option of using pentobarbital as Option A or, alternatively, a three-drug Midazolam/vecuronium bromide/potassium protocol as Option B. The claims that proceeded to trial alleged that the Midazolam-based protocol provided as Option B constitutes cruel and unusual punishment; that the protocol violated Plaintiffs' procedural due process rights, as it requires no notice to Plaintiffs of which method the State would use to execute them or standards by which that decision would be made; that the protocol violates their substantive due process rights, as the State's decision to use Midazolam in its three-drug protocol despite its knowledge of its ineffectiveness shocks the conscience and constitutes deliberate indifference; and that the protocol violates their rights to counsel and access to the courts, as it does not provide their counsel with access to a telephone to reach the courts during the execution.

On July 2, 2018, Plaintiffs filed a Second Amended Complaint alleging that Option B constitutes cruel and unusual punishment as the three-drug protocol will

cause unnecessary and severe pain and suffering.[2] Plaintiffs also alleged that Option A, the one-drug pentobarbital protocol, constituted a feasible and readily available alternative to the three-drug protocol.

On July 5, 2018, Defendants adopted a new lethal injection protocol, removing Option A (Plaintiffs' pled alternative), designating former Option B, the three-drug Midazolam protocol, as the sole method of lethal injection in Tennessee, and making other substantial changes. On that same day, July 5, 2018, Plaintiffs filed their trial brief. In that brief, Plaintiffs asserted that, notwithstanding Defendants' recent refusal to procure pentobarbital for use in Option A, the one-drug pentobarbital protocol remained a feasible and readily available alternative to Tennessee's three-drug Midazolam protocol. Plaintiffs also added that a viable alternative method of execution for purposes of the second prong of *Glossip* would be the removal of the second drug, vecuronium bromide. The removal of that paralytic drug is clearly available and readily implemented, and it would substantially reduce pain and suffering by (1) hastening Plaintiffs' deaths and (2) sparing Plaintiffs the horrifying experience of suffocation brought on by vecuronium bromide. Plaintiffs had earlier pled that the use of vecuronium bromide as part of Tennessee's three-drug protocol was unnecessary and that its inclusion created additional severe pain and terror.

[2] The second amended complaint added allegations regarding the use of compounded Midazolam and potassium chloride.

On July 7, 2018, Defendants answered Plaintiffs' Second Amended Complaint, denying for the first time that the one–drug pentobarbital protocol constituted a feasible and readily available alternative to their three-drug protocol.[3]

Trial began on July 9, 2018. The Chancery Court heard from 23 witnesses over the course of 10 trial days. [4] More than 139 exhibits were introduced into the record. Plaintiffs presented extensive testimony from four witnesses who were recognized by the trial court as "well-qualified and imminent experts" (conversely, the trial court noted that the Defendants' two experts "did not have the research knowledge and imminent publications that Plaintiffs' experts did."). Attachment C, Chancery Court Order, p. 21.

Plaintiffs first presented the testimony of Dr. Craig Stevens a neuropharmacologist who has published extensively, including co-authoring a leading textbook in his field, Pharmacology.[5] Dr. Stevens provided an overview of neuropharmacology and explained how various anesthetic and sedative drugs affect

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

[4] For a detailed discussion of the proof presented at trial see, Segura, L.,"*Our Most Cruel Experiment Yet,"* August 5, 2018, available at: https://theintercept.com/2018/08/05/death-penalty-lethal-injection-trial-tennessee/ (last checked August 6, 2018).

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

the inhibitory and excitatory centers in the human brain. He then explored the limitations of Midazolam (*vis-a-vis* barbiturates and anesthetic gases) in the lethal injection context. Dr. Stevens explained that Midazolam's single, limited mechanism of action (unlike the three mechanisms of barbiturates, or the five of halogenated anesthetic gases) prevents it from ever bringing a human to a state where they are insensate to pain. Because of its inherent limitations, persons administered Midazolam may be initially sedated, and can even pass a consciousness check. But once noxious stimuli is applied, those persons will be roused from their sedated state and will be aware and will feel pain. Dr. Stevens further explained that the excitatory neurotransmitters in the body will overwhelm the limited sedative effects of Midazolam. As he explained in his overview, sedation is created through the interplay of both excitatory and inhibitory neurotransmitters—Midazolam only works, to a very limited degree, on the inhibitory side of the equation. Dr. Stevens explained why Midazolam's efficacy is not increased with greater dosage: its limited mechanism of action limits what it can do. This "ceiling effect" is not unique to Midazolam, rather it is a common pharmacological property possessed by aspirin (regardless of dose, it cannot numb the pain of an amputation) and myriad other common pharmaceuticals.

Dr. David Greenblatt is an M.D. and clinical pharmacologist. He is the leading expert in the country on benzodiazepines. He was part of the team that conducted the seminal research on the efficacy of Midazolam. His publications in the area are authoritative—and were cited by Defendants' pharmacy expert, Dr.

Roswell Evans, as underlying his conclusions. Dr. Greenblatt echoed Dr. Stevens testimony regarding the limitations of Midazolam. Not only does Midazolam not protect the inmates from feeling pain, it is incapable of keeping them in a state of unawareness. Dr. Greenblatt testified that the inmates will be aroused from sedation by the noxious stimuli of pulmonary edema, the paralytics' suffocating effects and the burning of potassium chloride. Dr. Greenblatt testified that Midazolam is so acidic, with a pH of 3.0, that the 500 mg administered under the protocol will destroy the lining of the lungs, causing the inmate to experience pulmonary edema. Dr. Greenblatt's testimony on this point is corroborated by Dr. Mark Edgar. Dr. Edgar reviewed all available autopsies of inmates executed with Midazolam and found that 85% were recorded to have suffered pulmonary edema.[6] The pulmonary edema will cause the inmate's lungs to fill with bodily fluids, and they will begin drowning.

Dr. Greenblatt explained that as the inmates experience the feeling of drowning from pulmonary edema, the paralytic will take effect, and then that noxious stimuli will be followed by the burning of potassium chloride. Dr. Greenblatt testified that Midazolam is incapable of protecting the inmate from any of these three noxious stimuli—regardless of the dose delivered.

Dr. Greenblatt relied on scientific data to explain that Midazolam as used in the lethal injection protocol will not render the inmates in a deep coma-like state.

[6] It is impossible to know how many of the remaining 15% had pulmonary edema that was not observed, due to a cursory autopsy, not diagnosed due to inattention, or if diagnosed was not deemed worthy of being recorded.

His credible testimony eviscerates the underpinning of this Court's decision in *Glossip.*

Dr. David Lubarsky, co-author of the chapter in Miller's Anesthesia on the Use of Intravenous Anesthetics, explained the limitations of Midazolam from a real world perspective. Dr. Lubarsky is an internationally renowned expert on pain management.

Dr. Lubarsky testified that the physical movements that have been observed by lay witnesses to midazolam executions in every jurisdiction to use midazolam are indicative that the inmates were aware and sensate during their executions.

Dr. Lubarsky testified that under the Midazolam protocol, inmates will not be in a state of general anesthesia and will feel as if they are "locked in a box and someone has covered [their] mouth and [their] lungs and [their] brain are screaming." Dr. Lubarsky further testified that the feeling of the potassium chloride will be as if every nerve in the body has been "set on fire." The pain and terror will be excruciating.

Regarding alternatives, Plaintiffs elicited testimony during the trial that a 2-drug alternative is feasible, available, and substantially reduces the risk of pain and suffering. Defendant, TDOC Commissioner Tony Parker, admitted that his department could conduct an execution with Midazolam and potassium chloride, and that vecuronium was not needed. Drs. Stevens, Greenblatt and Lubarsky all testified that vecuronium did nothing to protect the inmate or to hasten the inmate's death—rather, it simply added greater noxious stimuli (suffocation and

paralysis), while delaying the inmate's ultimate demise (which would be effected by the potassium chloride). Neither of Defendants' experts, Dr. Evans or Dr. Feng Li, disputed these contentions.

At the close of the evidence, Plaintiffs made an oral motion pursuant to Rule 15.02 asking the court to allow the amendment of the pleadings to conform to the evidence based on Plaintiffs' evidence that the State had a feasible, readily available alternative which would substantially reduce the risk of pain to Mr. Irick and other Plaintiffs, *i.e.*, a two-drug protocol. As established by the evidence, elimination of the paralytic (which is not necessary to kill the inmate) eliminates the chemical veil and speeds up the execution by at least four minutes. The trial court denied Plaintiffs' motion.[7]

On July 26, 2018, the Chancery Court issued its order, denying relief. Attachment C, Order. In large part, this Order explored a novel legal question: if death occurs, on average in 13 minutes, is it torture? The Chancellor answered this question in the negative: "if the law were to be expanded to provide for a torture exception to the *Glossip* requirement for inmates to prove a known and available alternative method of execution, the Tennessee three-drug lethal injection protocol would not come within the exception." *Id.* at p. 28. Nonetheless, the Chancellor did

[7] The Chancellor had previously denied a motion to amend the complaint to add an as-applied claim challenging the State's new plan to compound some or all of the lethal injection chemicals needed for Option B, which presents many additional dangers, which are even further exacerbated by the State's decision to use a compounding pharmacy and pharmacist who are unlicensed in this state, have a history of disciplinary infractions in their home state, and who only received approval to compound in their home state on June 26, 2018. The state court Plaintiffs will also appeal this ruling which again, implicates *Bucklew* where plaintiffs seek to raise an as applied challenge to the use of an unregulated compounding pharmacy with a history of disciplinary infractions and questionable licensing status.

find that Defendant's "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." *Id.* at p. 21.

On August 6, 2018, the Tennessee Supreme Court denied Mr. Irick a stay of execution. Attachment A. The Honorable Sharon Lee dissented for a variety of reasons, not limited to her observation that the states of Texas and Georgia were successfully carrying out executions with pentobarbital in 2018: "Surely, our [Department of Corrections] should be as resourceful and able as correction officials in Texas in Georgia in obtaining pentobarbital." Attachment B, p. 6.

Absent a stay from this Court, Mr. Irick will be denied his right to appeal and will be executed under a protocol using compounded Midazolam and compounded potassium chloride. Only one other state (Virginia) has used this protocol.

The appeal in this case will present numerous and nuanced claims of legal and constitutional error – including the Chancellor's refusal to permit Plaintiffs to allege that the Tennessee Department of Corrections ("TDOC") has a feasible readily available alternative which substantially reduces the risk of pain and suffering: a two-drug protocol utilizing Midazolam and potassium chloride and eliminating the paralytic. All of the expert witnesses testified that the paralytic is unnecessary and increases the risk of pain and suffering by causing and prolonging suffocation. This evidence is uncontroverted.

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

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

> The inmates counter that the holdings in *Glossip* and *Baze* are not dispositive. They note that *Glossip* did not consider a challenge to the paralytic, while *Baze* considered the paralytic in the context of a different sedative—sodium thiopental, a barbiturate, which the petitioners conceded would "eliminate any meaningful risk" of pain from injection of the subsequent drugs. *Baze*, 553 U.S. at 49, 128 S. Ct. 1520. Noting the posture in which the case reached the Supreme Court, the inmates also contend that *Glossip* "did not enshrine one court's findings after an emergency injunction hearing as scientific fact beyond challenge, let alone endorse Midazolam's constitutionality in all cases." (Doc. 102 at 3–4.)
>
> The inmates' arguments are well taken. Neither *Baze* nor *Glossip* is dispositive of their Eighth Amendment claims. The inmates challenge Protocol C, alleging that Midazolam is not reliable as a sedative, which means the paralytic will mask the inmate's pain. In *Baze*, by contrast, there was no dispute that the first drug, sodium thiopental, would

> render the inmate insensate to pain caused by the paralytic and the potassium chloride. 553 U.S. at 49, 128 S.Ct. 1520.
>
> *Glossip* does not foreclose relief. *Glossip* held only that the district court did not clearly err in denying a preliminary injunction based on the evidence before it. Here, the inmates indicate they will present substantial new evidence challenging Midazolam's efficacy as a sedative. (Doc. 102 at 4.) *Glossip* underscores that this is a fact-based inquiry, and the inmates are entitled to present evidence in support of the allegations. *See Glossip*, 135 S. Ct. at 2740 (explaining that "an inmate challenging a protocol bears the burden to show, *based on evidence presented to the court*, that there is a substantial risk of severe pain") (emphasis added).
>
> The inmates have stated an Eighth Amendment claim that is plausible on its face. Assuming the alleged material facts as true and construing them in the light most favorable to the inmates, Claim 1 adequately alleges that Protocol C, by calling for a paralytic after an ineffective sedative, is very likely to cause serious illness and needless suffering. *Baze*, 553 U.S. at 50, 128 S. Ct. 1520. The inmates have also adequately alleged that removing the paralytic from the three-drug protocol is a feasible, readily implemented alternative that would significantly reduce a substantial risk of severe pain. *Id.* at 52, 128 S.C t. 1520. They also allege that alternatives to Midazolam, such as pentobarbital, are readily available. (Doc. 102 at 4 n.4.)

Id. at 950–51. Under this analysis, Mr. Irick met the second prong of *Glossip* through the pleadings and the proof. The Chancellor's denial of Mr. Irick's Rule 15.02 motion to amend was constitutional error.[8]

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

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

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

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

C. Plaintiffs gave adequate notice of intent to amend.

As early as April 11, 2018, Plaintiffs gave notice that they would amend their complaint to add additional alternatives depending on the outcome of discovery. See Attachment D, April 11, 2018 Transcript, pp. 5, 19-32; Attachment E, May 2, 2018 Transcript pp. 5, 81-82; Attachment F, May 21, 2018 transcript, 15-24, 44-45. Because of the extraordinary speed with which the case was brought to trial, discovery did not end until the week before the trial. Further, Defendants did not

abandon pentobarbital as an alternative in the protocol until July 5 – 4 days before trial. On that same day, Plaintiffs gave notice of their intent to elicit evidence and proof regarding the two-drug protocol. Attachment G, Excerpt of Plaintiffs' Trial Brief. Under these circumstances, where Mr. Irick plainly met the second prong of *Glossip*, a stay is warranted to preserve this Court's jurisdiction to decide whether a state can hide behind a procedural technicality to execute an inmate in violation of the Eighth Amendment.

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

The trial court relied in large part, directly or indirectly, upon the testimony of Commissioner Parker and Ms. Inglis on whether pentobarbital was available to the State. Neither witness has personal knowledge of this fact. Plaintiffs were prohibited from deposing the only two people with direct knowledge of Defendants' access to pentobarbital - the staffer to whom the job of finding the drugs was delegated (the "Drug Procurer") and the for-profit pharmacist to whom the staffer abdicated his responsibility. The testimony of Commissioner Parker and Ms. Inglis was, in fact self-serving, inadmissible hearsay. Nevertheless, their testimony was contradicted by the Drug Procurer, whose notes and PowerPoint indicate that of the pharmacies the Drug Procurer contacted, 80% were willing to sell the TDOC pentobarbital. Ex. 105.[9] Further, the notes indicate that the TDOC was quoted a price of $27,500 per pentobarbital execution. The trial record further demonstrates

[9] This proof completely undoes the narrative that anti-death penalty advocates are preventing states from obtaining lethal injection drugs.

that Texas and Georgia continue to obtain supplies of pentobarbital. *See* Attachment B, p. 6. This is compelling proof that the drug is available to Defendants.

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

E. Tennessee's conduct regarding 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 State continued to suggest that it 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.[10] 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.

F. The pentobarbital alternative.

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 chose not to purchase

[10] *See* Attachment G, Excerpt of Plaintiffs' Trial Brief.

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, as Tennessee Supreme Court Justice Sharon Lee noted in her dissent

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 due to hopes of securing a lower-price, negligence, or bureaucratic ineptitude.. Tennessee secrecy laws shielded the "Drug Procurer" from being interviewed, deposed or called as a witness. Thus, why he chose not to purchase pentobarbital from any or all of the ten (10) suppliers who, his records reflect, possessed pentobarbital, and were willing to sell pentobarbital, is unknown.

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 this Court in *Bucklew v. Precythe, et al.*, No. 17-8151. It is exceedingly unfair to execute Mr. Irick while these important legal issues remain unsettled.

III. The trial record upends the factual predicate of this Court's opinion in *Glossip*.

In *Glossip*, this Court observed 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. As Justice Lee observed:

> To begin with, this is the first time a Midazolam-based protocol has been challenged in Tennessee. No court has previously determined its constitutionality in this state. Second, every case must be decided on its own merits and facts. Cases may present the same issues of law and similar facts, but no two cases are identical, particularly in terms of the evidence introduced by the parties. Third, since 2014 when Glossip was tried, new evidence may have developed that would result in a different ruling. Mr. trick claims indeed 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." He further contends that he presented evidence not considered by other courts that executed inmates "suffered from pulmonary edema that likely aroused them from the inadequate sedation provided by [M]idazolam and left them awake, sensate, and experiencing the sensations of drowning." The State did not respond to any of these assertions.

Appendix B, p. 7 (footnote omitted). Indeed, 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 this 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. Dr. Evans was heavily impeached with previous testimony and the Chancellor agreed that Plaintiffs experts were vastly more credentialed – and credible. In contrast to

Glossip, Plaintiffs here presented evidence that no other court has considered—namely that no less than 85% of the autopsies done of inmates executed using Midazolam show that they suffered from pulmonary edema that likely aroused them from the inadequate sedation of Midazolam through the noxious stimuli of drowning in their own fluids. 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 the Supreme 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.

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

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

Tennessee's three-drug protocol substitutes Midazolam (a benzodiazepine) for sodium thiopental (a barbiturate) for the express and sole purpose of preventing pain.[11] This Court previously held, "Proper administration of an adequate amount of sodium thiopental is essential to the constitutionality of Tennessee's three-drug protocol." *West,* 2010 Order, p. 2. The Court's holding echoed the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). In the plurality opinion, Chief Justice Roberts wrote, "It is uncontested that, failing a proper dose of sodium

[11] The protocol also substitutes the paralytic vecuronium bromide for the similar paralytic pancuronium bromide. These two drugs are equivalents.

thiopental that would render the prisoner unconscious, there is a substantial, **constitutionally unacceptable risk of** suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.* at 53 (emphasis added).

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

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

Midazolam's sole intended purpose in the July 5, 2018 protocol is to provide pain relief from the administration of the second and third drugs which this Court has already recognized *will* cause severe pain without an effective analgesic used first. See, Attachment C, Order, p. 4. Yet, the proof in the record – established by every expert who testified - is that Midazolam is not an analgesic and *cannot* provide pain relief. Dr. David Greenblatt who participated in the research which later led to FDA approval for Midazolam's uses as a *sedative* established that Midazolam's absence of analgesic properties is not seriously debated within the scientific/medical community. In fact, as the expert witnesses testified, the leading textbook in this area, Miller's Anesthesia states quite clearly that drugs like Midazolam "lack analgesic properties and must be used with other anesthetic drugs to provide sufficient analgesia." Miller, R., *et al.* eds., Miller's Anesthesia, Vol. 1, p.

842 (8th ed. 2015).[12] Dr. Lubarsky plainly stated, "there simply is no debate" about Midazolam's limitations. Instead the use of Midazolam in pain-producing procedures is *always* accompanied with a pain-relieving opioid such as fentanyl.

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

Dr. Greenblatt testified that the most likely reason for the pulmonary edema is the acidic quality of the massive dose of Midazolam that will not be buffered until after it has passed through the lungs. The lungs will be assaulted with acid a second time with the subsequent massive dose of Midazolam. As a result, the lungs will fill with fluid, and the inmate will feel as if he is being drowned. One expert compared the experience to chemical waterboarding. The credible expert testimony established that the most likely cause of the pulmonary edema is the Midazolam, based on specific findings made in the vast majority of autopsies of inmates executed using Midazolam. The Chancellor's order fails to address this additional

[12] Plaintiffs' expert Dr. David Lubarsky co-wrote the chapter on the use of intravenous anesthetics for a number of years. His work is acknowledged in the most current edition.

cause of pain and suffering, which no court, including the Supreme Court in *Glossip*, had ever heard before.

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

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

Plaintiffs presented eyewitness proof that the science as described by Plaintiffs' experts has played out in real life in every jurisdiction to use Midazolam. Witnesses from these states witnessed inmates raising their arms, clenching their fists, trying to speak (the microphones are always turned off), moving their hands, moving their feet, straining against the straps, writhing, producing tears, struggling and choking. All of these observations were made after DOC employees

declared the inmates "unconscious." Dr. Lubarsky confirmed that these physical reactions are proof that the inmates were not unconscious. Rather, with his training and expertise, Dr. Lubarsky recognizes these physical actions as signs of awareness and pain.

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

V. The appeal below presents serious and nuanced issues of constitutional law necessarily implicates issues which this Court is considering in *Bucklew*.

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

It is appropriate then for this Court to exercise its authority under the All Writs Act to stay Mr. Irick's execution so that his right to appeal and ultimately to seek certiorari from this Court is preserved.

VI. Conclusion

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

Respectfully submitted,

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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 7th day of August, 2018, to:

Ms. Andree Blumstein
Solicitor General

Ms. Jennifer Smith
Associate Solicitor General
P.O. Box 20207
Nashville, TN 37202

Hard copies will follow in the United States Mail.

/s/ *Kelley J. Henry*
Kelley J. Henry
Counsel of Record

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[i] 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.

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. BILLY RAY IRICK

Criminal Court for Knox County
No. 24527

No. M1987-00131-SC-DPE-DD

For Publication

ORDER

Thirty-two years ago a jury convicted Billy Ray Irick of the rape and murder of a seven-year-old child and sentenced him to death. Thirty years ago, this Court affirmed Mr. Irick's murder conviction and sentence of death. *State v. Irick*, 762 S.W.2d 121 (1988), *cert. denied*, 489 U.S. 1072 (Mar. 6, 1989). Over the course of this decades-long journey, all of Mr. Irick's subsequent efforts to obtain relief from his conviction and sentence of death in state and federal courts were unsuccessful. *See, e.g.*, *Irick v. State*, 973 S.W.2d 643 (Tenn. Crim. App. 1998), *perm. app. denied* (Tenn. June 15, 1998), *cert. denied* 525 U.S. 895 (Oct. 5, 1998) (state post-conviction case); *Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009), *cert. denied* 559 U.S. 942 (Feb. 22, 2010), *reh'g denied* 559 U.S. 1088 (Apr. 19, 2010) (federal habeas corpus case); *Irick v. State*, No. E2010-02385-CCA-R3-PD, 2011 WL 1991671 (Tenn. Crim. App. May 23, 2011), *perm. app. denied* (Tenn. Aug. 25, 2011) (state writ of error coram nobis case); *Irick v. State*, No. E2012-01326-CCA-R3-PD, 2013 WL 1097816 (Tenn. Crim. App. Mar. 18, 2013), *perm. app. denied* (Tenn. Aug. 27, 2013) (second state writ of error coram nobis case). After Mr. Irick completed the standard three-tier review process—twenty-four years after his conviction and sentence—the State moved this Court to set an execution date pursuant to Tennessee Supreme Court Rule 12(4)(A). This Court granted the State's motion and scheduled the execution for December 7, 2010, now more than seven years ago.

Thereafter, Mr. Irick asserted that he was incompetent to be executed, and his execution was again put on hold to allow for a judicial determination of that claim, which ultimately was resolved against Mr. Irick. *See State v. Irick*, 320 S.W.3d 284 (Tenn.

2010), *cert. denied* 562 U.S. 1145 (Jan. 10, 2011). On motion of the State, this Court rescheduled his execution for January 15, 2014. On December 11, 2013, this Court reset the execution of Mr. Irick to October 7, 2014.

At the time of Mr. Irick's conviction and sentencing, electrocution was the only method of execution in this State, but by the time his execution dates were set, lethal injection had become the default method of execution in Tennessee.[1] Initially, Tennessee utilized a three-drug lethal injection protocol consisting of Sodium Pentothal (a barbiturate to render the inmate unconscious), Pancuronium Bromide (a paralytic to paralyze the muscles), and Potassium Chloride (to stop the heart). *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 300 (Tenn. 2005). Several death row inmates challenged the constitutionality of this protocol in 2002, and this Court rejected the constitutional challenge. *Id.* Thereafter, on September 27, 2013, the Tennessee Department of Correction ("TDOC") adopted a new single-drug lethal injection protocol providing for injection of a lethal dose of Pentobarbital. *West v. Schofield*, 519 S.W.3d 550, 552 (Tenn. 2017).

Prior to the October 7, 2014 execution date, Mr. Irick and other death row inmates filed a declaratory judgment action attacking the constitutionality of the newly adopted single-drug lethal injection protocol. This Court again stayed Mr. Irick's execution until the completion of that litigation, and on March 28, 2017, this Court rejected the constitutional challenge to the single-drug lethal injection protocol. *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, 138 S. Ct. 476 (Nov. 27, 2017) and *Abdur'Rahman v. Parker*, 138 S. Ct. 647 (Jan. 8, 2018).

On January 8, 2018, TDOC adopted a three-drug protocol, which provides for the use of Midazolam, Vecuronium Bromide, and Potassium Chloride, as an alternative to the single-drug protocol this Court upheld in *West v. Schofield*. Ten days later, on January 18, 2018, and pursuant to Tennessee Supreme Court Rule 12(4)(E), this Court *sua sponte* reset the execution date for Mr. Irick to August 9, 2018.

On February 20, 2018, Mr. Irick and thirty-two other death row inmates filed in the Chancery Court for Davidson County a declaratory judgment action challenging the constitutionality of the newly adopted *alternative* three-drug lethal injection protocol.

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[1] Tennessee adopted lethal injection as a method of execution on May 18, 1998, and by the same legislation allowed persons sentenced before January 1, 1999, to elect to be sentenced to death by lethal injection rather than electrocution. Tenn. Code Ann. § 40-23-114 (Supp. 1998). On March 30, 2000, lethal injection became the default method of execution in this state. Tenn. Code Ann. § 40-23-114 (Supp. 2000); *see also West v. Schofield*, 468 S.W.3d 482, 485 (Tenn. 2015) (citing *West v. Ray*, 401 Fed. Appx. 72, 75 (6th Cir. 2010)).

See Abdur'Rahman v. Parker, No. 18-183-III (Nashville Chancery Division III). While that declaratory judgment action was pending, on July 5, 2018, TDOC again revised the lethal injection protocol to eliminate the single-drug protocol so that the three-drug protocol became the exclusive method of execution by lethal injection in Tennessee. On July 19, 2018, the Chancery Court clarified that the only claim that would be adjudicated in the declaratory judgment action was the constitutional challenge to the three-drug protocol adopted on July 5, 2018.[2] *Id.*

After a ten-day trial, on July 26, 2018, the Davidson County Chancery Court dismissed the complaint for declaratory judgment, finding that the plaintiffs had failed to establish that Tennessee's three-drug lethal injection protocol was unconstitutional or unlawful. *Id.* On July 30, 2018, the plaintiffs filed a notice of appeal. *See Abdur'Rahman v. Parker*, No. M2018-01385-COA-R3-CV. On that same day, Mr. Irick filed a Motion to Vacate Execution Date. On August 2, 2018, the State filed its Response to the Motion to Vacate Execution Date. On August 3, 2018, Mr. Irick filed a Reply to the State's Response.

Having set forth much of the procedural history of these cases involving Mr. Irick, we now turn to the specific matter currently before the Court. Significantly, effective July 1, 2015, this Court amended its rule pertaining to what a prisoner must show to be entitled to a stay of execution under these circumstances. *See* Tenn. Sup. Ct. R. 12(4)(E). After the 2015 amendment to Tennessee Supreme Court Rule 12(4)(E), this Court will not stay an execution pending resolution of collateral litigation in state court "unless the prisoner can prove a likelihood of success on the merits of that [collateral] litigation." Tenn. Sup. Ct. R. 12(4)(E). The inmates' currently pending challenge to the lethal injection protocol clearly constitutes collateral litigation. Thus, before this Court can stay Mr. Irick's execution date, Mr. Irick must prove that he has a likelihood of succeeding on the merits of that litigation. "In order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success." *Six Clinics*

[2] It bears noting at this point that TDOC's revisions of its lethal injection protocol since 2010 have been necessitated by the success anti-death-penalty advocates have had in convincing drug companies not to provide certain drugs for use in executions. As the United States Supreme Court noted, after legal challenges to the common three-drug protocol that Tennessee initially used were rejected, "a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences." *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726, 2733 (2015). States, including Tennessee, then adopted the single-drug protocol that utilized Pentobarbital. *Id.* But soon thereafter, "[a]nti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions." 135 S. Ct. at 2733-34. TDOC's revisions of its lethal injection protocol, as well as the litigation and delay resulting therefrom, are attributable to the success of anti-death-penalty advocates in convincing pharmaceutical companies not to provide drugs for executions. *Id.*

Holding Corp. II v. Cafcomp Sys., 119 F.3d 393, 402 (6th Cir. 1997). Therefore, we first must consider the elements that Mr. Irick must prove to prevail in the pending action to determine whether he has satisfied this standard and established more than a mere possibility of success on the merits.

The constitutional analyses set forth by the United States Supreme Court in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), and *Baze v. Rees*, 553 U.S. 35 (2008), and by this Court in *West v. Schofield*, 519 S.W.3d at 550, hold that to prevail on a claim that a particular method of execution amounts to cruel and unusual punishment, an inmate must establish *both* that the method in question presents an imminent risk of serious illness and needless suffering *and* that a feasible, readily implemented alternative method of execution exists that will significantly reduce a substantial risk of severe pain. The trial court held that the inmates failed to establish either of these prongs. We now turn to our analysis as to whether Mr. Irick has demonstrated a likelihood of success on both of these elements in his motion.

We turn first to the requirement that Mr. Irick demonstrate a likelihood of success in establishing a feasible, readily implemented alternative method of execution. Although the inmates asserted that a single-drug method using only Pentobarbital was a quicker and more humane way to execute, they did not offer any direct proof that this method is available to TDOC. Instead, the inmates chose to simply attempt to discredit the State's witnesses on this issue. Testimony from the State's witnesses established that they were unable to obtain Pentobarbital through ordinary transactional efforts, despite many efforts to do so. The trial court accredited this testimony as to the efforts made by TDOC to acquire Pentobarbital and concluded that Pentobarbital was not available. As such, the trial court found that the inmates had failed to establish this element. We are unwilling to presume, as does the dissent, that Pentobarbital is available to TDOC because it has been used in executions in Texas and Georgia. Our review of the record before us at this time leads us to the same conclusion as that of the trial court. Mr. Irick has not demonstrated a likelihood of success on the merits of this element.

In so ruling, we reject as well Mr. Irick's argument that he has established a likelihood of success on his assertion that the trial court erred in denying his post-trial motion to amend his complaint to allege the two-drug protocol consisting of Midazolam and Potassium Chloride as an alternative method of execution. "Trial courts have broad authority to decide motions to amend pleadings and will not be reversed absent an abuse of discretion." *Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 741 (Tenn. 2013) (citing *Hawkins v. Hart*, 86 S.W.3d 522, 532 (Tenn. Ct. App. 2001)). An appellate court cannot "substitute its judgment for that of the trial court" when applying the abuse of discretion standard. *Id.* (citing *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006)). Many considerations "guide a trial court's discretionary decision

whether to allow a late-filed amendment," including "undue delay, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments[,] and futility of the amendments." *Id.* (citing *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979)). In this case, Mr. Irick filed his complaint challenging the alternative three-drug protocol in February 2018 but did not allege the two-drug protocol as a known and available constitutionally acceptable alternative method of execution in that initial complaint. He failed to include this allegation in the amended complaint that was filed only days before the trial. In denying his motion to amend, the trial court found that the issue also was not tried by express or implied agreement. Given these circumstances, we need not review the trial testimony, as the dissent asserts, to determine that Mr. Irick has failed to prove a likelihood of success on his allegation that the trial court abused its discretion in denying his post-trial motion to amend.[3]

Given that Mr. Irick must prove a likelihood of success on the merits of *both* elements, our inquiry could stop there. However, given the magnitude of what is at stake in these proceedings, we also note some additional points that dictate that this Court must deny Mr. Irick's motion. First, the *Glossip* Court upheld Oklahoma's three-drug protocol that used the same procedure with the same combination of drugs as that found in the current Tennessee protocol. *See Glossip*, 135 S. Ct. at 2731. Additionally, as already noted, this Court previously upheld a similar three-drug protocol in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005). Second, to the extent that Mr. Irick seeks to attack the current Tennessee protocol based upon the potential use of compounded drugs in the Tennessee protocol, this Court expressly approved the use of a compounding process when it upheld the protocol at issue in *West v. Schofield*, 519 S.W.3d at 552. Finally, Mr. Irick attempts to rely on precedent from prior actions in which this Court has granted a stay of execution while collateral litigation was pending. Indeed, this Court has granted such stays in the past. *See, e.g.*, Order, *Abdur'Rahman v. State*, No. M1988-00026-SC-DPE-PD (Tenn. Apr. 10, 2015). However, Mr. Irick fails to recognize that the amendment to Rule 12(4)(E) requiring the inmate to establish a likelihood of success on appeal as a prerequisite to this Court granting a stay was adopted *after* this Court's Order granting the stay in *Abdur'Rahman v. State*. As a result, the present case is the first case presented to this Court governed by the amended version of Rule 12(4)(E). Consequently, to obtain a stay at this time, Mr. Irick must establish a likelihood of success, and he has failed to satisfy this standard.[4]

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[3] We note as well that alleging the two-drug protocol as a constitutionally acceptable alternative to the three-drug protocol would have been difficult to square with Mr. Irick's assertions regarding the effects of Midazolam.

[4] We reject the dissent's assertion that this decision represents a "rush to execute." Indeed, by applying the law and requiring satisfaction of this legal standard, we are not "rush[ing] to execute" Mr.

For all of the reasons set forth above, the Court concludes that Mr. Irick has failed to establish a likelihood of success on the merits of the collateral litigation. Accordingly, his Motion to Vacate Execution Date is DENIED.

PER CURIAM

LEE, SHARON G., J., DISSENTING.

Irick. In fact, this suggestion is astonishing, actually, given that Mr. Irick was convicted and sentenced thirty-two years ago and has obtained multiple stays over the years.

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. BILLY RAY IRICK

Criminal Court for Knox County
No. 24527

No. M1987-00131-SC-DPE-DD

SHARON G. LEE, J., dissenting.

The question is not whether the State will execute Billy Ray Irick, but whether the State will execute Mr. Irick before an appellate court can review the chancery court's dismissal of the claims by Mr. Irick and thirty-two other death row inmates that Tennessee's newly adopted method of lethal injection is unconstitutional. In his motion to vacate the August 9, 2018 execution date, Mr. Irick has shown a likelihood of success on appeal by asserting error in the chancery court's factual findings, its legal conclusions, and its denial of his motion to amend. Unless the execution date is vacated, Mr. Irick—unlike the other thirty-two death row inmates who also have challenged the State's method of execution—will not live to see whether the chancery court's decision was correct.

If an appellate court determines that the State's lethal injection protocol, adopted on July 5, 2018, is unconstitutional, the harm to Mr. Irick is irreparable. Yet a brief delay in the execution until after appellate review is concluded causes only minimal, if any, harm to the State. By denying Mr. Irick's motion to vacate his August 9 execution, the Court deprives Mr. Irick of his right to appellate review of his challenge to the State's lethal injection protocol. I will not join in the rush to execute Mr. Irick and would instead grant him a stay to prevent ending his life before his appeal can be adjudicated.

The State opposes Mr. Irick's motion to vacate his execution date by emphasizing the nature of the crimes he committed thirty-three years ago and the fact that three previous execution dates have "come and gone." Without a doubt, over thirty years ago, Mr. Irick committed horrendous crimes and deserves to be punished. He has had previous execution dates reset by this Court for good reason. Our decision whether to briefly stay Mr. Irick's execution until after his appeal is concluded cannot be dictated by the nature of his crimes, how long it has been since he was sentenced to die, or how many times his

execution date has been reset. These emotional considerations should not sway or sidetrack us. Rather, logic and reason must prevail.

I.

Since 2010, the Tennessee Department of Correction (TDOC) has repeatedly changed its lethal injection protocol, resulting in litigation and delays. The chronology of events surrounding Mr. Irick's execution began at a deliberate pace but in the past few months has proceeded at breakneck speed.

In 1986, a jury sentenced Mr. Irick to death by electrocution. *See State v. Irick*, 762 S.W.2d 121 (Tenn. 1988). After Mr. Irick completed the standard three-tier review process, this Court set his execution date for December 7, 2010. We thereafter remanded Mr. Irick's case to the Knox County Criminal Court to resolve his claim that he was not mentally competent to be executed. The trial court ruled he was mentally competent, and in September 2010, we affirmed that decision. *State v. Irick*, 320 S.W.3d 284, 286 (Tenn. 2010).

In November 2010, TDOC changed its lethal injection protocol by adopting a three-drug protocol of sodium thiopental, pancuronium bromide, and potassium chloride. Mr. Irick and other death row inmates filed suit in the Davidson County Chancery Court for declaratory judgment and injunctive relief, asserting that the protocol violated constitutional prohibitions against cruel and unusual punishment. Mr. Irick and the other inmates prevailed. On November 22, 2010, the chancery court ruled that the State's lethal injection method was cruel and unusual because the protocol did not ensure that the inmate was unconscious before injection of the second drug. On November 29, 2010, in light of this ruling, we granted Mr. Irick a stay of execution, effective throughout the pendency of any appeal of the chancery court's final judgment in the declaratory judgment action.

TDOC then revised its protocol to include checks for consciousness before injection of the second drug. On March 24, 2011, the chancery court ruled that the revised protocol was constitutional. The Court of Appeals affirmed this decision, and this Court denied permission to appeal. *West v. Schofield*, 380 S.W.3d 105 (Tenn. Ct. App. 2012), *perm. app. denied* (Tenn. Aug. 17, 2012).

On September 27, 2013, TDOC replaced its three-drug protocol with a single-drug protocol that used only pentobarbital. On October 3, 2013, the State moved to set Mr. Irick's execution date. On October 22, 2013, this Court set the execution date for January 15, 2014. On November 20, 2013, Mr. Irick and other death row inmates filed a declaratory judgment action in the Davidson County Chancery Court, challenging the constitutionality and legality of the newly adopted single-drug protocol. On December 6, 2013, Mr. Irick filed a motion to alter, amend, or modify the order setting his execution date, in light of the chancery court's scheduling order setting the trial for July 7, 2014. On

December 11, 2013, we reset Mr. Irick's execution date to October 7, 2014, to allow enough time for his constitutional challenge to be heard.

Meanwhile, the Tennessee General Assembly enacted Tennessee Code Annotated section 40-23-114(e), effective July 1, 2014, which provides for death by electrocution if lethal injection is held unconstitutional or if the TDOC Commissioner certifies to the governor that one or more of the ingredients essential to carrying out death by lethal injection is unavailable through no fault of TDOC.

On September 18, 2014, the inmates amended their lawsuit to challenge the constitutionality of death by electrocution. Due to an interlocutory appeal in a discovery dispute, this Court, on September 25, 2014, vacated its previous order setting Mr. Irick's October 7, 2014 execution date. The discovery dispute eventually resulted in this Court's March 10, 2015 decision in *West v. Schofield*, 460 S.W.3d 113 (Tenn. 2015). A second interlocutory appeal resulted in this Court's July 2, 2015 decision in *West v. Schofield*, 468 S.W.3d 482 (Tenn. 2015). Reversing the chancery court's denial of the defendants' motion to dismiss, we held that the inmates' claims challenging the constitutionality of the 2014 statute and electrocution as a means of execution were not ripe because the inmates were not then and would not ever be subject to execution by electrocution unless one of the two statutory contingencies occurred in the future. *Id.* at 484–85.

On September 24, 2014, TDOC amended the lethal injection protocol to allow the use of compounded pentobarbital instead of manufactured pentobarbital. On June 25, 2015, TDOC again amended the protocol to incorporate a contract with a pharmacist for compounded pentobarbital. After the chancery court denied relief in the declaratory judgment action that had begun in November 2013, we assumed jurisdiction over the appeal. On March 28, 2017, we held that the chancery court did not err in concluding that the inmates failed to prove that the one-drug pentobarbital protocol, on its face, violated the constitutional prohibitions against cruel and unusual punishment. *West v. Schofield*, 519 S.W.3d 550, 552 (Tenn. 2017).

On January 8, 2018, TDOC again changed the protocol, adopting a new three-drug protocol using Midazolam, vecuronium bromide, and potassium chloride as an alternative method of execution to the single-drug pentobarbital protocol. On January 18, 2018, we set Mr. Irick's execution date for August 9, 2018.

On February 20, 2018, in response to the change of protocol, Mr. Irick and thirty-two other death row inmates filed a declaratory judgment action challenging the constitutionality of the newly adopted three-drug lethal injection protocol in the Chancery Court for Davidson County. *See Abdur'Rahman v. Parker*, No. 18-183-III (Davidson Cnty. Chancery Ct., Part III).

On July 5, 2018, only four days before the trial was set to begin, TDOC again revised the protocol. TDOC eliminated the alternative single-drug pentobarbital protocol

so that the exclusive method of execution was the three-drug protocol using Midazolam, vecuronium bromide, and potassium chloride.

During the ten-day trial, based on a 104-page complaint, twenty-three witnesses testified and 139 exhibits were admitted into evidence. On July 26, 2018 at 6:32 p.m., the chancery court issued a forty-nine page decision, dismissing the case because Mr. Irick and the other inmates had failed to establish that Tennessee's three-drug lethal injection protocol was unconstitutional or unlawful.

Mr. Irick wasted no time responding to this adverse ruling. On July 30, 2018, he filed in this Court a motion to vacate his August 9, 2018 execution date. He also filed a notice of appeal in the Court of Appeals. On this same date, July 30, the Court of Appeals, on its own motion, issued an order noting that Mr. Irick's execution was set for August 9, and that it had no authority to stay the execution. Significantly, the Court of Appeals advised that, although it would consider the issues presented in the appeal with deliberate speed, it would not have sufficient time to review the chancery court's decision and issue an opinion before Mr. Irick's scheduled execution.

II.

This case presents us with the first opportunity to apply revised Tennessee Supreme Court Rule 12.4(E) since it became effective on July 1, 2015. Rule 12.4(E) requires Mr. Irick to "prove a likelihood of success on the merits in [collateral litigation]" for this Court to grant the delay he requests. Tenn. Sup. Ct. R. 12.4(E). Thus, the relevant inquiry is whether Mr. Irick has a likelihood of success on the merits in his appeal of his claims that the State's three-drug protocol exposes him to an imminent risk of serious illness and needless suffering and that the State has a known and available alternative method of execution that entails a lesser risk of pain. *See West*, 519 S.W.3d at 563–64 (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015)). Under Rule 12.4(E), Mr. Irick need only show a *likelihood* of success—not a substantial likelihood or a guarantee of success. The purpose of this rule is to weed out frivolous claims with no likelihood of success.

Mr. Irick argues that he has a likelihood of success on appeal based on errors in the chancery court's findings of fact, its conclusions of law, and its denial of his motion to amend his pleadings to conform to the evidence. To make the necessary determination under Rule 12.4(E), we have a limited record to review—only the chancery court's order, Mr. Irick's motion to vacate the execution date, the State's response, and Mr. Irick's reply. We lack the pleadings, transcripts of the chancery court proceedings, and the exhibits.

Mr. Irick first asserts that he established at trial that a two-drug protocol (Midazolam and potassium chloride) was a feasible and readily available alternative and

would substantially reduce the risk of severe pain associated with the State's three-drug protocol, as required by *Glossip*, and that the chancery court erred by not allowing him to amend his pleadings under Tennessee Rule of Civil Procedure 15.02 to conform to the evidence. The State responds that the chancery court did not err in denying Mr. Irick's motion to amend because the two-drug protocol was known or could have been known to Mr. Irick when he filed suit and that the two-drug protocol was not tried by express or implied consent.

More specifically, Mr. Irick claims that two expert witnesses testified that the two-drug protocol would reduce the risk of pain and suffering. He also asserts that the TDOC Commissioner testified that the State could use the two-drug protocol. Mr. Irick argues that as early as April 11, 2018, he gave notice that he would amend his complaint to include additional alternatives depending on the outcome of discovery. Discovery, however, did not end until the week before the trial started. In addition, only four days before trial, the State changed its protocol by eliminating pentobarbital as a single-drug protocol alternative. Mr. Irick contends that, on the same day the State changed the protocol, he gave notice in his trial brief of his intent to elicit evidence regarding the two-drug protocol.

Under Tennessee Rule of Civil Procedure 15.02, when issues not raised by the pleadings are tried by express or implied consent of the parties, the issues are treated as if they had been raised in the pleadings. A party may make a motion to amend to conform to the evidence at any time, even post trial. If a party objects to evidence at trial because it is not within the issues in the pleadings, the court may allow the pleadings to be amended and "shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits." Tenn. R. Civ. P. 15.02.

Rule 15.02 aims to place substance over form. *Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888, 890 (Tenn. 1980). The relevant consideration is not when the motion is made, but whether the parties actually tried the issue. *Id.* "'A party who knowingly acquiesces in the introduction of evidence relating to issues that are beyond the pleadings is in no position to contest a motion to conform.'" *Id.* at 891 (quoting 6 Wright & Miller, *Federal Practice and Procedure* § 1493 at 462–63). Trial by informed consent can be established when the party opposing the amendment knew or should have known of the evidence on the new issue, did not object to its introduction, and was not prejudiced by its introduction. *Id.* at 890.

An appellate court would need to review the pleadings, transcripts, and exhibits of the trial to determine what was pleaded, what the witnesses said, whether objections were made, and what evidence was introduced before determining whether the chancery court abused its discretion in denying the motion to amend. There is not a complete record for

us to review, and we can only rely on the parties' statements to this Court. Given the unusual speed with which this case proceeded to trial and the State's change in the lethal injection protocol on the eve of trial, it is likely that Mr. Irick and the other inmates did not fully anticipate in their pleadings the evidence that would be introduced at trial. Moreover, we cannot determine what the testimony was and whether the State objected to any testimony regarding the two-drug alternative. Mr. Irick's argument does not appear to be frivolous or totally without merit. There is no guarantee that he will prevail on appeal, but he has shown a likelihood of success.

Next, Mr. Irick argues that he established that pentobarbital is an available alternative that entails a lesser risk of pain. The State contends that he failed to prove this essential requirement.

To support his argument, Mr. Irick submits that "notes and PowerPoint" introduced as part of "Ex. 105" show that "80% [of pharmacies contacted by the State's Drug Procurer] were willing to sell the TDOC pentobarbital." In addition, Mr. Irick argues that he proved pentobarbital is available because Texas and Georgia continue to obtain supplies of pentobarbital for executions.

Without reading the transcript, we do not know what efforts TDOC made to obtain pentobarbital and whether those efforts were reasonable. What we do know is that in the first seven months of this year, Texas executed eight inmates using pentobarbital.[1] Most recently, Christopher Young was executed on July 17, 2018, and Danny Bible was executed on June 27, 2018.[2] Texas has eight more executions set in 2018, all using pentobarbital.[3] Georgia executed Carlton Gary on March 15, 2018, and Robert Butts, Jr. on May 4, 2018, using pentobarbital.[4] Surely, our TDOC should be as resourceful and able as correction officials in Texas and Georgia in obtaining pentobarbital.

Mr. Irick also argues that he established that there is a significant risk that he will experience pain and suffering because of the use of Midazolam instead of sodium thiopental in the three-drug protocol. The State disagrees.

In *State v. West*, No. M1987-00130-SC-DPE-DD (Tenn. Nov. 29, 2010) (Order), we held that "[p]roper administration of an adequate amount of sodium thiopental is

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[1] Death Penalty Information Center (DPIC), *Execution List 2018*, https://deathpenaltyinfo.org/execution-list-2018.

[2] *Id.*

[3] DPIC, *Executions Scheduled for 2018*, https://deathpenaltyinfor.org/ upcoming-executions#year2018.

[4] DPIC, *Execution List 2018*, https://deathpenaltyinfo.org/execution-list-2018.

essential to the constitutionality of Tennessee's three-drug protocol," because failure to administer a proper dose of the drug results in a "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). Mr. Irick contends that he proved that Midazolam does not relieve pain and that its administration could cause pulmonary edema and severe pain. In addition, Mr. Irick claims that he proved that inmates in other states where Midazolam has been used showed physical signs of awareness during their executions, including writhing, crying, struggling and choking, even after correction officials had declared they were "unconscious." The chancery court made a specific finding that the inmates' experts "established that [M]idazolam 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."

This Court relies on the decisions in *Glossip* and *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), to conclude that Mr. Irick did not prove that the use of Midazolam presents an imminent risk of serious illness and needless suffering. The Court's reliance is misplaced for many reasons. To begin with, this is the first time a Midazolam-based protocol has been challenged in Tennessee. No court has previously determined its constitutionality in this state. Second, every case must be decided on its own merits and facts.[5] Cases may present the same issues of law and similar facts, but no two cases are identical, particularly in terms of the evidence introduced by the parties. Third, since 2014 when *Glossip* was tried, new evidence may have developed that would result in a different ruling. Mr. Irick claims indeed 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." He further contends that he presented evidence *not* considered by other courts that executed inmates "suffered from pulmonary edema that likely aroused them from the inadequate sedation provided by [M]idazolam and left them awake, sensate, and experiencing the sensations of drowning." The State did not respond to any of these assertions. Last, *Abdur'Rahman* is wholly inapposite because that case did not involve a Midazolam-based protocol.

These unchallenged factual allegations in Mr. Irick's motion and reply to the State's response, pointing to evidence introduced at trial and not properly considered by the chancery court, raise a likelihood that he will succeed on his claim that the use of Midazolam creates a significant risk that he will experience serious and needless pain and suffering during his execution.

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[5] *See State v. Travis*, 622 S.W.2d 529, 532 (Tenn. 1981) ("With all due respect to the good faith and sincere concern of the learned trial judge, each case must be considered on its own facts and merits."); *Stringfield v. Hirsch*, 29 S.W. 609, 613 (Tenn. 1895) ("Each case must stand on its own merits and facts."); *State v. Williams*, No. 03C01-9303-CR-00072, 1994 WL 413830, at *5 (Tenn. Crim. App. Aug. 3, 1994) (internal citations omitted) ("Each case must be considered on its own merits and depends on its own facts. The fate of each defendant depends on the evidence contained in the record of that case.").

III.

Mr. Irick timely challenged the State's revised protocol and has not unduly delayed the proceedings to obtain an advantage. In Tennessee, a party to a civil action has an appeal as of right to the Court of Appeals. Tenn. R. App. P. 3(a). Mr. Irick timely and promptly perfected his appeal as of right on the second business day after the chancery court entered the order dismissing his claim. On that same date, Mr. Irick moved this Court to delay his execution date to allow the expeditious adjudication of his appeal. This Court has the inherent authority to delay Mr. Irick's execution and should do so.[6] Mr. Irick has promptly taken every step necessary to exercise his right to appeal under the Rules of Appellate Procedure. The one obstacle blocking his right to appellate review is his August 9 execution date.

We construe our Rules of Appellate Procedure to secure the "*just*, *speedy*, and inexpensive determination of every proceeding on its *merits*." Tenn. R. App. P. 1 (emphasis added). For good cause, an appellate court may suspend the requirements of the rules to expedite a decision in any matter on motion of a party or on its own motion. Tenn. R. App. P. 2. It follows then that an appellate court could reasonably expedite the appeal of this case to minimize the time needed for review. All in all, a short delay is fair and proper given the high stakes involved.

The State's interest in finality and closure is a legitimate concern, but not before Mr. Irick obtains appellate review of the chancery court's decision on his challenge to the State's latest method of execution. The harm to Mr. Irick of an unconstitutional execution is irreparable. Yet the harm to the State from briefly delaying the execution until after appellate review is minimal, if any.

The nature of this case counsels against a rush to execution. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Powell, Stevens, and Stewart, JJ., plurality opinion). Mr. Irick, whose life is at stake, should not be denied the right to appellate review to ensure that his execution complies with constitutional requirements.

IV.

In sum, this is a complicated case. It was filed and tried in about five months, but its roots go back some thirty-odd years. The State changed its lethal injection protocol

[6] *See West v. Schofield*, 468 S.W.3d 482, 494 (Tenn. 2015) (declaring the Court's "intent sua sponte to schedule new execution dates"); *Coe v. State*, 17 S.W.3d 251, 251 (Tenn. 2000) (holding that after "an execution date is initially set, this Court possesses continuing jurisdiction to set a new date should the original date of execution expire as the result of a stay issued by a federal court or other appropriate authority").

only four days before trial. The trial lasted ten days, during which the chancery court heard the testimony of twenty-three witnesses and reviewed 139 exhibits. All parties were zealously represented by able counsel. The chancery court expeditiously issued a detailed and well-written forty-nine page opinion on the constitutionality of the State's new lethal injection protocol. Mr. Irick's filings in this Court raise important issues that, if resolved in his favor, could merit a reversal of the chancery court's decision. Mr. Irick need not show a guarantee or even a substantial likelihood of success, only a likelihood of success. He has done that. I would grant Mr. Irick's request to delay his execution date until after the conclusion of appellate review.

Sharon G. Lee

SHARON G. LEE, JUSTICE

APPENDIX C

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

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

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

Ruling

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

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

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

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

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

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

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

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

Case Summary

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

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

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

> *Baze* cleared any legal obstacle to use of the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion. But a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.
>
> * * *
>
> After other efforts to procure sodium thiopental proved unsuccessful, States sought an alternative, and they eventually replaced sodium thiopental with pentobarbital, another barbiturate.
>
> * * *

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

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

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

CHEMICALS USED IN LETHAL INJECTION

> The Department will use the following protocol for carrying out executions by lethal injection:
>
> | | |
> |---|---|
> | **Midazolam** | 100 ml of a 5mg/ml solution (a total of 500mg) |
> | **Vecuronium Bromide** | 100 ml of a 1mg/ml solution (a total of 100 mg) |
> | **Potassium Chloride** | 120 ml of a 2 mEq/ml solution (a total of 240mEq) |
>
> Chemicals used in lethal injection executions will either be FDA-approved commercially manufactured drugs; or, shall be compounded preparations prepared in compliance with pharmaceutical standards consistent with the United States Pharmacopeia guidelines and accreditation Departments, and in accordance with applicable licensing regulations.

The midazolam is to provide pain relief. Vecuronium bromide paralyzes the inmate. Potassium chloride stops the heart within 30 to 45 seconds of injection.

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

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

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

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

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

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

Inmates' Causes of Action

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

1. Count I: Eighth and Fourteenth Amendments of the United States Constitution and Article 1, § 16 of the Tennessee Constitution prohibiting the use of cruel and unusual punishment,

2. Count IV: Fourteenth Amendment of the United States Constitution and Article 1, § 8 of the Tennessee Constitution of procedural due process,

3. Count V: First, Eighth and Fourteenth Amendments of the United States Constitution and Article 1, §§ 8, 16, 17 of the Tennessee Constitution of the right to counsel and access to the courts, and

4. Count VIII: Fourteenth Amendment of the United States Constitution and Article 1, § 8 of the Tennessee Constitution that the use of midazolam shocks the conscience.[3]

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

[3] These are the causes of action which remained for disposition after the May 4, 2018 ruling dismissing portions of the Plaintiffs' pleading.

Count I: Cruel and Unusual Punishment

Constitutional Law

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

> To prevail on a claim that punishment is cruel and unusual,
>
> > First, the inmates must establish that the protocol "presents a risk that is '*sure or very likely* to cause serious illness and needless suffering and give rise to sufficiently *imminent* dangers.' " *Glossip*, 135 S.Ct. at 2737 (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520) (internal quotation marks omitted). "To prevail on such a claim, 'there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.' " *Id.* (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520) (internal quotation marks omitted). Second, the inmates "must identify an alternative [method of execution] that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.' " *Id.* (quoting *Baze,* 553 U.S. at 52, 128 S.Ct. 1520); *see also Baze*, 553 U.S. at 61, 128 S.Ct. 1520 (stating that an inmate asserting an Eighth Amendment challenge to a state's lethal injection protocol must establish "that the State's lethal injection protocol creates a demonstrated risk of severe pain" and "that the risk is substantial when compared to the known and available alternatives").

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

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

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

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

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

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

No Proof of Available Alternative

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

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

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

> Dr. Zentner contended that there were "numerous sources" for both the active and inactive ingredients needed to compound pentobarbital, including professional drug sourcing services. He said that these ingredients were available for sale in the United States and could be found through an Internet search. For example, Dr. Zentner found pentobarbital sodium listed on a drug manufacturer's product listing, which listing indicated that the drug was produced in the United States. He stated that other manufacturers might offer it for sale or the drug could be synthesized in a lab. He said that he knew of one lab that would be willing to synthesize the drug and he suspected "all of them would be willing."
>
> Dr. Zentner stated that he conducted an Internet search of sterile compounding pharmacies in Alabama from the listing available on the Accreditation Commission for Health Care's Web site, and found 19 such pharmacies, although two were essentially the same company. Dr. Zentner gave his list to the ADOC. Dr. Zentner contacted two of these pharmacies, and they said that they did perform sterile compounding. Dr. Zentner admitted that he did not ask them whether they would be willing to compound pentobarbital for use in an execution by the ADOC. In his deposition, Dr. Zentner clarified that he did not ask these two pharmacies any questions whatsoever regarding compounded pentobarbital.
>
> Accordingly, Dr. Zentner could only give his opinion that (1) pentobarbital sodium is available for purchase in the United States, and (2) there are compounding pharmacies that "have the skills and licenses to perform sterile compounding of pentobarbital sodium."
>
> On cross-examination, Dr. Zentner admitted that he had not contacted any drug companies at all about their willingness to sell pentobarbital to the ADOC for executions. He also admitted that he was unaware that the company that currently owned Nembutal had restrictions in place to keep that drug from being purchased for use in lethal injections. Dr. Zentner admitted that he had no knowledge of whether the pharmacies that he found would be able to procure pentobarbital, nor did he ever personally attempt to purchase the drug from a manufacturer. He stated that one drug synthesis company that he has a "long-term relationship" with was "willing to discuss" producing compounded pentobarbital. Dr. Zentner admitted that sodium thiopental is not listed in the FDA Orange Book, meaning it is not

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

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

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

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

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

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

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

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

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

* * *

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

* * *

- XXXXXXXX assigned with task of locating source of Pentobarbital

- First step was to search by contacting compounding pharmacies to determine if they: 1) Had an inventory of Pentobarbital; or 2) Had a source of Pentobarbital and were willing to compound the LIC for the department

- Several pharmacies declined to be involved in any way. Finally, a compounding pharmacy agreed to both compound the LIC and aid in the search for a source.

- Search involved cold calling U.S. based Active Pharmaceutical Ingredient (API) supply companies.

* * *

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

- Company did not have an inventory of Pentobarbital – apprx. 70%

- Company did not have sufficient quantities of the needed form of Pentobarbital and no source to obtain sufficient quantities – apprx. 10%

- Company unwilling to supply Pentobarbital if it was to be used in lethal injection – apprx. 20%

* * *

[4] "X" indicates text that has been redacted as required by Tennessee Code Annotated TENN. CODE ANN. § 10-7-504(h) (West 2018).

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

- C.F.R. § 1312.13 grants the DEA the authority to issue permits for the importation of schedule II narcotics (i.e. Pentobarbital) when it is necessary to provide for a legitimate need of the U.S. and the domestic supply is inadequate

- At the meeting, the agents informed XXXXXX that XXXXXXXXXXX because, according to them, there is a supply of pentobarbital available in the United States.

- When told that the companies who do have a supply would not sell their supply for use in lethal injection, the XXXXXX agents explained that it didn't matter and that it was an issue to take up with the companies themselves.

* * *

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

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

* * *

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

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

- South Carolina has stated, in connection with the recent conviction of Dylan Roof, that they do not have a supply of LIC and have not been able to find a supply.

- Indiana DOC was reprimanded for not following proper procedure in unilaterally trying to change their protocol to a new LIC due [sic] their inability to locate a supply of the current drug.

- Texas, in the case mentioned before, attempted to import a different LIC chemical than they currently use in executions. Presumably due to the potential unavailability of Pentobarbital even on an international level.

- Some states are using LIC chemicals that have some under harsh scrutiny, such as Alabama's use of Midazolam in the recent execution of Robert Melson.

- Florida is using a drug, etomidate, that has never been used in the United States for execution.

* * *

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

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

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

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

> Me
> I'm running around today so not sure when I'll be open for a call but in the meantime can u send me a list of all companies etc u reached out to about sourcing so I can have it for when we have to show it's unavailable? Thanks
>
> 8:49 AM

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

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

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

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

> Arthur would have us hold that if a drug is capable of being made and/or in use by other entities, then it is "available" to the ADOC. Arthur stresses that: (1) pharmacies throughout Alabama are theoretically capable of compounding the drug; (2) the active ingredient for compounded pentobarbital (pentobarbital sodium) is generally available for sale in the United States; and (3) four other states were able to procure and use compounded pentobarbital to carry out executions in 2015.
>
> We expressly hold that the fact that other states in the past have procured a compounded drug and pharmacies in Alabama have the skills to compound the drug does not make it available to the ADOC for use in lethal injections in executions. The evidentiary burden on Arthur is to show that "there is now a source for pentobarbital that would sell it to the ADOC for use in executions." Brooks, 810 F.3d at 820 (emphases added).
>
> To adopt Arthur's definition of "feasible" and "readily implemented" would cut the Supreme Court's directives in Baze and Glossip off at the knees. As this Court explained in Brooks, a petitioner must show that "there is now a source for pentobarbital that would sell it to the ADOC for use in executions." 810 F.3d at 820 (emphases added). This Arthur patently did not do. Arthur's own expert witness, Dr. Zentner, could not even identify any pharmacies that had actually compounded an injectable solution of compounded pentobarbital for executions or were willing to do so for the

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

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

* * *

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

* * *

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

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

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

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

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

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

Attempt to Expand the Law

In addition to their attempt to discredit State officials to satisfy the essential elements of proof required by the United States Supreme Court of proving an available alternative execution method, the Inmates attempted to develop and expand the law that this case is an exception and they should not have to prove an alternative method of execution because Tennessee's three-drug lethal injection method constitutes torture akin to being dismembered or burned at the stake. This Court's study of decisions of the United States Supreme Court is that no such exception has yet been recognized, and as an inferior trial court, this Court cannot so expand the law. If, however, the law were to be so expanded, the evidence in this case established that Tennessee's three-drug lethal injection protocol is not a drastic, exceptional deviation from accepted execution methods so as to be found to constitute torture, that is "sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers." *Glossip*, 135 S. Ct. at 2737.

Midazolam—The Experts

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

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

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[7] The Inmates provided testimony of: Dr. Stevens, Dr. Greenblatt, Dr. Edgar and Dr. Lubarsky.

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

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

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

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

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

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

Midazolam—The Case Law

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

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

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

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

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

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

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

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

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

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

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

> • And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. *Ibid.* After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.

Glossip v. Gross, 135 S. Ct. 2726, 2732–33 (2015).

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

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

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

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

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

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

Midazolam—Official Documentation

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

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

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

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

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

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

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

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

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

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

Midazolam—Eye-Witnesses to Executions

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

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

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

Midazolam—Application of the Law

Based upon

— the United States Supreme Court and other courts determining that the use of midazolam does not pose a constitutionally unacceptable risk of severe pain, even in light of the prolonged executions of Wood and Lockett,

— applying the context of an execution, not the standard of a medical procedure, that an execution is not required to be painless, and

— the 10 to 18 minute duration of most of the midazolam executions in evidence,

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

Midazolam—Deliberate Indifference

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

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

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

Vecuronium Bromide

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

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

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

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

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

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

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

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

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

Other Challenges to Protocol

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

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

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

* * *

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

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

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

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

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

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

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

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

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

Reiteration—Failure to Prove *Glossip* Alternative Prong

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

Count VIII: Substantive Due Process – Shocks the Conscience

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

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

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

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

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

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

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

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

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

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

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

amendment. *Id.* In the instant case, Plaintiff's claim is covered by the Eighth Amendment; therefore, his due process claim should be dismissed.

Gary v. Aramark Corr. Servs., No. 5:13-CV-417-RS-EMT, 2014 WL 3385119, at *5 (N.D. Fla. July 10, 2014).

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

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

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

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

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

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

Count IV: Procedural Due Process

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

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

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

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

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

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

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

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

[9] During the trial, Department of Correction General Counsel Debbie Inglis testified that the Department would use compounded midazolam in the upcoming executions.

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

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

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

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

Count V: Right to Counsel and Access to the Courts

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

> 381. The official witness room does not provide Plaintiff's lawyer with the ability to view the injection site for signs of extravasation or infiltration.
>
> 382. The official witness room does not permit attorney observation of the syringes which is critical to ascertain the sequence and timing of the injection of the different syringes.
>
> 383. The official witness room does not provide Plaintiff's lawyer with sufficient ability to observe signs of unnecessary pain and distress.
>
> 384. The official witness room does not provide Plaintiffs with telephone access to the courts or co-counsel.
>
> * * *
>
> 386. Defendants have the ability to provide Plaintiffs' counsel visual monitoring of the IV injection site throughout the execution process.
>
> 387. Defendants have the ability to provide Plaintiffs' counsel visual observation of the operation of the syringes.
>
> 388. Defendants have the ability to provide Plaintiffs with appropriate visual monitoring of their client during the execution process.
>
> 389. Defendants have the ability to provide Plaintiffs' counsel with suitable telephone access to the courts and co-counsel during the execution process.
>
> * * *
>
> 726. During his deposition, Defendant Parker agreed to provide telephone access for Plaintiffs' during the execution process.
>
> 727. After his deposition, that agreement was rescinded.
>
> 728. During her deposition, Debbie Inglis agreed to consider allowing Plaintiffs' counsel to access the telephone adjacent to the Death Watch cells during the execution process.

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

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

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

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

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

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

> Initially, we note that the trial court allowed the Plaintiffs to adduce proof about a variety of things that might conceivably go wrong in a compounded pentobarbital lethal injection execution as well as proof about the consequences of the Protocol being carried out in accordance with the Protocol's specific provisions. For instance, the Plaintiffs elicited expert proof about the risks associated with the LIC if it was compounded, transported, or stored improperly, i.e., in contravention of the Protocol, including the Contract. However, we view this proof as more appropriate to an as-applied challenge to the Protocol because the Protocol, on its face, does not provide for the improper preparation, transportation, or storage of the LIC. As the United States Court of Appeals for the Sixth Circuit has recognized, "[s]peculations, or even proof, of medical negligence in the past or in the future are not sufficient to render a facially constitutionally sound protocol unconstitutional." Cooey v. Strickland, 589 F.3d 210, 225 (6th Cir. 2009).
>
> Certainly, there are risks of error in every human endeavor. Indeed, as the United States Supreme Court has recognized, "[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure." Baze v. Rees, 553 U.S. 35, 47, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion). However, " 'accident[s], with no suggestion of malevolence' [do] not give rise to an Eighth Amendment violation." Id. at 50, 128 S.Ct. 1520

> (citation omitted) (quoting Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947)).
>
> Again, this lawsuit consists of a facial challenge to the Protocol. A facial challenge does not involve a consideration of the Plaintiffs' list of things that *might* go wrong if the Protocol is not followed. Therefore, we need not itemize the substantial amount of proof in the record before us that relates only to potential risks that might occur from a failure to follow the Protocol rather than the proof of risks that are inherent in the Protocol itself.

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

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

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

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

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

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

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

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

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

It follows, then, that because the Inmates' claims regarding cell phones and better sight views for Counsel while observing the executions, do not state a constitutional violation, this Court has no authority to order TDOC to make such changes. In an analogous area, Tennessee case law provides that courts generally give great deference to an agency's interpretation of its own rules because the agency possesses special knowledge, expertise, and experience with regard to the subject matter of the rule. *BellSouth Adver. & Publ'g Corp. v. Tennessee Regulatory Auth.*, 79 S.W.3d 506, 514

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

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

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[11] § 40-23-116. Capital punishment; procedure; witnesses

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

(1) The warden of the state penitentiary or the warden's duly authorized deputy;

(2) The sheriff of the county in which the crime was committed;

(3) A priest or minister of the gospel who has been preparing the condemned person for death;

(4) The prison physician;

(5) Attendants chosen and selected by the warden of the state penitentiary as may be necessary to properly carry out the execution of the death sentence;

(6) A total of seven (7) members of the print, radio and television news media selected in accordance with the rules and regulations promulgated by the department of correction. Those news media members allowed to attend any execution of a sentence of death shall make available coverage of the execution to other news media members not selected to attend;

(7)(A) Immediate family members of the victim who are eighteen (18) years of age or older. Immediate family members shall include the spouse, child by birth or adoption, stepchild, stepparent, parent, grandparent or sibling of the victim; provided, that members of the family of the condemned prisoner may be present and witness the execution;

(B) Where there are no surviving immediate family members of the victim who are eighteen (18) years of age or older, the warden shall permit up to three (3) previously identified relatives or personal friends of the victim to be present and witness the execution;

(8) One (1) defense counsel chosen by the condemned person; and

(9) The attorney general and reporter, or the attorney general and reporter's designee.

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

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

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

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

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

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

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

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

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

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

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Rule 58 Certification

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

s/ Justin F. Seamon July 26, 2018

Deputy Clerk
Chancery Court

APPENDIX D

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

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

Plaintiffs,

vs.

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

Defendants.

No. 18-183-II(III)

P R O C E E D I N G S

THE COURT: Good morning.

MS. HENRY: Good morning.

MR. SUTHERLAND: Good morning, Your Honor.

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

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

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

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

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

MR. SUTHERLAND: And readily implemented.
THE COURT: And so in terms of pleading, you assert that the Court has to dismiss if they plead A is unavailable and, two, they don't allege an alternative to A and B?
MR. SUTHERLAND: That's correct, Your Honor.
THE COURT: All right.
MR. SUTHERLAND: That also does the second part of the element, which is, if the alternative, in fact, which I assume they would prove through expert testimony, substantially reduces the risk of injury.
THE COURT: Yes, I understand. Now, so that we don't -- aren't inefficient and are just playing semantics or using semantics so that we can do good competent work here, paragraphs 431 through 433 of the complaint, if the State were required to answer that, those allegations concern availability, if there is -- it is undisputed that the State cannot get A, then we've eliminated an issue in the case. And it would seem to make sense to get that done before we even go into the motion to dismiss phase.

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

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

THE COURT: Well, you can understand --

MR. SUTHERLAND: Obviously the Department --

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

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

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

THE COURT: It's not premature because we

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

MR. SUTHERLAND: I think --

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

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

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

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

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

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

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

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

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

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

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

MR. SUTHERLAND: Respectfully, Your Honor --

THE COURT: Yes, sir.

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

THE COURT: Yes.

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

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

MR. SUTHERLAND: Okay.

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

MR. SUTHERLAND: Right.

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

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

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

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

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

MR. SUTHERLAND: I think --

THE COURT: And you have a choice here.

MR. SUTHERLAND: Sure.

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

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

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

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

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

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

MR. SUTHERLAND: I understand, Your Honor.

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

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

MR. SUTHERLAND: Yes, ma'am.

THE COURT: And it needs to be done correctly.

MR. SUTHERLAND: Yes, ma'am.

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

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

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

MR. SUTHERLAND: May I ask a question?

THE COURT: Yes, sir.

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

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

saying.

MR. SUTHERLAND: Okay.

THE COURT: I am not asking you that.

MR. SUTHERLAND: You're asking --

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

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

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

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

saying.

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

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

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

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

MR. SUTHERLAND: All right.

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

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

MR. SUTHERLAND: All right. Thank you.

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

MS. HENRY: Thank you, Your Honor.

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

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

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

MS. HENRY: Yes, ma'am.

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

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

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

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

MS. HENRY: Yes, Your Honor.

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

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

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

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

you would amend to allege Protocol A as an alternative?

MS. HENRY: Yes, Your Honor.

THE COURT: Would you state that explicitly?

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

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

MR. MacLEAN: Yes, Your Honor.

THE COURT: Okay.

MS. MORRIS: Yes, Your Honor.

THE COURT: Okay. Thank you very much.

MS. HENRY: Thank you very much.

THE COURT: Anything else from the State?

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

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

APPENDIX E

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

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

P R O C E E D I N G S

THE COURT: Thank you. Good morning.

MS. HENRY: Good morning.

MR. SUTHERLAND: Good morning, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX F

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

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

Transcript of Proceedings

Taken before the
Honorable Ellen Hobbs Lyle

May 21, 2018

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

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

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

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

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

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

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

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

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

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

alternatives, which we will do.

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

MS. HENRY: Yes, ma'am.

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

MS. HENRY: Yes, ma'am.

THE COURT: So you need to take those two?

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

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

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

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

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

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

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

THE COURT: And I had not brought

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

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

MR. HENRY: I'm sorry.

THE COURT: Yes.

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

THE COURT: I'm going to try to

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

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

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

MS. HENRY: Yes, ma'am.

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

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

MS. HENRY: Yes, ma'am.

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

MS. HENRY: Thank you.

THE COURT: General Sutherland.

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

THE COURT: Good afternoon.

MR. SUTHERLAND: Good afternoon.

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

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

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

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

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

The plaintiffs have --

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

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

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

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

MR. SUTHERLAND: If I may?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the State of Tennessee has drugs, period.

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

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

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

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

APPENDIX G

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

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

PLAINTIFFS' TRIAL BRIEF

---

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

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

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[14] Plaintiffs do not endorse any of these methods, nor are they required to by *Glossip*.

[15] The proof will show that the State of Arizona has agreed to never again use a paralytic in an execution.

Attachment E

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7/26/2018 6:32 PM
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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

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