THIS IS A CAPITAL CASE
EXECUTION SET FOR NOVEMBER 1, 2018 AT 7 PM

IN THE
SUPREME COURT OF THE UNITED STATES
No. 18-6530

EDMUND ZAGORSKI,
Petitioner,
v.

BILL HASLAM, et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

CORRECTED PETITION FOR WRIT OF CERTIORARI

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November 1, 2018

QUESTIONS PRESENTED

1. Did *Glossip v. Gross,* 135 S.Ct. 2726 (2015), modify centuries-old jurisprudence prohibiting involuntary waiver of constitutional protections in the context of method of execution claims?

2. Does *Stewart v. LaGrand*, 526 U.S. 115 (1999), prevent a death-sentenced inmate from challenging a barbaric method of execution he was coerced into choosing by threat of an even more-barbarous method because he was prevented from meeting the alternative-method-pleading-requirement of *Glossip* by state secrecy laws and procedural technicalities?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Edmund Zagorski respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported. *Zagorski v. Haslam, et al.*, No. 18-6145 (6th Cir. 2018). Appendix A. The district court's entry of judgment as to Counts I and II of Zagorski's complaint is unreported. *Zagorski v. Haslam, et al*, No. 3:18-cv-1205 (M.D. Tenn. October 30, 2018). Appendix B. The Order of the District Court denying the motion to alter or amend is unreported. *Zagorski v. Haslam, et al*,

No. 3:18-cv-1205 (M.D. Tenn. October 29, 2018). Appendix C. The District Court's Memorandum and Order dismissing counts I and II of the Complaint is unreported. *Zagorski v. Haslam, et al*, No. 3:18-cv-1205 (M.D. Tenn. October 26, 2018). Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2018. Appendix A. This petition is timely filed pursuant to Supreme Court Rule 30.1. Jurisdiction is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> [N]or cruel or unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law[.]

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Edmund Zagorski is an inmate under sentence of death. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), *cert. denied* 528 U.S. 829 (1999). This petition relates solely to the manner in which he will die.

In 2015, Edmund Zagorski was one of thirty-seven plaintiffs, all under sentence of death, in the case of *West v. Schofield*, 468 S.W.3d 482, 485 fn. 2 (Tenn. 2015). The plaintiffs contended that death in Tennessee's electric chair would be cruel and unusual. *Id.* at 484. The Tennessee Supreme Court rejected their suit as unripe, as lethal injection by pentobarbital was the constitutional default option, and the State would only resort to electrocution if it could not obtain lethal injection chemicals or if a court found its lethal injection protocol unconstitutional. *Id.* at 484-85; *see also* T.C.A. § 40-23-114. The court reasoned that the events needed to trigger use of electrocution might never come to pass and that the pentobarbital protocol "if administered properly, will likely cause death with minimal pain and with quick loss of consciousness." *West v. Schofield*, 519 S.W.3d 550, 562 (Tenn. 2017).

On January 8, 2018, Tennessee modified its lethal injection protocol to add a second option, a three-drug protocol using midazolam, vecuronium bromide, and potassium chloride. R. 1, PageID # 7-8.[1] On February 20, 2018, Mr. Zagorski joined thirty-two other plaintiffs in filing suit in state court against the midazolam option. *Id.* at 8. The inmates submitted that Tennessee's first enumerated option, single-drug pentobarbital, was a feasible and readily available alternative that had

[1] Record citations, unless otherwise noted, will be to the underlying record in the Middle District of Tennessee, Case 3:18-cv-01205.

already been found to be constitutional and pain-free. *Abdur'Rahman v. Parker*, ___S.W.3d. ___, 2018 WL 4858002, at *3 (Tenn. Oct. 8, 2018).

On March 15, 2018, the Tennessee Supreme Court scheduled Mr. Zagorski to die on October 11, 2018. R. 1, PageID # 8.

On July 5, 2018, four days before trial was to commence, the State of Tennessee amended their lethal injection protocol to delete the single-drug pentobarbital alternative, leaving the midazolam-protocol as the only lethal injection method. R. 1, PageID # 23. On July 9, 2018, through July 24, 2018—over ten days of testimony—proof was presented from six expert witnesses, twelve witnesses to midazolam executions, and three representatives of the State of Tennessee; 151 exhibits were introduced. R. 1, PageID # 8-9.[2]

The proof presented was not rebutted (indeed, in all material respects it was agreed to by the State's expert), and it established that:

a. Midazolam, regardless of dose, does not possess analgesic properties, and it cannot render a person insensate to pain;

b. The midazolam is dissolved in 100 ml of pH 3.0 acid, and this acid will cause pulmonary edema; the condemned's lungs will fill with fluid, and he will struggle to breathe; other inmates suffering this edema have "coughed, gasped, labored to breathe, barked and strained against their restraints;"

c. Following a three-minute wait, and a medically inappropriate "consciousness check," the inmate will be injected with vecuronium bromide, which will cause paralysis and then suffocation;

[2] The complaint misstated the number of eyewitnesses as eleven, forgetting that in addition to eleven lawyers, plaintiffs also called one investigator.

> d. Finally, after two additional minutes of pulmonary edema and paralysis, the inmate will be injected with potassium chloride, which will cause excruciating pain, as it "ignites" every nerve fiber in his body.

Id. at 9-11; R. 9, PageID # 65.

On July 26, 2018, the trial court ruled against the plaintiffs. R. 1, PageID # 11. On July 30, 2018, Mr. Zagorski and the majority of other plaintiffs filed notice of appeal. *Id.*

On August 9, 2018, Tennessee performed its first execution using midazolam on a man named Billy Ray Irick. R. 1, PageID # 11. The prison officials did not follow their protocol. *Id.* The first dose of midazolam was not prepared until 28 minutes after the execution was set to commence. *Id.* The backup dose, ostensibly designed to protect Mr. Irick if he displayed signs of "consciousness," was never prepared at all. *Id.*

Witnesses to Mr. Irick's execution described what the experts had predicted: he gasped for breath, coughed, and strained against his restraints. *Id.* Mr. Irick was clearly sensate to pain and suffering from pulmonary edema. *Id.* After the vecuronium took effect, the degree of suffering he felt from continuing edema, air hunger, paralysis and the chemical burning of potassium chloride is unknown, but was inevitably severe and horrific. *Id.*

On August 13, 2018, the Tennessee Supreme Court "reached down" to take jurisdiction of Mr. Zagorski's appeal. *Id.* at 12. The court set an expedited briefing schedule, with oral argument set for October 3, 2018—eight days before Mr. Zagorski's scheduled execution. *Id.*

On August 30, 2018, with his appeal pending, and his execution looming, Mr. Zagorski delivered a letter to the Warden of his prison, informing him that he was unable to choose a method of execution. *Id.* at 13. Pursuant to Tennessee law, Mr. Zagorski had the option to accept the default—death by some manner of lethal injection—or to choose death in the electric chair. Tenn. Code Ann. §§ 40-23-114, 116.

At approximately 4:00 p.m. on October 8, 2018, the Tennessee Supreme Court issued its decision. *Id.* It declined to determine whether Tennessee's midazolam protocol would cause severe pain, finding this issue "pretermitted" and moot. *Abdur'Rahman v. Parker* __ S.W.3d __, 2018 Wl 4858002, at *1, 14-15. Instead, the court concluded that the inmates had failed to "plead and prove" a feasible and readily implemented alternative. *Id.* at *1, 7-15. In reaching this decision, the court upheld the application of a discretionary Tennessee procedural bar, Rule 15.02, and declined to consider a two-drug alternative that was feasible and readily implemented. *Id.* at *9-12. The court found that the State of Tennessee's pre-trial maneuver of removing the single-drug pentobarbital protocol as an option four days before trial did not excuse the inmates from having failed to plead an alternative-to-that-alternative prior to trial. *Id.* at *11-12.

In conclusion, the Tennessee Supreme Court held that "the Plaintiffs failed to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment." *Id.* at *15. Put another way, the Tennessee Supreme Court held that a discretionary decision of the lower court to apply a

procedural rule, and to refuse to consider a clearly feasible and readily implemented alternative, made it constitutionally acceptable to execute inmates under a protocol that they had proven was sure or very likely to inflict severe pain, mental anguish and needless suffering.[3]

Within two-hours of the Tennessee Supreme Court finding that the plaintiffs had not prove the midazolam protocol was unconstitutional, Mr. Zagorski submitted to the Warden his "Affidavit Concerning Method of Execution," wherein he chose death in the electric chair. R. 1, PageID # 13. In this affidavit, he made the following statement:

> By signing this affidavit I am not conceding that electrocution is constitutional. I believe that both lethal injection and electrocution violate my rights under the 8th amendment. However, if I am not granted a stay of execution by the courts, as between two unconstitutional choices I choose electrocution. I do not waive my right to continue to appeal my challenge to lethal injection. And, if that appeal is successful, then I will challenge electrocution as unconstitutional. I am signing this document because I do not currently have a stay of execution and I do not want to be subjected to the torture of the current lethal injection method.

R. 1, PageID # 13-14.

On October 9, 2018, the State declined to honor Mr. Zagorski's election and told him he would be killed with midazolam, vecuronium bromide and potassium chloride. *Id.* at 14. Mr. Zagorski filed suit in federal district court on October 10, 2018, to enjoin the State from killing him with chemical poisons and to require that

[3] The rightness or wrongness of the Tennessee Supreme Court's decision is not the basis of this petition. However, their elevation of technical pleading rules of dubious application over bedrock constitutional protections animates at least one of the arguments that follows.

it use the electric chair. *Id.* at 14. The court granted a temporary injunction enjoining prison officials from executing him by lethal injection contrary to his expressed wishes. *Id.* Prison officials already had conducted required training on the use of the chair on September 27, 2018, and tested the chair itself on October 10, 2018. *Id.* All was set for Mr. Zagorski to die; indeed on the evening of October 11, 2018, this Honorable Court dissolved a separate stay (in his habeas proceedings—unrelated to this particular litigation), and cleared the way for death in the chair. However, some hours earlier, the Governor of Tennessee granted a ten-day reprieve, apparently so that the electric chair could be made ready for use. R. 1, PageID # 14. Mr. Zagorski does not know what prevented its use on October 11, 2018.

Mr. Zagorski's choice of the electric chair was made in light of the alternative. *Id.* at 13. If he had not selected electrocution, he would have suffered over 10 to 18 minutes in a manner that was described by the state trial court as "dreadful and grim." *Id.* The three separate and distinct vehicles of suffering, described above, would all be inflicted upon him—the last two while he appeared insensate and serene because of the paralytic.

Death in the electric chair was comparatively superior, in Mr. Zagorski's estimation. *Id.* Yet, what he chose was also something he believed was unconstitutionally cruel and unusual. *Id.*

From an inmate's perspective there are two major issues with Tennessee's electric chair: (1) it is an electric chair, and (2) it is Tennessee's specific electric chair.

Following a series of botched electrocutions this Court granted certiorari to address whether execution by electrocution is unconstitutional under the Eighth Amendment because it constitutes cruel and unusual punishment and violates evolving standards of decency. *Bryan v. Moore*, 528 U.S. 960 (1999). In response to the grant of certiorari, the state of Florida abandoned electrocution as its default method of punishment resulting in the case being dismissed. *Bryan v. Moore*, 528 U.S. 1133 (2000). There has been an overwhelming movement of states discontinuing use of the electric chair as a means of execution. In 1974, nineteen states used the electric chair as their sole method of execution. R. 1, PageID # 21-22. Today, no state uses it as the primary method, and only a small handful even keep it as an alternative. *Id.* The supreme courts of Georgia and Nebraska have both found the electric chair to be cruel and unusual under their respective state constitutions. *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008); *Dawson v. State*, 554 S.E.2d 137, 143-44 (Ga. 2001). Georgia concluded that, factually, the electric chair carries the "specter of excruciating pain" and the "certainty of cooked brains and blistered bodies." *Dawson*, 554 S.E.2d at 144. Nebraska held it violative of its state constitution for two major reasons. First:

> There is also no question that [the electric chair's] continued use will result in unnecessary pain, suffering, and torture for some, but not all of [the] condemned murderers in this state. Which ones or how many will experience this gruesome form of death and suffer unnecessarily;

> and which ones will pass with little conscious suffering cannot be known.

Mata, 745 N.W.2d at 272.

Second,

> Besides presenting a substantial risk of unnecessary pain, we conclude that electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner's body. Electrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man.

Id. at 279.

Thus, when Mr. Zagorski chose death in the electric chair, he chose a method that had been found to cause extreme suffering, and physical mutilation. Yet, he chose it based on his hope that the duration of suffering would be shorter. R. 1, PageID # 3.

He also chose it as preferable to the midazolam protocol, despite the fact that the chair to be used was Tennessee's electric chair. This chair was designed and installed by Fred Leuchter, who falsely held himself out to be an electrical engineer. *Id.* at 17. He also held himself out to be an expert on the Holocaust (or its absence), having published a denial report entitled "An Engineering Report on the Alleged Execution Gas Chambers at Auschwitz, Birkenau, and Majdanek." *Id.* But for the zeal of the State of Massachusetts, this charlatan might still be trying to sell implements of death. That state forced him into a consent decree wherein he agreed to cease (1) pretending to be an electrical engineer, and (2) distributing his Holocaust denial report. *Id.*

For Tennessee, however, the damage was done. Leuchter's chair has been tested and found wanting by two separate engineering firms (apparently real ones). *Id.* at 17-18. Tennessee has made some of the modifications those engineers suggested, but not all. *Id.* at 18. Whatever was done, on October 11, 2018, Tennessee was not comfortable using it. *Id.* at 14.

This history of the chair leads to the next developments. On October 22, 2018, the Tennessee Supreme Court issued a new execution date: November 1, 2018. *Id.* at 15. On October 24, 2018, the State moved the district court to make permanent its temporary injunction against use of midazolam, and requirement that the State use the electric chair in Mr. Zagorski's execution. M.D. Tenn. 3:18-cv-01035, R. 15, PageID # 464-68.

On October 26, 2018, with his challenge to the electric chair finally ripe, Mr. Zagorski did what he had said he would do in his affidavit of October 8, 2018, and what he had tried to do back in 2014—he filed suit challenging the constitutionality of the electric chair. R. 1, PageID # 1-33. He also filed suit challenging the coercive pressure that had been placed upon him, which had compelled him to choose such a gruesome method of death. R. 1, PageID # 29-30.[4]

Within hours of filing suit, the district court dismissed these two counts. R. 8, PageID # 48-50. In regards to his due process coercion claim, the court found that

[4] In a third count, which is not subject to this petition, Mr. Zagorski sued so that during his execution he would have two attorneys present and/or his attorney(s) would have access to a telephone, so that his right to access the courts would be respected. R. 1, PageID # 31.

collateral estoppel precluded such suit. *Id.* at 48-49. As to his challenge to the electric chair, the court held that *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999), required dismissal without consideration for the (in)voluntariness of the alleged waiver. On October 28, 2018, Mr. Zagorski filed a Motion to Alter or Amend, with supporting documents. R. 9, PageID # 52-448. On October 29, 2018, the district court denied this motion. R. 15, PageID # 589-597. Respondents did not file responses to any of these pleadings.[5]

On October 30, 2018, the District Court issued final judgment, and Mr. Zagorski promptly filed Notice of Appeal. Briefing was completed on October 31, 2018, and the Court of Appeals denied relief at 8:20 p.m. EST that evening, holding in substantive part:

> To prevail on his coercion claim (count I), Zagorski would have to show that he was coerced to waive *his constitutional right against electrocution*—and a challenge to the constitutionality of electrocution is precisely the one we are bound to conclude Zagorski waived. *See Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) ("[W]e need not consider whether electrocution is cruel and unusual punishment because, for that issue to be relevant, Stanford would first have to waive it.") (citing *Stewart v. LaGrand*, 526 U.S. 115 (1999)). His standalone Eighth Amendment challenge to his electrocution (count II) fails for the same reason.

18-6145, R. 11-1, Page 3 (emphasis in original).

[5] The district court ordered Respondents to reply only to the access-to-courts claim.

The Sixth Circuit did not address the collateral estoppel ground relied upon by the district court. *Id.* Similarly, the court did not decide whether Mr. Zagorski was in fact coerced, or whether that coercion led to his waiver. *Id.*

By failing to address the substance of the legal arguments presented by Zagorski in his appeal to the Sixth Circuit (the district court's error in finding Count I barred by collateral estoppel and whether the constitution tolerates and involuntary waiver of a constitutional right), the Court has essentially ruled that though Zagorski may be legally correct, *Glossip v. Gross,* 135 S.Ct. 2726 (2015), modified centuries old jurisprudence mandating that constitutional rights can only be waived if done so voluntarily.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The perverse (mis)application of *Glossip* shields courts from honestly considering whether a method of execution is cruel and unusual.

Mr. Zagorski's coerced choice to die swiftly, but painfully and gruesomely in the electric chair is not unique. As the media are recognizing, his decision is consistent with a larger national trend that can only be expected to grow. Adam Tambourin, *Edmund Zagorski has chosen the electric chair over lethal injection. Will other inmates do the same?*, The Tennessean, October 31, 2018, *available at* https://www.tennessean.com/story/news/crime/2018/10/31/tennessee-electric-chair-lethal-injection-zagorski/1774951002/ (last visited Nov. 1, 2018). Eight inmates in Alabama have chosen death by lethal gas, rather than execution under a midazolam protocol that is substantively identical to Tennessee's. *Id.*

This is the unintended, and largely unanticipated result of *Glossip v. Gross*: extremely painful execution methods that would never have been permissible under *In re Kemmler,* 136 U.S. 436, 447 (1890) and *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) are now deemed "not unconstitutional," if inmates are unable to carry their burden on the alternative requirement. Undoubtedly, this court never intended to condone the intentional infliction of severe pain as constitutional—yet through (mis)application of *Glossip* that has now occurred as courts focus exclusively on alternatives and ignore all proof regarding suffering.

In this case, the Tennessee Supreme Court found it irrelevant to their decision whether the midazolam-based, three-drug protocol causes severe pain. *Abdur'Rahman v. Parker*, – S.W.3d –, 2018 WL 4858002, *1, 7, 13-15 (Tenn. Oct. 8, 2018). The substantive proof regarding the certainty of severe pain, mental anguish and needless suffering, presented by four experts—including the nations' leading researcher on midazolam, Dr. David Greenblatt—and from twelve eye-witnesses did not merit a single sentence in the Tennessee Supreme Court's opinion *Abdur'Rahman* at *1-15 (established by omission).[6] Instead, the Tennessee Supreme Court devoted its analysis to the *Glossip* "prerequisite" that the inmates carry their burden to plead and prove a feasible alternative. *Id.* at *1, 6-7, 9-15. The court found that the inmates failed to carry this burden—in large part based on technical Tennessee pleading requirements and discovery rules that prevented

[6] The court merely mentioned that they testified, but the substance of this testimony was not mentioned. *Abdur'Rahman* at *3

examination of the person responsible for purchasing pentobarbital. *Id.* For this reason, alone, the court held that "the Plaintiffs failed to establish that Tennessee's current three-drug lethal injection constitutes cruel and unusual punishment." *Id.* at *15.[7] Thus, "whether the lethal injection protocol creates a demonstrated risk of severe pain" was "pretermitted" and made moot. *Id.* at *14.

The proof that the Tennessee Supreme Court did not address, has been considered by Edmund Zagorski. While, under the (mis)application of *Glossip* it may be legally irrelevant that the three-drug protocol will cause him a "dreadful and grim" death lasting from 10 to 18 minutes, during which he will face the certainty of (1) pulmomary edema (drowning in his own fluids), (2) paralysis, suffocation and air hunger, and (3) excruciating pain from chemical burning—these realities are very relevant to him, and to other inmates who face such a death. That this painful and prolonged death was not "established" to be unconstitutional in no way alters the reality of the suffering it will inflict. And, it is the certainty of that extreme suffering that acted to coerce Mr. Zagorski to choose a less-awful death in the electric chair, in violation of his due process rights against such compulsion. *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *U.S. v. Jackson*, 390 U.S. 570, 581-82 (1968). *Simmons v. U.S.*, 390 U.S. 377, 394 (1968) *Garrity v. State of N.J.,* 385 U.S. 493, 498 (1967). It is that compulsion, which makes any purported waiver of his Eighth Amendment

[7] It might bear mention that a failure to prove something unconstitutional, does not establish that it is constitutional. Criminal defense attorneys are often reminded of this truth when they win an acquittal, which is (at least in Tennessee) rendered as a finding of "Not Guilty" not one of "Innocent."

rights involuntary and of no significance. *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Payne v. Arkansas*, 356 U.S. 560 (1958)

Mr. Zagorski's predicament is not unusual, and will become more prevalent as more courts adopt Tennessee's interpretation of *Glossip.* In the Eleventh Circuit, it is now acceptable to conduct a bifurcated trial that focuses solely on the alternative prong, and to decline to hear any proof regarding pain or suffering. *E.g. Price v. Dunn*, 2017 WL 1013302 (S.D. Ala. March 15, 2017) *aff'd Price v. Comm'r Alabama Dept. Corrections*, -- Fed.Appx., 2018 WL 4502035 (11th Cir. Sept. 19, 2018). Under such analysis *In re Kemmler, Wilkerson* and even *Graham v. Florida,* 560 U.S. 48, 59 (2010) are dead letters. Under this (mis)application of *Glossip,* the Eighth Amendment no longer "prohibits the imposition of inherently barbaric punishments under all circumstances". *Graham*, 560 U.S. at 59 (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)). Rather, barbaric punishments are fully acceptable unless inmates can find a willing seller of lethal injection drugs (or some other method of ending life).

It might need noting that since *Glossip* was decided no plaintiff, anywhere, has succeeded in satisfying the alternative requirement. Possibly, state and federal laws regulating the sale of Schedule II controlled substances (such as pentobarbital and sodium thiopental) play a role.[8] Perhaps, the desire of pharmacies that would sell such drugs to maintain anonymity and avoid public notice is significant.

[8] As criminal defense attorneys by trade, counsel for Mr. Zagorski are aware that reasonable people have some reticence about talking to complete strangers about conduct that could carry significant prison time.

McGehee v. Texas Dept. of Criminal Justice, *slip opinion*, 2018 WL 3996956, at *3 (S.D. Tex. Aug. 21, 2018) (noting that Texas has "acquired pentobarbital from compounding pharmacies that have attempted to keep their identities secret"). No doubt, it is due to this desire for anonymity that no less than fourteen states have adopted secrecy laws that protect the identity of drug suppliers. *Guardian News & Media LLC v. Ryan*, *slip opinion,* 2017 WL 4180324, at *7-8 (D.Az. September 21, 2017) (providing history of laws protecting drug suppliers from identification).

In any event, the inherent hope of *Glossip* that more humane methods of execution might be identified by death row inmates has proven to have been in vain. Instead, the tragic result of lower courts' (mis)application of this precedent has been a complete overturning of over one-hundred and forty years of precedent, and an abandonment of all protections against "inherently barbaric" punishments. *Graham*, 560 U.S. at 59; *see also In re Kemmler,* 136 U.S. at 447; *Wilkerson*, 99 U.S. at 136.

Review by this court is needed, so that *Glossip* can be correctly placed within the larger cannon of Eighth Amendment jurisprudence. What was, arguably, a wise and common-sense approach to "risks of substantial harm" has been misapplied to become a warrant for cruelty, and a justification for the abandonment of judicial review.

II. The court should grant certiorari to resolve the tension between *Stewart v. LaGrand*, *Glossip v. Gross*, and *Johnson v. Zerbst*.

Respondents and the district court are incorrect that *Stewart v. LaGrand*, 526 U.S. 115 (1999), prevents him from bringing an Eighth Amendment challenge

to being executed in Tennessee's electric chair. *LaGrand* only applies to voluntary waivers. Mr. Zagorski was unconstitutionally coerced to select death in the electric chair. Such a compelled waiver, aside from violating due process and the Fourteenth Amendment, does not comport with the rationale of *LaGrand*, which involved the voluntary choice to forego a constitutional AND pain-free method of execution (a lethal injection protocol involving an actual anesthetic, sodium thiopental), for an obviously more painful method of death—one that had already been declared unconstitutional—poison gas. *LaGrand*, 526 U.S. at 119; *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996) (finding California's use of lethal gas to be cruel and unusual); *see also LaGrand v. Stewart*, 133 F.3d 1253, 1263-64 (9th Cir. 1998) (history of LaGrand's choice).

This Court has set a "high standar[d] of proof for the waiver of constitutional rights" since at least 80 years ago, when it decided *Johnson v. Zerbst*, 304 U.S. 458 (1938). *See Maryland v. Shatzer*, 559 U.S. 98, 118 (2010) (Thomas, J., concurring) (alteration in original). A waiver of constitutional rights "cannot be presumed." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018) (First Amendment context) (citing *Zerbst*, 304 U.S. at 464).[9] Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting Zerbst, 304 U.S. at 464). Relinquishment

[9] Indeed, this Court has created a presumption *against* finding that a constitutional right has been waived in some contexts. *See, e.g.*, *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (once an arrestee asserts Fifth Amendment right to counsel during custodial interrogation, later waiver is presumed involuntary).

of constitutional rights must be "voluntary, knowing, and intelligent." *Montejo v. Louisiana*, 556 U.S. 778, 786–88 (2009) (citations omitted). This Court has "described a waiver of counsel as intelligent when the defendant 'knows what he is doing and his choice is made with eyes open.'" *Iowa v. Tovar*, 541 U.S. 77, 87–88 (2004) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). The *Zerbst* inquiry takes into account the totality of the circumstances surrounding the waiver—including [in the *Miranda* context] any improper pressures by police." *Shatzer*, 559 U.S. at 118 (Thomas, J., concurring) (citing *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)).

Mr. Zagorski did not waive his right to raise an Eighth Amendment challenge to Tennessee's electric chair. His election form stating his preference to be electrocuted instead of poisoned explicitly stated that he was not waiving his right to challenge the constitutionality of electrocution. As a result, he cannot be said to have waived his Eighth Amendment right in a manner that was "voluntary, knowing, or intelligent." To the contrary, he knew "what he [was] doing" and made his choice "with eyes open" when he stated his intention to challenge the constitutionality of Tennessee's electric chair.

The totality of the circumstances shows that Mr. Zagorski was coerced into "choosing" to die by electrocution. The State of Tennessee has thwarted each effort he has made to challenge the constitutionality of Tennessee's electrocution *and* its midazolam-based execution protocol. In 2014, he attempted to challenge the constitutionality of the electric chair, but his claim was deemed not yet ripe. *West v.*

Schofield, 468 S.W.3d 482, 485 (Tenn. 2015). While waiting for the Tennessee Supreme Court to rule on his challenge to Tennessee's midazolam-based lethal injection protocol, on August 30, 2018, Mr. Zagorski informed the Department of Corrections in a signed affidavit that (1) he would not elect a method of execution as required by state statute until the Tennessee Supreme Court ruled on his challenge to Tennessee's midazolam-based lethal injection protocol, and (2) given the opportunity, he intended to "challenge electrocution as unconstitutional." On October 8, 2018, the Tennessee Supreme Court rendered its decision in Mr. Zagorski's lethal injection challenge—just three days before his scheduled execution. Within hours, Mr. Zagorski informed Respondents of his wish to elect to be executed by electrocution rather than by Tennessee's midazolam-based execution protocol. After Tennessee prison officials refused to honor that request, he filed suit, and the district court enjoined the State from executing him by lethal injection. On October 24, 2018, the State then moved the district court to enter a permanent injunction requiring it not to execute him by lethal injection. On October 26, 2018, two days after his challenge to Tennessee's electric chair became ripe, Mr. Zagorski filed suit, as he had made clear he would.

Mr. Zagorski has also made vigorous efforts to challenge Tennessee's midazolam-based lethal injection protocol, to no avail. The State hid its change from its previous pain-free protocol (pentobarbital) from Mr. Zagorski's counsel until January 8, 2018, when it issued an amended protocol with the midazolam-based three-drug protocol listed as an alternate to its previous pentobarbital protocol. Just

before releasing this protocol, the State asked the Tennessee Supreme Court for expedited execution dates for several inmates, in what can only be characterized as gamesmanship intended to make it difficult for inmates to have sufficient time to challenge the new protocol. On February 20, 2018, within five weeks of the release of the January 2018 protocol, Mr. Zagorski and other inmates sued the State of Tennessee, requesting that the court declare three-drug, midazolam-based protocol. The plaintiffs submitted that Tennessee's other option, a single-drug protocol using pentobarbital satisfied the *Glossip* alternative requirement. Prior to trial, counsel for the State, in open court, refused to disavow the intent or ability to use the single-drug protocol. At the State's urging, the trial court drastically limited the inmates' discovery into the availability of pentobarbital to the State by misconstruing state law, which fundamentally impaired the inmates' ability to prove availability of an alternative method of execution under *Glossip*. *See Zagorski v. Parker*, No. 18-6238, 2018 WL 4900813, at #2 (Oct. 11, 2018) ("When the prisoners tasked with asking the State to kill them another way are denied by the State information crucial to establishing the availability of that other means of killing, a grotesque requirement has become Kafkaesque as well.").

Then, on July 5, 2018, four days before trial, in what can only be temperately described as a cynical act of gamesmanship, the State amended its protocol to remove the plaintiffs' chosen alternative. This gambit worked, and the State prevailed—not on the merits of their chosen protocol (which, for all intents and

purposes they made no effort to defend)—but through their last-minute removal of a feasible and readily implemented alternative.

Given this series of events, Mr. Zagorski was coerced into electing to die by electrocution, which neither he nor other Tennessee death-row inmates have ever been allowed to challenge – and a method which this Court was poised to rule unconstitutional in *Bryan*. This was not a valid waiver of his Eighth Amendment rights. *LaGrand* does not prevent him from challenging electrocution in this context.

In our post-*Glossip* world, a very painful method of lethal injection appears to be immune from challenge unless inmates do what Zagorski was unable to do given the extreme and unfair restrictions placed upon him by the state court, and find a willing supplier of more benign lethal injection chemicals. Thus, a "choice" to select a (hopefully) less-painful method of execution (such as the electric chair) does not presuppose that either the preferred method or the avoided method (midazolam protocol) do not involve severe pain, mental anguish, and needless suffering.

At the time of *LaGrand*, prior to the comparative harm and alternative revolution of *Glossip* and *Baze*, courts still applied *In re Kemmler*, 136 U.S. 436 (1890), *Wilkerson v. Utah*, 99 U.S. 130 (1878), and even *Graham v. Florida*, 560 U.S. 48 (2010) to evaluate punishments in a categorical and objective manner.[10] At the time of *LaGrand*, courts were only asked to consider whether a particular

[10] To be clear, Mr. Zagorski believes that *In re Kemmler, Wilkerson*, and *Graham* are all still good law and controlling authority. He believes that *Baze* made clear that an inmate's being exposed to the pain and suffering of a paralytic and potassium chloride, would violate the Eighth Amendment. *Baze*, 553 U.S. at 53.

punishment was cruel and unusual. Now, post *Glossip*, the same method of punishment may be challenged *ad infinitum* in a series of comparative harm cases, as inmates (ideally from their perspective) become better at finding purveyors of less risky and less painful methods of execution.

In this ever-shifting world, a coerced "waiver" cannot pretermit a valid constitutional challenge to the electric chair. *LaGrand* is from a different time, and from different facts, and does not apply here.

CONCLUSION

WHEREFORE, the petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari, and accompanying appendix, were served upon counsel for Respondent, Jennifer Smith, Assistant Solicitor General, 425 Fifth Avenue North, Nashville, Tennessee, 37203, via email and United States Mail, this 1st day of November, 2018.

/s/ Kelley J. Henry
Kelley J. Henry