CAPITAL CASE
EXECUTION SCHEDULED FOR DECEMBER 6, 2018, AT 7:00 P.M., CST

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID EARL MILLER, STEPHEN MICHAEL WEST, and NICHOLAS TODD SUTTON,

Petitioners,

v.

TONY PARKER, in his official capacity as Commissioner, Tennessee Department of Corrections, TONY MAYS, in his official capacity as Warden, Riverbend Maximum Security Institution,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION

PETITION FOR WRIT OF CERTIORARI

Stephen M. Kissinger
Asst. Federal Community Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
Phone: (865) 637-7979
Facsimile: (865) 637-7999
Stephen_Kissinger@fd.org

Counsel of Record for Petitioners Miller, West and Sutton

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether under *Glossip v. Gross,* 135 S. Ct. 2726 (2015), inmates raising a facial challenge to one of two methods contained in a State's lethal injection protocol must present evidence of the availability of the alternate method independent from any evidence within the State's possession.

II. Whether, under *Glossip, supra,* and the Due Process Clause of the Fourteenth Amendment, the state court may refuse to consider compelling, uncontested evidence of a known and available alternative because the alternative was not pled in a facial challenge to a prior lethal injection protocol.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

OPINIONS BELOW

The majority and dissenting opinions of the Tennessee Supreme Court are published at *Abdur'Rahman v. Parker*, No. M2018-01385-SC-RDO-CV, ___ S.W.3d ___, 2018 WL 4858002 (Tenn. Oct. 8, 2018), and are attached hereto as Appendix A, 1a-21a. The opinion of the trial court was entered on July 26, 2018, is unpublished and is attached hereto as Appendix B, 22a-73a. *Abdur'Rahman v. Parker*, Davidson County Chancery Court No. 18-183-III.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on October 8, 2018, attached hereto as Appendix C, 74a. This petition is timely filed pursuant to Supreme Court Rule 30. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

In *Glossip,* this Court held that when raising a method of execution challenge, the condemned inmate is required to "plead and prove a known and available alternative" that substantially reduces the risk of pain and suffering. *Glossip v. Gross,* 135 S. Ct. 2726, 2739 (2015). In this case, Plaintiffs did just that. Yet the state court imposed arbitrary evidentiary and procedural restrictions on consideration of the proof.

Regarding a known and available one-drug alternative, the state court faulted Plaintiffs for proving its case by eliciting the evidence from defense witnesses and defense records. But the burden to plead and prove does not mean the Plaintiffs may not rely on evidence in the custody of defense witnesses. In a court of law, neither side "owns" the evidence. To hold otherwise thwarts the truth-finding process, as occurred in this case.

As for Plaintiffs' proof of a known and available two-drug alternative, the state court denied Plaintiffs due process of law when it refused to consider the supporting evidence because it had not been pled in Plaintiffs' facial challenge to a prior protocol. Plaintiffs' challenge to Tennessee's method of execution was purely to the face of the protocol. Four days before the trial began, the Defendants issued a new protocol. Within hours of learning of the new protocol, Plaintiffs advised the Defendants of an additional known and available alternative, a two-drug protocol. At the trial, Plaintiffs offered, without objection, evidence of the two-drug alternative. The Defendants even acknowledged they could apply the two-drug

protocol. The state court refused to consider the lay and expert proof on the two-drug alternative, faulting Plaintiffs for not anticipating the new protocol.

Glossip does not support this outcome, where Plaintiffs present two known and available alternatives and the state court arbitrarily refuses to consider the proof. Due process demands more. This Court should grant review to clarify the *Glossip* standard for when and how a condemned inmate must establish the known and available alternative and to affirm that even inmates challenging the method of their execution are entitled to due process.

Further, a case presenting closely related issues is pending this Court's merits review. In *Bucklew v. Precythe*, 138 S. Ct. 1706 (2018), this Court will address the manner in which a plaintiff may meet the burden of proof under *Glossip's* available alternative pleading requirement. This case should likewise be considered for full review because it is a perfect vehicle to establish the workability of the *Glossip* standard.

STATEMENT OF CASE

Events leading up to trial.

In January 2018, Defendant Tony Mays, Commissioner of the Department of Correction, released a new lethal injection manual that provided for two different ways of carrying out lethal injection: (1) a single-drug protocol using pentobarbital, a chemical associated with achieving a peaceful assisted suicide and numerous uneventful judicial executions; and (2) a three-drug protocol sequentially using midazolam, vecuronium bromide, and potassium chloride, a chemical combination

associated with the condemned's prolonged gasps, coughs, sputters, grimaces, clenches his fists, and reactions.

One month after the January 8th Protocol was announced, Plaintiffs filed a facial challenge *only* to Tennessee's January 8, 2018 lethal injection protocol.[1] A facial challenge is a challenge to the protocol "as written" and the "Protocol must be assessed *on its face* ...." *West v. Schofield*, 460 S.W.3d 113, 126-27 (Tenn. 2015). A facial challenge does not address how the protocol may be applied "hypothetically ... on some uncertain date in the future ...." *Id.* at 126. "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008). Plaintiffs alleged the single-drug pentobarbital option contained in the January 8th Protocol was a known and available alternative to the midazolam-based three-drug option and was also contained on the face of the protocol.

The state court set execution dates for two other inmates in August and October respectively, and scheduled Miller's date for December 6, 2018. *State v. Miller*, No. E1982-00075-SC-DDT-DD (Tenn. Jul. 10, 2018).[2]

During the several weeks before the trial began, the state court inquired of the Defendants whether they would use the single-drug or the three-drug option for

---

[1] Thirty-three death-sentenced inmates filed suit. *See Abdur'Rahman v. Parker*, 2018 WL 4858002, at *2 fn.6 (Appx. A at 4a).

[2] Plaintiff Irick was executed on August 9, 2018; Plaintiff Zagorski, November 1, 2018, after choosing electrocution to avoid the pain and suffering of Tennessee's

the scheduled executions. The Defendants generally declined to provide a direct answer. While Defendants stated they had difficulty sourcing the drugs, they maintained the search was ongoing. Defense counsel represented the State did not currently have the chemicals to perform the single-drug protocol but that "doesn't mean that they can't identify other sources." (Tr. XX, 24). Defense counsel later advised the state court, "[w]e continue to look for a source of both drugs. And we anticipate having some drug on August the 9th." (Tr. XXII, 22).

On May 21, 2018, Defendants presented to the state court affidavits of Defendants Parker and Mays. Defendant Parker's affidavit stated he approved the new January 8th Protocol because "the drugs in TDOC's previous procedures, are unavailable to TDOC for the purpose of carrying out executions by lethal injection." (R. V, 670). Parker did not explain why the new protocol retained the one-drug pentobarbital protocol as the first option if the drugs were unavailable. The state court refused to permit a deposition of individuals with first-hand knowledge of the availability of execution drugs.

On July 5, 2018, at 1:06 p.m.—the day Plaintiffs' trial brief was due and four calendar days before trial—Defendants filed notice of a new execution protocol (hereinafter "July 5th Protocol"). The July 5th Protocol deleted the one-drug option and retained as the sole method of execution the three-drug option. (*See* R. XII, 1589). In other words, Defendants deleted the method of execution designated by Plaintiffs as the available alternative to the three-drug option in the January 8th

---

three-drug protocol.

Protocol. Only seven hours later, Plaintiffs filed their trial brief. The brief informed the state court and Defendants of Plaintiffs' intent to present evidence of other available alternative methods of execution that significantly reduce the risk of pain and suffering, including the removal of the paralytic (vecuronium bromide) from the three-drug midazolam protocol. (R. XIII, 1712, 1747).

The trial proof.

The state court analysis of the evidence focused solely on whether the Plaintiffs established a known and available alternative to the Warden's chosen method of execution that reduces the risk of pain and suffering in comparison to the Warden's chosen method.

The warden's chosen method of execution will cause pain and suffering that lasts an average of 14 and up to 18 minutes.

The state court accredited Plaintiff's expert and lay witness testimony that the three-drug protocol will cause significant pain and suffering that lasts for an average of 14 and up to 18 minutes. Defendants issued the new July 5th three-drug protocol despite having been warned of its dangers. They were warned by their drug supplier of the risks of using midazolam:

> 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.** 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.

(Exh. 114, Exh. Vol. 11, 1628) (emphasis added).

Defendants nonetheless chose to proceed with the three-drug protocol.

The state court credited the testimony of Plaintiffs' expert witnesses over those presented by Defendants. *Compare* R. XVI, 2251 ("The Inmates presented the testimony of four well-qualified and [e]minent experts"); *with id.* at n.7 ("The Defendants' two experts, while qualified, did not have the research knowledge and [e]minent publications that Plaintiffs' experts did."). The experts' testimony establishes that during an execution, the inmate will experience the sensation of drowning as his lungs fill with fluid. Once the paralytic agent is introduced, the inmate experiences the terror and panic of involuntary paralysis and an inability to breathe. Once the potassium chloride is introduced, the inmate experiences a severe burning pain as the agent makes its way to his heart. He experiences the pain of a heart attack and eventually expires. The state court found: (1) this process takes on average of 14 and up to 18 minutes; (2) inmates may feel pain from the second and third drugs; (3) midazolam does not elicit strong analgesic effects; and (4) inmates executed under midazolam based protocols face a certainty of "dreadful and grim" pain.

Midazolam does not anesthetize.

The first drug in Tennessee's lethal injection protocol, midazolam, has no analgesic or pain-relieving properties. (Tr. XLVI, 2148-54). It is incapable of inducing anesthesia, regardless of dose. Midazolam is an anxiolytic benzodiazepine that produces sedation by assisting GABA in activating what are known as GABA receptors. The most relaxed state midazolam is capable of producing in a person is deep sedation (or deep sleep). People in a state of deep sedation still feel pain. (Tr. XXIV, 84-86).

The large dose of midazolam will cause the inmate's lungs to fill with fluid.

Midazolam for injection must have a pH of 3 to stay in solution. In comparison, the normal pH of blood is approximately 7.4; the pH of hydrochloric acid is 1. Injectable midazolam, therefore, is acidic. Tennessee's three-drug protocol requires the injection of a large volume—500 ml—of midazolam which cannot be immediately buffered by blood. The solution will be acidic when it reaches an inmates' lungs, scouring the lung tissue and causing small amounts of fluid to enter with every heartbeat. The more fluid accumulates the harder the lungs have to work and breathing becomes difficult and labored. As an inmate lays strapped to the gurney with a system of restraints preventing all but the slightest movements, fluid will accumulate in his lungs, producing a sensation similar to drowning or suffocation. In more than eighty-five percent of midazolam-based executions, inmates have experienced pulmonary edema. (Tr. XXXIX, 1390-91). Accumulation of fluid in the lungs will cause an inmate to fight harder to breathe. He may gulp, gasp, hack and cough to try to clear the fluid. He may move. He may try to rise up against the restraints. He may express tears.[3]

Vecuronium bromide paralyzes the inmate making him unable to move or breathe.

Executioners will then administer vecuronium bromide, a paralytic drug. As it reaches their lungs, inmates will eventually be unable to breathe, unable to cry

---

[3] Plaintiffs introduced eyewitness testimony about the physical responses of inmates executed under a midazolam-based three-drug protocol. The state court found credible the lay witness accounts of inmates.

out, unable to move. They will feel as though they have been buried alive. Under the protocol, this pain and suffering continues for minutes, not seconds.

Plaintiffs' first expert witness, Dr. Stevens, testified about two ways the use of vecuronium bromide in the three-drug midazolam protocol increases pain and suffering. First, he described scientific studies where people reported feeling like they were dead after being given paralytic drugs; a feeling he described as "horrific." (Tr. XXV, 156). This horror will increase excitation of neurons in the brain, making the already ineffective midazolam even more ineffective. (Tr. XXV, 156, 157, 161). ("[W]hen the vecuronium is then given, . . . the paralysis, the fear, suffocation . . . will cause increased excitation . . . causing less sedation as midazolam could provide.") (Tr. XXV, 161).

Plaintiffs' second witness, Dr. Greenblatt, testified vecuronium bromide is a "neuromuscular junction blocking agent" and described the pain caused by its use: "basically, you're suffocating and you want to breathe, but you can't because you can't work your muscles." (Tr. XXVIII, 507, 510-11). The use of vecuronium bromide does not hasten death and there is not "any benefit" to including it in the three-drug midazolam protocol. (Tr. XXVIII, 542-43).

Plaintiffs' third witness, Dr. Lubarsky, testified vecuronium bromide does nothing to protect an inmate from pain. It increases the risk the inmate will feel pain. (Tr. XLII, 1821). He confirmed Dr. Stevens' opinion that pain and suffering caused by vecuronium bromide will stimulate the excitatory neurons. It will initiate

the fight or flight response and a surge of adrenaline, and overcome any sedative state midazolam produced. (Tr. XLII, 1775). Dr. Lubarsky described the pain:

> A: Basically, it's like burying someone alive. They lose the ability to communicate their distress. They lose the ability to breath[e]. They still have the air hunger. It's as if you're basically locked in a box and someone now has basically covered your mouth and you can't take a breath and your lungs and your brain are screaming.
>
> I try to think of how to describe this, but I can only harken back to what I most remember, the first time I remember being dunked under water for too long and how terrifying and how desperate we were to reach the surface. I'm sure everybody remembers that. I remember that. And that's two seconds, not minutes.

(Tr. XLII, 1774).

Potassium chloride burns and causes heart attack.

After two syringes of vecuronium bromide and one syringe of saline are administered the executioners will push a massive volume of highly concentrated solution of potassium chloride into the inmate's veins. The inmate will feel as if he is being burnt alive. The pain will continue as the potassium chloride courses through the veins, reaches the heart, and induces cardiac arrest. The inmate will feel the pain of a heart attack as the potassium chloride depolarizes the muscles of the heart.

The state court found that after an average of almost 14 minutes and as long as 18 minutes, the inmate will be declared dead. (R. XVI, 2255).[4]

---

[4] Plaintiffs introduced timelines of midazolam executions carried out in other states.

Plaintiffs proposed the one-drug pentobarbital option, contained in the protocol, as the alternative to the three-drug option.

Defendants did not dispute that the one-drug pentobarbital protocol significantly reduces the substantial risk of serious pain posed by the three-drug protocol.

Plaintiff demonstrated availability of the one-drug protocol.

Plaintiffs offered several records that demonstrated pentobarbital is available. The records were admitted for the truth of the matters asserted therein. (Tr. XXXVII, 1334). The state court did not accept the plain language of the notes.

The Department of Correction relied upon a person referred to below as the "drug procurer." The drug procurer searched for pentobarbital after the state supreme court upheld the constitutionality of the one-drug protocol in March of 2017. *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017). The drug procurer made handwritten notes documenting his search. (Exh. 105, Exh. Vol. 11, 1501-14). The notes reflect the exact amount of pentobarbital required for one Tennessee execution, ten grams. An arrow is drawn to the cost for that amount, the sum of $24,000. Below that, the amount charged by the unknown compounding pharmacist to compound pentobarbital is $3,500. Next in the note is a redaction where the amount of pentobarbital which could be purchased at one time should have appeared. Further on, the time until the pentobarbital was available is also redacted.

Text messages show the drug procurer knew how to obtain pentobarbital. On page 38 of Exhibit 105, the drug procurer lists a (redacted) source of pentobarbital.

(Exh. Vol. 11, 1505). On Page 39, the drug procurer indicates a source of pentobarbital could ship the drug on March 1st. (*Id.* at 1506). The notes also reflect the drug procurer learned he could obtain the drugs from veterinarians because the drug is widely used for animal euthanasia. The drug procurer received instructions how to accomplish this (the instructions are redacted).

The drug procurer later created a PowerPoint summarizing his findings. It shows the availability of pentobarbital. It shows the following: (1) not all pharmacies contacted actually sold pentobarbital (Tr. XXXVII, 1346-47); (2) one-third of drug suppliers contacted were willing to supply it (witness without personal knowledge agrees the information is accurate but offers a contrary interpretation) (Tr. XXXVII, 1349); and, (3) pentobarbital could be obtained if Defendants applied for licensing (Tr. XXXVII, 1350-51). The documents were admitted at trial for the truth of the assertions contained therein. (Tr. XXXVII, 1334-35).

Plaintiffs presented other evidence establishing: (1) Defendants have a physician willing to write a prescription for pentobarbital; (2) Defendants have a pharmacy and pharmacist at the DeBerry Special Needs Facility (adjacent to Riverbend) with the proper licensing to obtain pentobarbital; (3) Defendants have two contracts with two different compounding pharmacists to compound pentobarbital for executions; (4) other States have sources of pentobarbital and conduct executions using pentobarbital; (5) Defendants retained the one-drug pentobarbital method in Tennessee's January 8th Protocol; and (6) Defendants' drug source stated vecuronium bromide was unavailable but Defendants

subsequently obtained it. Defendants also obtained drugs that are subject to the same distribution controls as pentobarbital.[5]

Individuals with first hand knowledge of the search for available drugs (namely the drug procurer) were barred from testifying. The documents created by the drug procurer, the only person with firsthand knowledge of availability, established the availability of pentobarbital. This is particularly so in light of the additional facts plaintiff established: that there is a doctor who will write the prescription; that there is a prison pharmacy; that there are contracts with two different compounding pharmacies to compound the pentobarbital; and, that the one-drug protocol was an option in the January 8th Protocol.

The State instead presented the testimony of the Commissioner and the Deputy Commissioner who admitted both that the task for finding the drugs had been delegated to the drug procurer and that they had no first-hand knowledge. (Tr. XXXVI, 1145; Tr. XXXVII, 1336; Tr. XL, 1605, 1619-20). Nonetheless, and despite the records generated by the drug procurer showing pentobarbital is available, they claimed pentobarbital is unavailable.

Plaintiffs' proposed two-drug alternative significantly reduces the substantial risk of serious pain from the three-drug midazolam protocol.

They credited expert testimony established that the administration of vecuronium bromide causes severe terror and pain akin to drowning or being buried

---

[5] Defendants' counsel conceded to the Tennessee Supreme Court that Plaintiffs are not at fault for any actions of anti-death penalty advocates. In other words, Plaintiffs should not be burdened based on the actions of others.

alive. Moreover, the proposed two-drug alternative requires no more than removing the paralytic agent from the existing protocol. Expert testimony established this would significantly reduce the pain and suffering the inmate experiences. And, defense witness Parker agreed the paralytic is unnecessary to carry out the execution and could easily be removed. (Tr. XXXVII, 1315-16).

Dr. Stevens testified:

> Q: From a pharmacological perspective and to a reasonable degree of scientific certainty, will vecuronium bromide do anything to expedite the inmate's death or make it less painful?
>
> A: No, it wouldn't.
>
> Q: From a pharmacological perspective and to a reasonable degree of scientific certainty, would a two-drug protocol involving just midazolam and potassium chloride, but removing the three-minute interlude with vecuronium, be less painful and cause less suffering than the present three-drug protocol?
>
> A: It would in the sense of death comes sooner.

(Tr. XXV, 162-63)

Similarly, Dr. Greenblatt, testified the use of vecuronium does not hasten death and he does not "see any benefit" in its use. (Tr. XXVIII, 542-43). Finally, Dr. Lubarsky testified vecuronium bromide does nothing to protect an inmate from pain and actually increases the risk the inmate will feel pain. (Tr. XLII, 1821).

Plaintiffs' unimpeached and unrebutted expert testimony establishes: the use of vecuronium bromide causes horrific pain and suffering; vecuronium bromide is not needed to cause Plaintiffs' deaths; and, the third drug, potassium chloride, causes the swift cessation of cardiac function and death. The administration of vecuronium bromide also prolongs executions by a number of minutes and therefore

prolongs the duration of pain before death. Defendant Parker, the official with discretion over how to carry out executions, testified that vecuronium bromide served no purpose and could be removed from the protocol. (Tr. XXXVII, 1315-16).

Plaintiffs demonstrated availability of the two-drug protocol.

Defendant Parker admitted vecuronium bromide is unnecessary to carry out executions and he can easily remove it from Tennessee's lethal injection protocol. (Tr. XXXVII, 1315-16). When Plaintiffs proposed the two-drug alternative method, counsel for Defendants responded, "It sounds like to me it's certainly something we'd do." (Tr. XLIII, 1937-38).

Trial Court Ruling.

The state court dismissed Plaintiffs' complaint solely on the basis that the availability of pentobarbital was not proven. Regarding the one-drug alternative, the state court faulted Plaintiffs for not calling their own witness to establish the availability of pentobarbital. (R. XVI, 2239) ("[U]nlike 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."). The state court said proving availability "is not an impossible burden;" Plaintiffs' experts were not retained to investigate sources of pentobarbital; and, Plaintiffs' experts were unable to provide any information about availability. (R. XVI, 2241). The state trial court concluded Plaintiffs had not met their burden, it denied Plaintiffs' claims and dismissed the lawsuit. (R. XVI, 2234, 2239, 2250, 2264). The state court held:

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

(R. XVI, 2232).

Regarding the two-drug alternative, the state court refused to consider the proof. The trial court reasoned the "potential cause of action was known or could have been known by Plaintiffs upon the filing of the lawsuit." (R. XV, 2138). The trial court also reasoned Defendants did not have notice. The trial court's ruling failed to acknowledge that: (1) Plaintiffs raised a facial challenge to the January 8th Protocol; (2) on July 5, 2018, the Defendants changed to a new protocol; and (3) on the same day, Plaintiffs gave notice of the two-drug alternative as a replacement for the one-drug option that Defendants removed from the face of the protocol. The state court faulted Plaintiffs for failing to anticipate the Defendants would change the protocol days before trial.

Although *Glossip* does not require plaintiffs to plead multiple alternative execution methods, the state court decided, "[t]his potential cause of action, was known or could have been known by the Plaintiffs upon the filing of the lawsuit[.]" (R. XV, 2138).

Tennessee Supreme Court Ruling.

Regarding the one-drug alternative, the Tennessee Supreme Court ruled, "The plaintiffs offered no direct proof as to availability of this alternative method of execution[,]" and did not offer expert proof on availability. *Abdur'Rahman*, 2018 WL 4858002, at *12 (Appx. A at 13a) ("All of the Plaintiffs' expert witnesses confirmed that they were not retained to identify a source for pentobarbital and that they had

no knowledge of where TDOC could obtain it."). The state supreme court also found that the records Plaintiffs introduced did not establish availability "now." *Id.* at *13 (Appx. A at 13a).

Regarding the two-drug protocol, the Tennessee Supreme Court affirmed the state trial court's refusal to consider the evidence. It found the July 5th Protocol was not different from the January 8th Protocol, even though it eliminated a constitutional method of carrying out lethal injection. The Tennessee Supreme Court found the January 8th Protocol established availability of pentobarbital "in theory" but that Plaintiffs could not rely upon the face of the protocol in their facial challenge to the protocol. *Abdur'Rahman*, 2018 WL 4858002, at *7 (Appx. A at 8a).

Tennessee Supreme Court Justice Lee dissented. *Id.* at *15-21 (Appx. A at 16a-21a). She noted Tennessee's "lethal injection protocol has been a moving target." *Id.* at *15 (Appx. A at 16a). She further opined Plaintiffs "faced a steep uphill battle" due in part to the "inconsistent and unworkable requirements imposed by *Glossip* ... [and] the State's evasiveness and last-minute decision about its last lethal injection protocol." *Id.* at *16 (Appx. A at 17a). She also noted Petitioners "reasonably assum[ed]" the state court could carry-out the one-drug protocol, *id.* at *17 (Appx. A at 18a), because it was contained in the manual setting forth the methods of lethal injection.

REASONS FOR GRANTING THE PETITION

I. *Glossip* does not hold that evidence of an available alternative must come from a specific source or a specific type of evidence.

While *Glossip* held that plaintiffs have the burden to plead and prove a known and available alternative, the state court's ruling adds an additional, novel requirement that the plaintiff must call its own witnesses to establish availability. This requirement cannot be based upon this Court's holding in *Glossip*. Nor can this evidentiary requirement be squared with traditional, well-established rules of evidence, proof, and procedure.

Plaintiffs offered substantial evidence that the one-drug protocol was a known and available alternative. This evidence came from records produced by the Defendants that showed availability. *See infra* pp. 11-13. The state court found Plaintiffs should have called their own independent expert witness to testify to these matters.

The state court grounded this conclusion in this Court's holding in *Glossip* that plaintiffs plead and prove an alternative execution method. This reasoning is plainly wrong and distorts the truth-finding function of a trial. A plaintiff may prove his case through presentation of his own witnesses as well as through cross-examination of defense witnesses. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 507-08 (1993) (citing *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981)). Neither party "owns" the evidence that is admissible at trial. *Glossip* did not overrule traditional methods of proof. This Court should grant certiorari to clarify that while *Glossip* clarified the burden to plead and prove,

Glossip did not create a rule that only one party may possess and rely upon evidence establishing or rebutting the cause of action.

Pending before this Court is a case with the identical issue: *Bucklew v. Precythe*, No. 17-A911 (Stay Grant); *Bucklew v. Precythe*, 138 S. Ct. 1706 (2018) (Mem.). In *Bucklew*, the Court is going to review the *Glossip* standard and how it is to be applied. More specifically, the Court will clarify confusion regarding the burden of proof and how the *Glossip* analysis is to be conducted. The lower court held that Bucklew did not carry his burden because he relied on evidence from the State's expert and did not present that evidence through his own expert. The following questions will be answered:

> [2] Must evidence comparing a State's proposed method of execution with an alternative proposed by an inmate be offered via a single witness, or should a court at summary judgment look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate?

Bucklew v. Precythe, No. 17-8151, 2018 WL 1757763, at *i (Mar. 15, 2018) (Petition for Writ of Certiorari); and,

> [4] Whether petitioner met his burden under *Glossip v. Gross*, 576 U.S. 2726 (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution.

Bucklew, 138 S. Ct. at 1706.

This Court's forthcoming merits determination on these issues will bear directly on the merits of Plaintiffs' case. The state trial court faulted Plaintiffs for not presenting proof through their own expert witnesses. The state trial court failed to engage with the evidence that Plaintiffs discovered from Defendants and

presented at the hearing; it discounted that evidence, characterizing it as Plaintiffs' "attempt[] to prove their case solely by discrediting State officials." (R. XVI, 2241). Plaintiffs' evidence, however, established on its face that Defendants knew of at least one source for pentobarbital. The proof was admitted into evidence for its truth. (Tr. XXXVII, 1334-35). Instead of accepting the proof for its truth, the state court rejected it because Plaintiffs did not call their own witness.

Glossip does not require the Plaintiff to present his own witness to establish availability. This Court's opinion in *Bucklew* will address the manner of proof regarding the availability and effectiveness of an alternative method of execution (*Glossip* second prong) and is relevant to the issues here. This Court should grant review to clarify *Glossip* does not overrule traditional methods of proof.[6]

II. Under *Glossip, supra,* and the Due Process Clause of the Fourteenth Amendment, the state court may not refuse to consider compelling, uncontested evidence of a known and available alternative for the reason that the alternative was not pled in a facial challenge to a prior lethal injection protocol.

The Plaintiffs filed a facial challenge to the January 8th Protocol. This means their challenge was limited to the face of the protocol. This understanding of the facial challenge is reflected in the state supreme court's treatment of method of execution challenges as well as in this Court's caselaw. A facial challenge is a challenge to the protocol "as written" and the "Protocol must be assessed *on its face*

---

[6] Concurrent with the filing of this Petition for Certiorari is a motion to stay Mr. Miller's execution so that it may be viewed in light of *Bucklew*. Mr. Miller moved the Tennessee Supreme Court for a stay in light of *Glossip* and the court rejected the motion, finding *Bucklew* to be an "as-applied challenge based on the petitioner's unique medical condition." *Abdur'Rahman*, 2018 WL 4858002, at *10 (Appx. A at

...." *West v. Schofield*, 460 S.W.3d at 126-27. A facial challenge does not address how the protocol may be applied "hypothetically ... on some uncertain date in the future ...." *Id.* at 126. "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 552 U.S. at 449-50 (quoting United States v. *Raines*, 362 U.S. 17, 22 (1960)). Plaintiffs alleged the single-drug pentobarbital option contained in the January 8th Protocol was a known and available alternative to the midazolam-based three-drug option also contained in the protocol.

In a facial challenge, plaintiffs are required to raise a challenge to the face of the protocol and *only* that. Indeed, Plaintiffs were denied an opportunity to amend their compliant with as-applied challenges. And the state trial court denied all discovery about how the execution would be carried out, reasoning Plaintiffs' challenge was to the face of the protocol. Here, when the January 8th Protocol was released, Plaintiffs filed suit alleging its three-drug midazolam option was likely to cause substantial pain and suffering and that the one-drug option was a known and available protocol that significantly reduced that substantial risk of harm. The facial nature of the challenge is the basis for the state court's tradition of denying discovery of various aspects of how the protocol would be carried out and by whom. *West v. Schofield*, 460 S.W.3d at 126. In this case, Plaintiffs attempted to learn which method of execution the warden would use for their executions. The

---

11a).

Defendants' refrain to that question was that they were not required to disclose this information in light of *Glossip*. In light of the nature of the facial challenge, the trial court denied discovery. (Tr. XX, 20-21, 25; R. V, 661-71; R. VI, 739-45a; R. XIII, 1752-53).

Given the facial nature of the challenge, and given the state court's admonishments that a facial challenge concerns only the four corners of the document and does not concern hypothetical facts, Plaintiffs were entitled to rely upon the Protocol's inclusion of the one-drug protocol as signifying the State would be able to carry out that method.

However, on the eve of trial, the State released a new protocol that abandoned the one-drug protocol. The face of the protocol drastically changed. Plaintiffs immediately alleged an additional, and then presented proof of, known and available alternative of removing the paralytic agent. The state court refused to consider the evidence of the two-drug alternative, even though the Defendants testified it was feasible for them to implement.

The state court found Plaintiffs should have known the one-drug protocol was not feasible based upon defense representations. However, Plaintiffs' lawsuit was against the Protocol itself. The state supreme court has denied any discovery that reaches behind the protocol itself. *West v. Schofield*, 460 S.W.3d at 126. This Court has likewise explained that a facial challenge is limited to the four corners of the document.

Yet in this case, Plaintiffs were required to ignore the Protocol, anticipate the Defendants would not be able to carry it out, and anticipate that they would change the Protocol right before trial began. *Glossip* cannot be read to eliminate the distinction between facial and as-applied challenges. Yet the state court held it was incumbent upon Plaintiffs to anticipate facts outside the four corners of the protocol and that *Glossip* required this outcome. The precise nature of a facial challenge is that the proof is devoid of hypothetical scenarios. Proof is limited to the four corners of the protocol. *See Raines,* 362 U.S. at 22 (in raising a facial challenge, one does not consider "hypothetical cases").

And, because Plaintiffs raised a facial challenge, they were denied discovery on whether Defendants did or did not have access to drugs needed to carry out the one-drug protocol. (R. VI, 739-45a; R. XIII, 1752-53). Nothing in *Glossip* does away with the traditional understanding of what a facial challenge is. Nor does *Glossip* require that Plaintiffs plead multiple alternative methods of execution. Yet here, the state court refused to consider evidence of a two-drug alternative because it was not initially pled in the facial challenge to the prior protocol along with the one-drug alternative alleged by Plaintiffs.

This outcome was not required by *Glossip.* And it is prohibited by the Due Process Clause of the Fourteenth Amendment. This denial violated the fundamental core of Due Process. *See Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708 (1884) ("Undoubtedly where life and liberty are involved, due process

requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard[.]").

"Two of the 'essential requirements of due process ... are notice and an opportunity to respond.'" *Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 153 (Tenn. 2013) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). "The purpose of notice is to allow the affected party to marshal a case against" the party whose actions amount to a deprivation of life, liberty or property. *Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys.*, 863 S.W.2d 45, 50 (Tenn. 1993). *See also Hagar*, 111 U.S. at 708. Plaintiffs were deprived of a meaningful opportunity to be heard on an alternative execution method after Defendants changed the protocol to remove the one-drug option that Plaintiff had plead as the available alternative method. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"). "The opportunity to be heard is an essential requisite of due process of law...." *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.4 (1996). The essence of this requirement is that "[t]he one who decides *must hear*." *Morgan v. United States*, 298 U.S. 468, 481 (1936) (emphasis added). One's opportunity to present evidence is meaningless unless the decision maker actually "listen[s] to what he has to say." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Due Process "requires that the [judge] actually consider the evidence and argument that a party presents." *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994)

(citing *Morgan*, 298 U.S. at 481). Plaintiffs were not heard on this issue, an outcome not required by *Glossip* and forbidden by our Constitution.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant the Petition for Writ of Certiorari.

Dated: November 15, 2018

Respectfully submitted,

Stephen M. Kissinger
Asst. Federal Community Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929
Phone: (865) 637-7979
Fax: (865) 637-7999
Stephen_Kissinger@fd.org

Counsel of Record for Petitioners
Miller, West, and Sutton