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Supreme Court of Tennessee,
AT NASHVILLE.

Abu-Ali ABDUR'RAHMAN et al.
v.
Tony PARKER et al.

No. M2018-01385-SC-RDO-CV
|
October 3, 2018 Session
|
FILED 10/08/2018

Synopsis

Background: Inmates who had been sentenced to death brought declaratory-judgment action against the state in which inmates asserted facial challenges to the constitutionality of the lethal-injection protocol. Following a trial, the Chancery Court, Davidson County, Ellen H. Lyle, Chancellor, dismissed the complaint. Inmates appealed.

Holdings: The Supreme Court, Jeffrey S. Bivens, C.J., held that:

expedited procedures did not deny inmates due process;

trial court did not abuse its discretion in refusing to allow inmates to add as-applied claims on behalf of inmates whose execution dates had been set; and

sufficient evidence supported finding that a one-drug lethal-injection protocol using a particular drug, which the only sufficiently pleaded alternative means of execution, was not available to the state with ordinary transactional effort.

Affirmed.

Sharon G. Lee, J., dissented and filed opinion

Appeal from the Chancery Court for Davidson County, No. 18-183-III, Ellen H. Lyle, Chancellor

Attorneys and Law Firms

Kelley J. Henry, Nashville, Tennessee, for the appellants, Abu-Ali Abdur'Rahman, Donnie Johnson, 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, Donald Middlebrooks, Farris Morris, Pervis Payne, Gerald Powers, William Glenn Rogers, Michael Sample, and Oscar Smith.

APPENDIX A

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Bradley A. MacLean, Nashville, Tennessee, for the appellant, Abu-Ali Abdur'Rahman.

Carl Eugene Shiles, Jr., and William J. Rieder, Chattanooga, Tennessee, for the appellant, Billy Ray Irick.

Kathleen Morris, Nashville, Tennessee, for the appellant, Lee Hall, a/k/a Leroy Hall.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; Jennifer L. Smith, Associate Solicitor General; Scott C. Sutherland, Deputy Attorney General; and Rob Mitchell and Charlotte M. Davis, Assistant Attorneys General, for the appellees, Tony Parker, Tony Mays, 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, and Jane/John Does 1-100.

Jeffrey S. Bivins, C.J., delivered the opinion of the Court, in which Cornelia A. Clark, Holly Kirby, and Roger A. Page, JJ., joined. Sharon G. Lee, J., filed a dissenting opinion.

OPINION

Jeffrey S. Bivins, C.J.

***1** This appeal represents the third time, each after a trial on the merits, that we have addressed the facial constitutionality of Tennessee's lethal injection protocol. In both prior appeals, we upheld the particular protocol at issue. In this most recent litigation, the death-sentenced inmates challenge Tennessee's current three-drug protocol, which calls for the administration of midazolam followed by vecuronium bromide and potassium chloride. The trial court dismissed the inmates' complaint for declaratory judgment. This Court, upon its own motion, assumed jurisdiction over the appeal. After our review of the record and applicable authority, we conclude that the inmates failed to carry their burden of showing availability of their proposed alternative method of execution—a one-drug protocol using pentobarbital—as required under current federal and Tennessee law. For this reason, we hold that the inmates failed to establish that the three-drug protocol constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution. This holding renders moot the majority of the other issues before us. The expedited appellate procedure has not denied the inmates due process, and they are not entitled to relief on their remaining issues. Accordingly, we affirm the trial court's judgment.

Historical and Procedural Background

Since 2000, lethal injection has been the default method of execution in Tennessee. *State v. Morris*, 24 S.W.3d 788, 797 (Tenn. 2000). [1] In 2004, this Court upheld the use of lethal injection as a constitutionally permissible means of imposing the death penalty. *See State v. Robinson*, 146 S.W.3d 469, 529 (Tenn. 2004) (appendix).

1 Tennessee adopted lethal injection as a method of execution on May 18, 1998. Tenn. Code Ann. § 40-23-114 (Supp. 1998). Two years later, on March 30, 2000, Tennessee adopted lethal injection as the default method of execution. Tenn. Code Ann. § 40-23-114 (Supp. 2000).

The next year, in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), *cert. denied*, 547 U.S. 1147, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006), we addressed for the first time the facial constitutionality of Tennessee's lethal injection protocol. The protocol at issue in that case used the following three drugs: sodium pentothal, pancuronium bromide, and

potassium chloride. *Id.* at 300. We held that the protocol: (1) did not violate the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution, (2) did not violate due process provisions under the United States Constitution or the Tennessee Constitution, (3) did not deny access to the courts in violation of the United States Constitution or the Tennessee Constitution, (4) did not violate the Uniform Administrative Procedures Act, (5) did not violate the Nonlivestock Animal Humane Death Act, (6) did not violate provisions governing the practice of medicine and provisions of healthcare services, and (7) did not violate the Drug Control Act or the Pharmacy Practice Act. *Id.* at 297-98.

A second round of litigation led to the same result in 2012, when the Tennessee Court of Appeals affirmed the trial court's ruling that the protocol, as revised in November 2010 to add checks for consciousness, did not violate the constitutional prohibitions against cruel and unusual punishment. *West v. Schofield*, 380 S.W.3d 105, 107 (Tenn. Ct. App. 2012), *perm. app. denied* (Tenn. 2012), *cert. denied*, 568 U.S. 1165, 133 S.Ct. 1247, 185 L.Ed.2d 192 (2013), and *cert. denied sub nom. Irick v. Schofield*, 569 U.S. 927, 133 S.Ct. 1808, 185 L.Ed.2d 827 (2013). This Court denied discretionary review. *West v. Schofield*, No. M2011-00791-SC-R11-SC (Tenn. Aug. 17, 2012) (Order).

Approximately one year later, on September 27, 2013, the Tennessee Department of Correction ("TDOC") adopted a new lethal injection protocol providing that inmates sentenced to death be executed by the injection of a lethal dose of a single drug, pentobarbital, which is a barbiturate. *See West v. Schofield*, 519 S.W.3d 550, 552 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, —— U.S. ——, 138 S.Ct. 476, 199 L.Ed.2d 364 (2017), and *cert. denied sub nom. Abdur'Rahman v. Parker*, —— U.S. ——, 138 S.Ct. 647, 199 L.Ed.2d 545 (2018), *reh'g denied*, —— U.S. ——, 138 S.Ct. 1183, 200 L.Ed.2d 328 (2018). [2] TDOC amended the protocol twice: in 2014 to specify that the lethal injection drug would be compounded pentobarbital rather than manufactured pentobarbital; and in 2015 to incorporate a contract between TDOC and a pharmacist for the provision of the compounded pentobarbital. *Id.* at 552-53.

2 Twenty-five of the appellants in this case were also appellants in that case.

***2** In *West v. Schofield*, filed on March 26, 2017, we addressed for the second time the facial constitutionality of Tennessee's lethal injection protocol. 519 S.W.3d 550. We held that the one-drug pentobarbital protocol: (1) did not violate the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution, (2) did not violate federal laws regulating the provision and use of certain prescription drugs, and (3) did not violate the Supremacy Clause of the United States Constitution. *Id.* at 552.

On January 8, 2018, TDOC adopted the current three-drug protocol as an alternative to the one-drug pentobarbital protocol. The three-drug protocol calls for the administration of 500 milligrams of midazolam (a sedative in the benzodiazepine family of drugs) followed by vecuronium bromide (a paralytic agent) and potassium chloride (a heart-stopping agent).

Three days after TDOC adopted the current three-drug protocol, the State filed in this Court a notice that the United States Supreme Court had denied certiorari in the two petitions seeking review of our recent decision in *West v. Schofield*. A week later, we *sua sponte* set an execution date of August 9, 2018, for Billy Ray Irick. *See State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Jan. 18, 2018) (Order) (citing Tenn. Sup. Ct. R. 12(4)(E)). [3] Mr. Irick was one of the appellants in this case. [4]

3 Rule 12(4)(E) provides: "Where the date set by the Court for execution has passed by reason of a stay or reprieve, this Court shall sua sponte set a new date of execution when the stay or reprieve is lifted or dissolved, and the State shall not be required to file a new motion to set an execution date." Tenn. Sup. Ct. R. 12(4)(E).

4 On July 30, 2018, while this appeal was pending in the Tennessee Court of Appeals, Mr. Irick filed in this Court a motion to vacate his execution date. On August 6, 2018, we denied the motion, ruling that Mr. Irick had not shown a likelihood of

success on the merits of this collateral litigation. *State v. Irick*, —— S.W.3d ——, —— (Tenn. 2018) (Order) (citing Tenn. Sup. Ct. R. 12(4)(E)). On August 9, 2018, the United States Supreme Court denied Mr. Irick's application for stay of execution of sentence of death. *Irick v. State*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2018 WL 3767151 (Aug. 9, 2018). Later that same day, Mr. Irick was executed using the three-drug protocol at issue in this appeal.

On February 15, 2018, the State filed in this Court a motion to set execution dates in eight capital cases before June 1, 2018, because of ongoing difficulty in obtaining the necessary lethal injection drugs. [5] Five days later, the thirty-three original Plaintiffs, [6] each death-sentenced inmates, initiated this declaratory judgment action against the Defendants, [7] asserting facial challenges to the constitutionality of the January 8, 2018 lethal injection protocol. Thereafter, responses were filed in this Court opposing the State's motion to set the expedited execution dates in the eight capital cases. We denied the State's motion on March 15, 2018. That same day, we *sua sponte* set execution dates for two other Plaintiffs: October 11, 2018, for Edmund Zagorski; and December 6, 2018, for David Earl Miller. *See State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn. Mar. 15, 2018) (Order) (citing Tenn. Sup. Ct. R. 12(4)(E)); *State v. Miller*, No. E1982-00075-SC-DDT-DD (Tenn. Mar. 15, 2018) (Order) (same).

5 The eight capital cases in which the motion was filed include the following: *Abu-Ali Abdur'Rahman*, No. M1988-00026-SC-DDT-DD; *Lee Hall*, No. E1997-00344-SC-DDT-DD; *Donnie Johnson*, No. M1987-00072-SC-DPE-DD; *David Earl Miller*, No. E1982-00075-SC-DDT-DD; *Nicholas Todd Sutton*, No. E2000-00712-SC-DPE-DD; *Stephen Michael West*, No. M1987-00130-SC-DPE-DD; *Charles Walton Wright*, No. M1985-00008-SC-DDT-DD; and *Edmund Zagorski*, No. M1996-00110-SC-DPE-DD.

6 The Plaintiffs include the following: Abu-Ali Abdur'Rahman, Lee Hall, a/k/a Leroy Hall, Billy Ray Irick (since executed on August 9, 2018), 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, and Oscar Smith.

7 The named Defendants include the following: 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, and John/Jane Does 1-100.

***3** Thereafter, the Plaintiffs filed a second amended complaint in this declaratory judgment action that identified the one-drug pentobarbital protocol as an alternative method of execution to the three-drug protocol. Two days later, on July 5, 2018, TDOC revised the lethal injection protocol to eliminate the one-drug protocol as an alternative so that the three-drug protocol became the exclusive method of execution by lethal injection in Tennessee.

A ten-day trial commenced on July 9, 2018. The Plaintiffs presented testimony from four experts: Craig Stevens, Ph.D., a neuropharmacologist; Dr. David Greenblatt, a clinical pharmacologist with particular expertise concerning midazolam; Dr. Mark Edgar, a pathologist; and Dr. David Lubarsky, an anesthesiologist. The Plaintiffs also introduced testimony from twelve attorneys who had witnessed their respective clients' executions in other states. The Plaintiffs made an oral motion at the close of their proof to amend the pleadings to assert removal of vecuronium bromide from the three-drug protocol as a known, feasible, and available alternative method of execution. After a hearing the next day, the trial court denied the Plaintiffs' motion. In addition, the trial court clarified that, by express consent of the parties, the pleadings were amended to limit the claims to facial challenges to the constitutionality of the July 5, 2018 revised protocol. *See* Tenn. R. Civ. P. 15.02 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Thereafter, the Defendants presented testimony from two experts and three TDOC officials.

On July 23, 2018, which also was the last day of testimony in the trial, TDOC timely provided notice to Mr. Irick that the July 5, 2018 revised protocol was to be used in his scheduled execution. *See State v. Irick*, No. M1987-00131-SC-

DPE-DD (Tenn. July 10, 2018) (Order) ("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 execution[ ] and of any decision by the Commissioner or TDOC to rely upon the Capital Punishment Enforcement Act."). [8]

8 Under the Capital Punishment Enforcement Act ("CPEA"), which became effective on July 1, 2014, "[t]he alternative method of execution [electrocution] shall be used if: (1) Lethal injection is held to be unconstitutional by a court of competent jurisdiction in the manner described in subsection (d); or (2) The commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department." Tenn. Code Ann. § 40-23-114(e) (2018). *See West v. Schofield*, 468 S.W.3d 482, 484-85 (Tenn. 2015) (dismissing as unripe the death-sentenced inmates' claims challenging the constitutionality of the CPEA). This Court filed similar orders setting forth the deadline to provide notice of the method of execution to two other Plaintiffs: no later than September 27, 2018, for Mr. Zagorski; and no later than November 21, 2018, for Mr. Miller. *See State v. Zagorski*, No. M1996-00110-DPE-DD (Tenn. July 10, 2018) (Order); *State v. Miller*, No. E1982-00075-SC-DDT-DD (Tenn. July 10, 2018) (Order).

On July 26, 2018, two days after closing arguments, the trial court dismissed the complaint for declaratory judgment. Regarding the claims that the protocol, on its face, amounts to cruel and unusual punishment, the trial court found that the Plaintiffs failed to prove an essential element—that an available alternative method of execution exists—and, on this basis alone, their claims must be dismissed. Though not necessary for its ruling, the trial court also found that the Plaintiffs failed to prove the other essential element—that the three-drug protocol creates a demonstrated risk of severe pain. In addition, the trial court denied relief as to the Plaintiffs' other constitutional claims that included substantive due process, procedural due process, and access to the courts.

***4** Four days after the trial court filed its judgment, twenty-nine Plaintiffs (all of the original Plaintiffs except Mr. Miller, Mr. Sutton, Mr. West, and Mr. McKay) filed a notice of appeal in the Tennessee Court of Appeals. Two weeks later, this Court, upon its own motion, assumed jurisdiction over this appeal. *See Abdur'Rahman v. Parker*, No. M2018-01385-SC-RDO-CV (Tenn. Aug. 13, 2018) (Order) (citing Tenn. Code Ann. § 16-3-201(d)(3)). [9] Nine days later, the appellate record was filed. The next day, the remaining four Plaintiffs filed their notice of appeal.

9 Section 16-3-201(d)(3) states that this Court "may, upon its own motion, when there is a compelling public interest, assume jurisdiction over an undecided case in which a notice of appeal ... is filed with an intermediate state appellate court." Tenn. Code Ann. § 16-3-201(d)(3).

Two weeks later, on September 6, 2018, the lead Plaintiffs and the other four Plaintiffs filed separate briefs. The lead Plaintiffs' brief contains a 174-page argument section that is three times the length allowed under the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 27(i). The lead Plaintiffs filed a "Motion to Waive Rule 27(i) Page Limit on Argument" and a "Motion to Waive Table of Authorities Required by Tenn. R. App. Pro. 27(a)(2)." We denied the motion to waive the table of authorities but granted an extension until September 12, 2018, to file it. *See Abdur'Rahman v. Parker*, No. M2018-01385-SC-RDO-CV (Tenn. Sept. 7, 2018) (Order). In the interests of justice given the accelerated time deadlines for briefing, we granted the motion to exceed the page limitation. *See id.*

Also on September 6, 2018, the lead Plaintiffs filed a "Motion to Consider Records Produced by Defendants as Part of the Procedures for Executing Billy Ray Irick after the Chancery Court Entered its Judgment." The Defendants filed a response in opposition and a motion asking the Court to strike all portions of the lead Plaintiffs' brief that refer to or rely on these matters. [10] We deferred ruling on these motions until after oral argument. *See Abdur'Rahman v. Parker*, No. M2018-01385-SC-RDO-CV (Tenn. Sept. 14, 2018) (Order). Following an accelerated briefing schedule, we heard oral argument in this appeal on October 3, 2018. [11]

10 The Defendants contended that these matters, which they described as "extra-record documents, media reports, and un-cross-examined expert opinions," are outside the scope of Tennessee Rule of Appellate Procedure 14(a) and this Court's appellate

jurisdiction. The Defendants asserted that the Plaintiffs "are attempting to use the alleged 'post-judgment facts' to bring before this Court an issue that was not before the trial court, namely an as-applied challenge to the protocol." Noting this Court's appellate jurisdiction, the Defendants submitted that this Court may not consider disputed evidence or a claim not litigated in the trial court. The Defendants further argued that the Plaintiffs' inclusion of the post-judgment material in their brief prior to seeking this Court's permission violated Rules 13(c), 14(c), and 27(a)(6) of the Tennessee Rules of Appellate Procedure.

11 The Court expresses its gratitude to the court reporter, the trial court, and the attorneys for their exemplary compliance with the expedited procedure in this appeal, which has allowed the Court to provide appellate review prior to Mr. Zagorski's October 11, 2018 execution date.

Analysis

Standard of Review

***5** Resolution of a constitutional claim after an evidentiary hearing generally presents a mixed question of law and fact. *West v. Schofield*, 519 S.W.3d at 563. The standard of review on appeal is de novo with a presumption of correctness extended only to the trial court's findings of fact. *Id.*

Cruel and Unusual Punishment

The Plaintiffs assert that Tennessee's current three-drug lethal injection protocol, on its face, violates the constitutional prohibitions against cruel and unusual punishment. They contend that midazolam, the first drug used in the protocol, fails to render a person insensate and that "there is a substantial, constitutionally unacceptable risk of suffocation from the administration of [the paralytic] and pain from the injection of potassium chloride." (alteration in original).

Summary of Law

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Article I, section 16 of the Tennessee Constitution contains similar language. Tenn. Const. art. I, § 16 ("That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

The United States Supreme Court addressed lethal injection as a method of execution for the first time in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion). *Baze* concerned a declaratory judgment action challenging Kentucky's lethal injection protocol. *Id.* at 41, 128 S.Ct. 1520. The *Baze* Court upheld Kentucky's protocol that used sodium thiopental followed by pancuronium bromide and potassium chloride. *Id.* at 45, 128 S.Ct. 1520. Tennessee's former protocol, which this Court upheld in 2005 in *Abdur'Rahman v. Bredesen*, 181 S.W.3d at 297, used this same combination of drugs. [12]

12 Sodium pentothal (a barbiturate) is also known as sodium thiopental. *See Workman v. Bredesen*, 486 F.3d 896, 917-18 (6th Cir. 2007) (vacating the temporary restraining order entered by the federal district court in a 23 U.S.C. § 1983 action challenging the constitutionality of Tennessee's former three-drug lethal injection protocol), *cert. denied*, 550 U.S. 930, 127 S.Ct. 2160, 167 L.Ed.2d 887 (2007).

Beginning with the settled principle that capital punishment is constitutional, the *Baze* plurality observed:

> It necessarily follows that there must be a means of carrying it out. Some 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. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

553 U.S. at 47, 128 S.Ct. 1520. The condemned prisoners in *Baze*, like the Plaintiffs in this case, argued that an unacceptable risk of suffering could be eliminated with an alternative one-drug protocol using a lethal dose of a barbiturate. *See id.* at 56, 128 S.Ct. 1520. *Baze* explained that an Eighth Amendment method-of-execution claim requires more than merely showing a slightly or marginally safer alternative:

> Permitting an Eighth Amendment violation to be established on such a showing would threaten 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. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, 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 death.

***6** *Id.* at 51, 128 S.Ct. 1520.

In summarizing the standard adopted on this issue, the *Baze* plurality instructed that an Eighth Amendment method-of-execution claim requires a condemned prisoner to establish *both* "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." *Id.* at 61, 128 S.Ct. 1520. Importantly, *Baze* made clear that a "State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." *Id.*

Seven years after *Baze*, the United States Supreme Court returned to the issue of Eighth Amendment challenges to lethal injection protocols in *Glossip v. Gross*, 576 U.S. ——, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015). *Glossip* concerned a 28 U.S.C. section 1983 action seeking to enjoin the use of midazolam as the first drug in Oklahoma's three-drug lethal injection protocol. The *Glossip* Court upheld Oklahoma's protocol that called for the administration of 500 milligrams of midazolam followed by a paralytic (pancuronium bromide, vecuronium bromide, or rocuronium bromide) and potassium chloride. *Id.*, 135 S.Ct. at 2734-35. Tennessee's current three-drug protocol uses the same combination of drugs, including the same amount of midazolam.

The *Glossip* Court recognized the practical difficulties in obtaining lethal injection drugs:

> *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.

Id., 135 S.Ct. at 2733. States, including Tennessee, then began using pentobarbital as an alternative barbiturate. *See id.* "Before long, however, pentobarbital also became unavailable. Anti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions." *Id.* (citation omitted). "Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs." *Id.*, 135 S.Ct. at 2734. Tennessee is among those states turning to midazolam.

As we observed recently in *West v. Schofield*, 519 S.W.3d at 563, *Glossip* "reiterated and emphasized" the *Baze* holding that an Eighth Amendment method-of-execution claim challenging a lethal injection protocol has two separate requirements. The *Glossip* Court affirmed the denial of injunctive relief for "two independent reasons." *Glossip*, 135 S.Ct. at 2731. "First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain." *Id.* (citing *Baze*, 553 U.S. at 61, 128 S.Ct. 1520). "Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution

protocol entails a substantial risk of severe pain." *Id.* The prisoners in *Glossip*, like the Plaintiffs in this case, suggested the use of a barbiturate (sodium thiopental or pentobarbital) in a single-drug protocol as an alternative method of execution. *See id.*, 135 S.Ct. at 2738. The record showed, however, that "Oklahoma [had] been unable to procure those drugs despite a good-faith effort to do so." *Id.*

***7** In addition to applying the *Glossip* standard to claims under the federal constitution, this Court has adopted the same two-pronged *Glossip* standard for method-of-execution claims under article I, section 16 of the Tennessee Constitution. *West v. Schofield*, 519 S.W.3d at 567-68. To prevail on a method-of-execution claim challenging Tennessee's lethal injection protocol as cruel and unusual punishment under the federal or state constitution, a death-sentenced inmate must establish both (1) that the protocol creates a demonstrated risk of severe pain and (2) that the risk is substantial compared to the known and available alternatives. Under the first requirement, the inmate must show that the protocol is "sure or very likely" to cause "objectively intolerable," "needless suffering." *Glossip*, 135 S.Ct. at 2737 (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520). Under the second requirement, concerning availability, the inmate "must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.' " *Id.* (alteration in original) (quoting *Baze*, 553 U.S. at 52, 128 S.Ct. 1520). Because both requirements must be met, failure to satisfy either essential element provides an independent reason for denying a method-of-execution claim. *See Glossip*, 135 S.Ct. at 2731. Viewing availability as a prerequisite for a method-of-execution claim comports with our recent interpretation of the *Glossip* standard. [13] *See West v. Schofield*, 519 S.W.3d at 565-66.

13 Interestingly, the dissent describes the *Glossip* standard as "perverse," "inconsistent," and "unworkable." Yet, the dissenting justice concurred in this Court's unanimous adoption of the *Glossip* standard just last year in *West v. Schofield*. *See West*, 519 S.W.3d at 550.

Preliminary Issues

Following the United States Supreme Court's lead in *Glossip*, we begin our analysis with the availability requirement. As a preliminary matter, we address several threshold issues and a related issue concerning the trial court's refusal to add as-applied claims.

First, the Plaintiffs argue that the availability requirement should not apply to them because of discovery disputes and "state secrecy laws related to executions." *See* Tenn. Code Ann. § 10-7-504(h)(1). [14] Acceptance of this argument would require this Court to establish new law not recognized in any federal court or in any other state. We decline to do so. In any event, the trial court properly balanced the propriety of discovery requests with the confidentiality provisions protecting the identity of those involved in executions. *See West v. Schofield*, 460 S.W.3d 113, 128 (Tenn. 2015) (setting forth balancing test).

14 This confidentiality provision in the Public Records Act provides in pertinent part: "Notwithstanding any other law to the contrary, those parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection." Tenn. Code Ann. § 10-7-504(h)(1) (Supp. 2018).

Second, the Plaintiffs assert that they were denied notice and an opportunity to be heard on availability of an alternative method of execution because TDOC revised the lethal injection protocol on the eve of trial. Four of the Plaintiffs—David Earl Miller, Nicholas Todd Sutton, Stephen Michael West, and Larry McKay—filed a motion to reconsider the trial court's order clarifying that, by express consent of the parties, the pleadings were amended to conform to the evidence limiting the claims to facial challenges to the constitutionality of the July 5, 2018 revised protocol. They contended that the revision to the protocol constituted a substantial change.

In denying the motion to reconsider, the trial court found that eliminating the alternative one-drug protocol was not a substantial change to the lethal injection protocol for purposes of this facial challenge. We agree. From the time of the filing of the original complaint on February 20, 2018, the method-of-execution claim: (1) challenged the three-drug protocol and (2) alleged a one-drug protocol using pentobarbital as an alternative method of execution. Availability in theory of pentobarbital, based solely on its status as an option in the lethal injection protocol prior to the revision on July 5, 2018, would not have satisfied the Plaintiffs' burden of proof. Furthermore, the State's February 15, 2018 motion, asking this Court to set execution dates in eight capital cases before June 1, 2018, because of ongoing difficulty in obtaining the necessary lethal injection drugs, put the Plaintiffs on notice that the three-drug protocol likely would be used. Additional notice came to the Plaintiffs on May 21, 2018, when the Defendants filed, as an attachment to a Motion for Protective Order, an affidavit of the TDOC commissioner, which stated, "As Commissioner, I approved the January 8, 2018 [lethal injection protocol] because the drug pentobarbital and chemicals to compound pentobarbital, the drug in TDOC's previous procedures, are unavailable to TDOC for the purpose of carrying out executions by lethal injection."

***8** Third, the Plaintiffs argue that the Eighth Amendment does not require proof of an alternative when the method of execution inflicts torture. *Glossip* rejected this argument: "Instead, [the prisoners] argue that they need not identify a known and available method of execution that presents less risk. But this argument is inconsistent with the controlling opinion in *Baze*, 553 U.S. at 61, 128 S.Ct. 1520, which imposed a requirement that the Court now follows." *Glossip*, 135 S.Ct. at 2738. The principal dissent in *Glossip* made this same argument. *See id.* at 2795 (Sotomayor, J., dissenting). Commenting on this argument, the majority stated: "Readers can judge for themselves how much distance there is between the principal dissent's argument against requiring prisoners to identify an alternative and the view, now announced by Justices Breyer and Ginsburg, that the death penalty is categorically unconstitutional." *Id.* at 2739 (citation omitted).

We conclude that the trial court properly rejected the Plaintiffs' attempt to expand the law. Tennessee's current three-drug lethal injection protocol does not rise to the level of punishments that are categorically forbidden by the Eighth Amendment. *See Baze*, 553 U.S. at 48, 128 S.Ct. 1520 (plurality opinion) (defining punishments of torture by reference to "cases from England in which 'terror, pain, or disgrace were sometimes superadded' to the sentence, such as where the condemned was 'embowelled alive, beheaded, and quartered,' " and explaining: "What each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain—'superadd[ing]' pain to the death sentence through torture and the like." (alteration in original) (quoting *Wilkerson v. Utah*, 99 U.S. 130, 135, 25 L.Ed. 345 (1878))). Reiterating and emphasizing the comparative analysis adopted in *Baze*, the *Glossip* Court declined to accept the principal dissent's invitation to abandon the availability requirement for a three-drug protocol, like Tennessee's current protocol at issue here, which uses midazolam and vecuronium bromide as the first and second drugs. *Glossip*, 135 S.Ct. at 2739. As we noted recently in *West v. Schofield*, 519 S.W.3d at 568 n.16, "there is no difference in language between the United States Constitution and the Tennessee Constitution which would warrant application of a different standard under the Tennessee Constitution." Therefore, we adhere to the *Glossip* standard requiring the Plaintiffs to plead and prove a known and available alternative method of execution in our analysis of any such claim under the Tennessee Constitution.

Next, the Plaintiffs assert that the voluminous record precludes meaningful appellate review under the expedited procedure in this appeal. They contend that the expedited appellate procedure has denied them due process.

Under the expedited procedure, the Plaintiffs' brief was due on or before September 6, 2018, two weeks after the filing of the record. The Defendants' responsive brief was due on or before September 21, 2018. Any reply brief filed by the Plaintiffs was due on or before September 28, 2018. We heard oral arguments on October 3, 2018.

In the interests of justice given the accelerated time deadlines, we permitted the lead Plaintiffs to exceed the fifty-page limitation for the argument section of their brief by filing an argument section consisting of 174 pages. *See* Tenn. R. App. P. 27(i) ("Except by order of the appellate court or a judge thereof, arguments in principal briefs shall not exceed

50 pages, and arguments in reply briefs shall not exceed 25 pages."). In addition, four other Plaintiffs (Mr. Miller, Mr. Sutton, Mr. West, and Mr. McKay) filed a separate forty-nine-page brief. Furthermore, we permitted an additional fifteen minutes for argument so that each side had a total of forty-five minutes. *See* Tenn. R. App. P. 35(c) ("Unless the appellate court otherwise orders, each side requesting the same relief shall be allowed 30 minutes for argument. If a party is of the opinion that additional time is necessary for the adequate presentation of the case, the party may request additional time by motion filed reasonably in advance of the date fixed for hearing.").

***9** The Plaintiffs emphasize the role "meaningful appellate review" plays to "ensure that death sentences are not imposed capriciously or in a freakish manner," citing *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). *Gregg* concerned the importance of automatic appellate review of a capital jury's imposition of the death penalty as an "additional safeguard against arbitrariness and caprice." *Id.* at 198. [15] *Gregg* provides no support for the Plaintiffs' argument that the expedited appellate review in this case, involving a separate collateral attack upon the Plaintiffs' death sentences, has denied them due process.

15 As the Defendants note, the "promise" of *Gregg* has already been fulfilled. Each of the Plaintiffs was afforded counsel and tried twice by a jury, first to determine whether they were guilty of first degree murder and then to determine whether death was the appropriate sentence based on an individualized assessment of aggravating and mitigating circumstances. Each of the Plaintiffs was convicted and sentenced according to the law and was afforded the right to direct and post-conviction review in the state and federal courts. The method of execution to be employed by Tennessee to carry out their lawful sentences has been upheld by the United States Supreme Court and numerous other courts. It has never been held unconstitutional. Thus, there is nothing arbitrary or "freakish" about this course of events.

The Plaintiffs suggest no other authority, and we have found none, holding that expedited appellate review in light of a scheduled execution date violates due process. Contrary to their assertion, neither the voluminous record nor the expedited schedule has prevented this Court in any way from engaging in meaningful appellate review. We conclude that the expedited appellate procedure has not denied the Plaintiffs due process.

The final issue to be addressed as a preliminary matter has been raised only by Mr. Zagorski. He argues that the trial court erred in denying a June 28, 2018 motion to amend the complaint to add as-applied claims on behalf of the Plaintiffs whose execution dates were set. [16] The Plaintiffs assert that they had learned only a week earlier of the Defendants' intent to compound midazolam. The motion to amend the complaint, alleging new claims regarding the use of compounded midazolam, was filed ten days before the start of the trial.

16 As noted earlier, Mr. Irick was executed on August 9, 2018, the day on which his execution was set. Mr. Zagorski's execution is set for October 11, 2018; and Mr. Miller's execution is set for December 6, 2018. Because the separate brief relating to Mr. Miller and three other Plaintiffs (Mr. Sutton, Mr. West, and Mr. McKay) indicates that they do not waive any right to relief contained in the other Plaintiffs' brief, we have reviewed this issue on behalf of Mr. Miller, as well as Mr. Zagorski. With respect to all other issues addressed in this opinion, our review has extended to all of the Plaintiffs, regardless of which brief contains the issue.

Under the Tennessee Rules of Civil Procedure, a party may amend its pleadings once as a matter of course before a responsive pleading is served. Tenn. R. Civ. P. 15.01. If the opposing party has filed a responsive pleading, the party seeking to amend must obtain written consent of the adverse party or leave of court, "and leave shall be freely given when justice so requires." *Id.* We address in another section of this opinion the trial court's denial of the Plaintiffs' oral motion, made at the close of their proof, to amend the pleadings to conform to the evidence under Tennessee Rule of Civil Procedure 15.02. Similar considerations apply under Rule 15.01 and 15.02. *See Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 740 (Tenn. 2013). "Trial courts have broad authority to decide motions to amend pleadings and will not be reversed absent an abuse of discretion." *Id.* at 741. When applying the abuse of discretion standard of review, an appellate court cannot substitute its judgment for that of the trial court. *Id.* (citing *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006)). The numerous factors that guide a trial court's discretionary

decision whether to allow an amendment of the pleadings include "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)).

***10** We conclude that the trial court did not abuse its discretion in denying the Rule 15.01 motion to amend based on "undue delay." Mr. Irick, Mr. Zagorski, and Mr. Miller had notice and opportunity to assert their proposed as-applied claims long before the June 28, 2018 motion to amend the complaint. We agree with the trial court that the Defendants' decision to use one or more compounded drugs to carry out the lethal injection protocol did not create or constitute a "new, unwritten protocol." The January 8, 2018 protocol had explicitly provided for the use of one or more compounded formulations of the lethal injection drugs. [17]

17 We also note that the protocol recently approved by this Court in *West v. Schofield*, 519 S.W.3d at 552, included the use of compounded formulations.

Furthermore, we decline Mr. Miller's request to stay his execution and the Plaintiffs' request to hold this appeal in abeyance pending the United State Supreme Court's decision in *Bucklew v. Precythe*, —— U.S. ——, 138 S.Ct. 1706, 200 L.Ed.2d 948 (2018). In addition to the questions presented in the petition in *Bucklew*, the parties were directed to brief and argue the following question: "Whether [the] petitioner met his burden under *Glossip v. Gross*, 576 U.S. ——, 135 S.Ct. 2726, 192 L.Ed.2d 761 (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." *Id.* The Plaintiffs contend that the "answer to this question may impact [their] claim that the Eighth Amendment does not require proof of an alternative when the method of execution inflicts torture." We disagree. This case is clearly distinguishable from *Bucklew*, which concerns an as-applied challenge based on the petitioner's unique medical condition. *Id.*

Burden to Plead

Baze and *Glossip* establish a pleading burden, in addition to a burden of proof, for availability of an alternative method of execution. *See Glossip*, 135 S.Ct. at 2739 (*Baze* "made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative."). A pleading that sets forth a claim for relief must contain a "simple, concise and direct" statement of the claim and demand for relief. Tenn. R. Civ. P. 8.05. "No technical forms of pleading or motions are required." *Id.* The sufficiency of the pleading is a matter of law, which we review de novo without any presumption of correctness. *Mortg. Elec. Registration Sys., Inc. v. Ditto*, 488 S.W.3d 265, 275 (Tenn. 2015).

The Plaintiffs contend that the trial court erred in refusing to consider a two-drug protocol, eliminating vecuronium bromide from the current three-drug protocol, as a proposed alternative method of execution in addition to a one-drug protocol using pentobarbital. [18] The Plaintiffs sufficiently pleaded in their July 3, 2015 second amended complaint, in a section designated "Available Alternative," that a one-drug pentobarbital protocol is an available alternative to the three-drug protocol. But the Plaintiffs completely failed to plead a two-drug protocol as an "Available Alternative."

18 The Plaintiffs also argue that, at worst, a two-drug protocol alternative is a new argument in support of a constitutional claim and therefore should have been considered by the trial court. This argument is unavailing in light of the United States Supreme Court's express directive that "requires a prisoner to *plead* and prove a known and available alternative." *Glossip*, 135 S.Ct. at 2739 (emphasis added).

The Plaintiffs invite us to examine their trial brief to determine what claims were pleaded in their second amended complaint, citing *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 541 (Tenn. 2008) ("Prior to trial, the plaintiffs filed a trial brief clarifying that they were attempting to bring two separate failure to warn claims."). [19] We have accepted

that invitation and our review shows that the Plaintiffs devoted twenty-seven pages in their July 5, 2018 trial brief to argument regarding the alternative method requirement under the *Glossip* standard. Their argument focused almost entirely on a one-drug protocol using pentobarbital. They stated that their "trial evidence will identify" Tennessee's one-drug pentobarbital protocol as an alternative method of execution. Their argument included no discussion of other alternatives, with the exception of one sentence stating that "discovery in this case has revealed at least three other feasible and readily implemented alternatives," including to "eliminate the use of vecuronium bromide." Even considering their trial brief as a possible source of clarification about a two-drug protocol as an alternative, this one sentence in their trial brief is totally inadequate to demonstrate that they met the pleading requirements of Rule 8.05, even with its liberal construction as adopted by this Court in *Flax*.

19 The pleadings do not include trial briefs. *See* Tenn. R. Civ. P. 7.01. Unless a party otherwise designates in writing, trial briefs are not included in the record. Tenn. R. App. P. 24(a).

***11** Additionally, the Plaintiffs made an oral motion at the close of their proof to amend the pleadings to assert removal of vecuronium bromide from the three-drug protocol as an alternative method of execution. When an unpleaded issue is tried by implied consent, the pleadings may be amended to conform to the evidence. *See* Tenn. R. Civ. P. 15.02. A trial court has discretion to decide whether there was implied consent under Rule 15.02, and we will not reverse its discretionary decision absent an abuse of discretion. *Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888, 891 (Tenn. 1980). An abuse of discretion occurs when a trial court applies an incorrect legal standard, reaches an illogical or unreasonable decision, or bases its decision on a clearly erroneous assessment of the evidence. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

"Generally speaking, trial by implied consent will be found where the party opposed to the amendment knew or should reasonably have known of the evidence relating to the new issue, did not object to this evidence, and was not prejudiced thereby." *Zack Cheek Builders*, 597 S.W.2d at 890. However, presentation of evidence that is relevant to both a pleaded issue and an unpleaded issue does not establish trial by implied consent. *Hiller v. Hailey*, 915 S.W.2d 800, 805 (Tenn. Ct. App. 1995). The most important factor is whether the opposing party "would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend." *Zack Cheek Builders*, 597 S.W.2d at 891 (citation omitted).

At the hearing on the Rule 15.02 motion, the trial court noted that vecuronium bromide pertained to a number of the causes of action but that its removal from the three-drug protocol had not been viewed analytically as an alternative method of execution. The trial court recognized that implied amendment of the pleadings would seriously prejudice the Defendants, who did not cross-examine the Plaintiffs' expert witnesses regarding the removal of vecuronium bromide from the three-drug protocol as an alternative method of execution.[20] The record entirely supports the trial court's determination. The Plaintiffs' proposed amendment of the pleadings was much more than a "housekeeping measure." *See Zack Cheek Builders*, 597 S.W.2d at 892 (holding that the trial court did not abuse its discretion in permitting an amendment to the pleadings that "was largely unnecessary, except as a housekeeping measure").

20 We note that the Plaintiffs' experts testified at trial that removal of vecuronium bromide (the paralytic) from the three-drug protocol would be less painful and cause less suffering in the sense that death would come sooner due to the sequential administration of two drugs instead of three. In upholding Kentucky's decision to include the paralytic as the second drug in its three-drug protocol, the *Baze* Court rejected the argument that the paralytic "serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of the first drug." 553 U.S. at 57, 128 S.Ct. 1520. The paralytic serves two purposes: (1) it "stops respiration, hastening death"; and (2) "it prevents involuntary physical movements during unconsciousness" that "could be misperceived as signs of consciousness or distress." *Id.* Although Dr. Greenblatt, an expert for the Plaintiffs, stated that the second drug would not hasten death, he qualified that statement by saying "except that there would be a period of time when [the inmate] can't breathe." In *Abdur'Rahman v. Bredesen*, 181 S.W.3d at 307-13, we rejected constitutional, as well as statutory, claims challenging the use of the paralytic in the former three-drug protocol.

***12** The trial court's order denying the Rule 15.02 motion noted that removal of vecuronium bromide as an alternative method of execution "was known or could have been known by the Plaintiffs upon the filing of the lawsuit." Contrary

to the Plaintiffs' assertion, the trial court did not apply an incorrect legal standard by acknowledging their responsibility for the undue delay that prejudiced the Defendants. With the filing of an original complaint, an amended complaint, and then a second amended complaint, the Plaintiffs had repeated opportunities to plead removal of vecuronium bromide from the three-drug protocol as an alternative method of execution. The Plaintiffs have no justifiable excuse for their failure to plead a two-drug protocol as an alternative, given their acknowledged recognition of it during discovery and their second opportunity to amend the complaint just six days before the trial started. We conclude that the trial court did not abuse its discretion by denying the Plaintiffs' motion to amend the pleadings to assert removal of vecuronium bromide from the three-drug lethal injection protocol as an alternative method of execution.

Burden to Prove

Our recent decision in *West v. Schofield* did not analyze what it means for a proposed alternative method of execution to be available because the condemned inmates in that case affirmatively abandoned any effort to satisfy this prerequisite. 519 S.W.3d at 565. For lethal injection drugs, the term "available" under the *Glossip* standard has been construed to mean the ability of the state to obtain the drugs with ordinary transactional effort:

> Ohio itself contacted the departments of correction in Texas, Missouri, Georgia, Virginia, Alabama, Arizona, and Florida to ask whether they would be willing to share their supplies of pentobarbital. All refused. Granted, for the one-drug protocol to be "available" and "readily implemented," Ohio need not already have the drugs on hand. But for [the *Glossip*] standard to have practical meaning, the State should be able to obtain the drugs with ordinary transactional effort. Plainly it cannot.

In re Ohio Execution Protocol, 860 F.3d 881, 891 (6th Cir. 2017), *cert. denied sub nom. Otte v. Morgan*, —— U.S. ——, 137 S.Ct. 2238, 198 L.Ed.2d 761 (2017); *see also McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017) ("We do not say that an alternative method must be authorized by statute or ready to use immediately, but we concur with the Eleventh Circuit that the State must have access to the alternative and be able to carry out the alternative method relatively easily and reasonably quickly.") (citation omitted), *cert. denied*, —— U.S. ——, 137 S.Ct. 1275, 197 L.Ed.2d 746 (2017).

We will not judge the reasonableness of Tennessee's efforts to obtain lethal injection drugs by the ability of other states to do so. *See Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1302 (11th Cir. 2016) ("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."), *cert. denied sub nom. Arthur v. Dunn*, —— U.S. ——, 137 S.Ct. 725, 197 L.Ed.2d 225 (2017), *reh'g denied*, —— U.S. ——, 137 S.Ct. 1838, 197 L.Ed.2d 777 (2017). Proof that lethal injection drugs are available with ordinary transactional effort requires more than mere speculation, more than just a showing of hypothetical availability. *See In re Ohio Execution Protocol*, 860 F.3d at 891 (discounting testimony that the witness "believed 'there are pharmacists in the United States that are able to compound pentobarbital for use in lethal injections because other states have been reported to have obtained compounded pentobarbital for use in executions,' " because "that is quite different from saying that any given state can actually locate those pharmacies and readily obtain the drugs"). The fact that other states have or can obtain pentobarbital for executions is not proof that Tennessee can do so with ordinary transactional effort. *See id.*

The trial court ruled that the Plaintiffs failed to prove that their proposed alternative method of execution, a one-drug protocol using pentobarbital, is available to the Defendants. The Plaintiffs offered no direct proof as to availability of this alternative method of execution. 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 Plaintiffs attempted to prove availability of pentobarbital by discrediting the testimony of the following witnesses for the Defendants: the TDOC Commissioner, the TDOC Deputy Commissioner for Administration, and the Warden of Riverbend Maximum Security Institution who is responsible for carrying out executions.

***13** The trial court found nothing in the demeanor of these TDOC officials, nor the facts to which they testified, to overcome the presumption that they had discharged their duties in good faith and in accordance with the law. *See West v. Schofield*, 460 S.W.3d at 131. The trial court found convincing their testimony that TDOC would use pentobarbital if it were available, because this Court recently upheld the one-drug protocol using pentobarbital. *See West v. Schofield*, 519 S.W.3d at 552. We agree with the trial court that the Plaintiffs' argument—that TDOC would not make a good-faith effort to locate pentobarbital—defies common sense. [21] Moreover, the trial court accredited the testimony of the TDOC officials, finding them all to be credible. We will not second-guess the trial court's credibility determinations without clear and convincing evidence to the contrary, which this record does not contain. *See King v. Anderson Cnty.*, 419 S.W.3d 232, 246 (Tenn. 2013).

21 Common sense and logic clearly dictate that TDOC would utilize pentobarbital if the drug could be secured, given that TDOC recently spent three and one-half years successfully defending the one-drug protocol in *West v. Schofield*.

The Commissioner and the Deputy Commissioner provided testimony regarding TDOC's unsuccessful efforts to obtain pentobarbital for use in the lethal injection protocol. The trial court found that "they proceeded reasonably as department heads to delegate the task of investigating supplies of pentobarbital to a member of their staff." A PowerPoint presentation, introduced as part of trial exhibit 105, detailed those unsuccessful efforts. The trial court found "that trial exhibit 105 and the testimony of the TDOC officials establish that Tennessee does not have access to and is unable to obtain [pentobarbital] with ordinary transactional effort." Our review of this finding of fact is accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d) ("Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.").

The Plaintiffs assert that uncontroverted proof shows pentobarbital was available for purchase in 2017 and would still be good for use in executions in 2019 and 2020. They also contend that the Defendants have (1) a physician willing to write a prescription for pentobarbital, (2) a pharmacy and pharmacist with the proper licensing to obtain pentobarbital, and (3) two contracts with two different compounding pharmacists to compound pentobarbital for executions. None of this evidence is relevant, however, if pentobarbital is not now available. The Plaintiffs' argument—that the Defendants acted in bad faith by choosing not to obtain pentobarbital when it was feasible and readily available—is totally inconsistent with the trial court's credibility determinations. [22] We conclude that the evidence does not preponderate against the trial court's finding that Tennessee does not have access to and is unable to obtain pentobarbital with ordinary transactional effort for use in lethal injections.

22 As the Defendants point out, the Plaintiffs' emphasis on TDOC's efforts to obtain pentobarbital is a red herring. *Glossip* requires the inmate challenging the method of execution to identify a known and available alternative; it places no burden on a state to show it exhausted all avenues of supply. *See Arthur*, 840 F.3d at 1303 ("[I]t is not the state's burden to plead and prove 'that it cannot acquire the drug.' " (quoting *Brooks v. Warden*, 810 F.3d 812, 820 (11th Cir. 2016))).

In summary, we agree with the trial court's finding that pentobarbital—the only alternative method of execution that the Plaintiffs sufficiently pleaded—is not available for use in executions in Tennessee. Therefore, the Plaintiffs failed to carry their burden of showing availability of their proposed alternative method of execution, as required under the *Glossip* standard set forth by the United States Supreme Court and recently adopted by this Court in *West v. Schofield* for state constitutional purposes. As we noted earlier, this requirement is an independent requirement, separate and apart from the requirement to prove that the protocol creates a demonstrated risk of severe pain. Therefore, for this reason, we hold that the Plaintiffs failed to carry their burden to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution or article 1, section 16 of the Tennessee Constitution. As a result, we need not address the Plaintiffs' claim that the three-drug protocol creates a demonstrated risk of severe pain. Accordingly, we affirm the trial court's dismissal of this action.

Pretermitted Issues

***14** Our holding above renders moot the remaining issues before us.[23] In light of this holding, we pretermit the following issues: (1) whether this Court should grant the Plaintiffs' "Motion to Consider Records Produced by Defendants as Part of the Procedures for Executing Billy Ray Irick after the Chancery Court Entered its Judgment;"[24] (2) whether the lethal injection protocol creates a demonstrated risk of severe pain; (3) whether the protocol violates the right to counsel and access to the courts; (4) whether the protocol violates substantive due process; (5) whether the trial court erred in dismissing the claims concerning dignity and evolving standards of decency; (6) whether the trial court erred in failing to exclude the Defendants' experts, who testified regarding the risk of severe pain; and (7) whether the trial court "relied on fact-based findings from other cases—not the facts developed below—when it addressed *Glossip*'s first prong, and thereby violated Plaintiffs' right to due process of law."[25]

23 As the trial court recognized in its order dismissing the Plaintiffs' challenge to Tennessee's lethal injection protocol, their other constitutional claims fall under the Eighth Amendment's analytical standard. *See Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (holding that where 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"). Because the Plaintiffs failed to satisfy the *Glossip* standard's availability requirement, these other constitutional claims also must fail. *See Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346, 360 (2016) (dismissing amended complaint challenging constitutionality of lethal injection protocol), *reh'g denied* (July 21, 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 1067, 197 L.Ed.2d 235 (2017), *reh'g denied*, —— U.S. ——, 137 S.Ct. 1838, 197 L.Ed.2d 777 (2017).

24 By order filed contemporaneously with this opinion, we have denied this motion, as well as the Defendants' motion to strike, as moot.

25 The Plaintiffs mischaracterize as "reliance" the trial court's observation that numerous other courts have concluded that midazolam is a constitutionally adequate substitute for pentobarbital as the first drug in a three-drug lethal injection protocol. *See Glossip*, 135 S.Ct. at 2740 (citing findings from other cases, including those where, as in this case, Dr. Lubarsky testified for the death-sentenced inmates).

Given the magnitude of what is at stake in these proceedings, we do reiterate three additional points made in our order denying Mr. Irick's motion to vacate execution date. *See Irick*, —— S.W.3d at ——. First, the United States Supreme Court's 2015 opinion in *Glossip*, 135 S.Ct. at 2731, upheld Oklahoma's three-drug protocol that used the same combination of drugs, including the same amount of midazolam, as found in the protocol at issue in this case.[26] Second, our 2017 opinion in *West v. Schofield*, 519 S.W.3d at 552, expressly approved the use of a compounding process when we upheld the protocol at issue in that case. Third, our 2005 opinion in *Abdur'Rahman v. Bredesen*, 181 S.W.3d at 309, upheld a three-drug protocol that used a paralytic as the second drug and potassium chloride as the third drug. In that case, we also considered and rejected other constitutional claims—procedural and substantive due process, contemporary standards of decency and dignity, and access to the courts—substantially similar to those raised here. *See id.* at 306-11.

26 We recognize that *Glossip* was decided in a preliminary injunction posture under a more deferential "clear error" standard of review compared to the declaratory judgment action here. This procedural difference, along with any substantive difference in the trial testimony in this case, does not require us to discredit, as the Plaintiffs suggest, the premise on which *Glossip*'s observations about midazolam were based. The District Court in *Glossip* made its finding—that the use of midazolam will not result in severe pain and suffering—after a three-day evidentiary hearing at which it heard testimony from seventeen witnesses and reviewed numerous exhibits. *See Glossip*, 135 S.Ct. at 2735. As we noted earlier, *Baze* cautioned against "transform[ing] 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." *Baze*, 553 U.S. at 51, 128 S.Ct. 1520.

Conclusion

***15** We conclude that the Plaintiffs failed to carry their burden of showing availability of their proposed alternative method of execution. For this reason, we hold that the Plaintiffs failed to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution. This holding renders moot the majority of their other issues. The expedited appellate procedure has not denied the Plaintiffs due process, and they are not entitled to relief on their remaining issues. Accordingly, we affirm the trial court's judgment.

Sharon G. Lee, J., filed a dissenting opinion.

Sharon G. Lee, J., dissenting.

The Petitioners, who have been sentenced to death, contend that the State's recently adopted lethal injection protocol violates their federal and state constitutional rights to be free from cruel and unusual punishment. On this important issue, the Petitioners are entitled to a fair and meaningful opportunity to be heard at trial and on appeal without regard to 1) the constitutionality of other lethal injection protocols the State has no plans to use; 2) the execution dates previously set by this Court for Petitioners Billy Ray Irick (already executed), Edmund Zagorksi, and David Earl Miller; [1] and 3) the length of the Petitioners' briefs or the extra minutes granted for oral argument.

1 Zagorski is set to be executed on October 11, 2018, and Miller on December 6, 2018. Irick was executed on August 9, 2018, after this Court and the United States Supreme Court denied him a stay of execution. *See Irick v. Tennessee,* 585 U.S. ——, ——, —— S.Ct. ——, —— L.Ed.2d ——, 2018 WL 3767151 (2018) (Sotomayor, J., dissenting) ("In refusing to grant Irick a stay, the Court today turns a blind eye to a proven likelihood that the State of Tennessee is on the verge of inflicting several minutes of torturous pain on an inmate in its custody, while shrouding his suffering behind a veneer of paralysis. I cannot in good conscience join in this 'rush to execute' without first seeking every assurance that our precedent permits such a result. No. M1987-00131-SC-DPE-DD (Lee, J., dissenting), at 1. If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism.").

The constitutionality of the State's current lethal injection protocol is a complicated issue, involving extensive expert testimony. Several factors, over which the Petitioners had little or no control, combined to deprive them of a fundamentally fair process. One significant factor is the Court's unfortunate rush to execute based on the perceived need to end this case before the executions of Petitioners Irick, Zagorski, and Miller. With the stroke of a pen and in the interest of fairness and justice, the Court could have reset these executions.

By putting this case on a rocket docket, the Court denied the Petitioners a fair and meaningful opportunity to be heard and jeopardized the public's confidence and trust in the impartiality and integrity of the judicial system. Today, the Court meets its self-imposed deadline by deciding this case before Zagorski's October 11 execution and Miller's December 6 execution—but at great cost. I cannot go along with the Court's decision because these proceedings have not been fundamentally fair to the Petitioners.

I.

For many years, the State's lethal injection protocol has been a moving target, with the Tennessee Department of Correction frequently changing its lethal injection protocols. On January 8, 2018, the Department adopted a new lethal injection protocol consisting of two options: 1) Protocol A, using compounded pentobarbital; 2) Protocol B, using

midazolam, vecuronium bromide, and potassium chloride. Ten days after the Department announced these protocols, this Court set Irick's execution date for August 9, 2018. [2]

2 On March 15, 2018, the Court set the execution dates for Zagorski and Miller.

***16** On February 20, 2018, the Petitioners filed a declaratory judgment action in the trial court, challenging the constitutionality of Protocol B, the new midazolam-based protocol. The Petitioners claimed that the midazolam-based protocol would cause them to suffer intolerable pain and that execution by Protocol A, pentobarbital, was an available, less painful execution alternative. The Petitioners, at the close of proof, moved to amend their pleadings to conform to the evidence to allege that a two-drug cocktail of midazolam and potassium chloride was an alternative method of execution. The trial court denied this request.

The Petitioners faced a steep uphill battle in their efforts to have the midazolam-based protocol declared unconstitutional. Their obstacles, which ultimately proved insurmountable, included 1) inconsistent and unworkable requirements imposed by *Glossip v. Gross,* —— U.S. ——, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015) and the cloak of secrecy regarding Tennessee executions; 2) the extraordinary and unnecessary time constraints imposed by this Court; and 3) the State's evasiveness and last-minute decision about its lethal injection protocol.

To begin with, *Glossip,* a split 5-4 decision by the United States Supreme Court, required the Petitioners to prove 1) that the State's execution protocol was likely to cause an intolerable risk of severe pain or needless suffering, *and* 2) an alternative feasible, readily implemented, available method of execution that would significantly reduce a substantial risk of severe pain. *Glossip,* 135 S.Ct. at 2736-37 (quoting *Baze v. Rees*, 553 U.S. 35, 50, 52, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008)). The Petitioners presented expert testimony that the State's execution protocol of midazolam, vecuronium bromide, and potassium chloride will cause the inmate being executed to feel severe pain and terror. This is because midazolam has no analgesic effects and will not render the inmate insensate to pain; vecuronium bromide causes great anxiety, noxious stimulus, paralysis, and the feeling of suffocation—all "quite horrific"—and potassium chloride, which stops the heart, causes the inmate to have very painful feelings of burning upon injection.

Despite this evidence, the trial court dismissed the Petitioners' case because they failed to prove the second *Glossip* prong of an available alternative execution method that would have reduced a substantial risk of severe pain. This *Glossip* requirement has been aptly described as "perverse" [3] because it replaces the Eighth Amendment's categorical prohibition against cruel and unusual punishment with a conditional one. [4] Thus, under *Glossip,* even if the Petitioners establish that the State's execution method will cause them to experience needless suffering or intolerable pain, the State may still carry out the execution *unless* the Petitioners also prove an available alternative method for their own executions.

3 *McGehee v. Hutchinson*, —— U.S. ——, 137 S.Ct. 1275, 1276, 197 L.Ed.2d 746 (2017) (Sotomayor, J., dissenting).

4 *See Glossip,* 135 S.Ct. at 2793 (Sotomayor, J., dissenting).

Considering the Eighth Amendment's clear prohibition on "cruel and unusual punishments," the focus here should have been on whether the Petitioners proved that the State's execution method was likely to cause needless suffering and pain. Yet the Petitioners' claims and evidence of intolerable pain and torture were not the basis of the trial court's decision and thus not reviewed on appeal.

Not only is *Glossip*'s available alternative requirement perverse, it is also unworkable. In Tennessee, executions are cloaked in secrecy, which makes it difficult—if not impossible—for the Petitioners to establish an available alternative to the State's method of execution. Tennessee Code Annotated section 10-7-504(h) (Supp. 2017) protects the identity of individuals or entities directly involved in the execution process. The trial court here prohibited identification of the Department's agents who were involved in procuring execution drugs, such as pentobarbital, and of its potential suppliers.

***17** In addition to the heavy burden imposed by *Glossip* and the cloak of secrecy surrounding executions, the Petitioners were operating under extraordinary time constraints because of the Court's scheduling of Irick's execution on August 9. After the Petitioners filed their challenge, the starting pistol was fired and the race to execute began. The trial court had to fast-track the case so that the parties could present their evidence and the trial court could prepare and file findings of fact, conclusions of law, and its decision before the August execution date. The trial court set the trial to begin on July 9, 2018, giving the parties less than five months to effectively conduct written discovery, litigate discovery disputes, take discovery depositions, locate and retain expert witnesses, research legal issues, file trial briefs, and prepare for trial. The discovery schedule was so compressed that the trial court eliminated summary judgment as an option because the Petitioners lacked the time to complete discovery *and* respond to a motion for summary judgment. Sufficient time for investigation, research, and discovery was out of the question because of the looming execution date.

The rush to execute here is in stark contrast to the measured way previous challenges to the State's lethal injection protocols have been handled. This case was pending in the trial court only 156 days. Yet the 2002 challenge to the State's protocol using sodium pentothal, pancuronium bromide, and potassium chloride took twice as long. It was pending in the trial court for 311 days. [5] *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), *cert. denied*, 547 U.S. 1147, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006). The 2013 challenge to the State's protocol using compounded pentobarbital took four times as long, lasting 645 days in the trial court, which included an appeal of a discovery dispute. [6] *See West v. Schofield,* 519 S.W.3d 550 (Tenn. 2017), *cert. denied sub nom. West v. Parker,* —— U.S. ——, 138 S.Ct. 476, 199 L.Ed.2d 364 (2017), *cert. denied sub nom. Abdur'Rahman v. Parker,* —— U.S. ——, 138 S.Ct. 647, 199 L.Ed.2d 545 (2018), *reh'g denied,* —— U.S. ——, 138 S.Ct. 1183, 200 L.Ed.2d 328 (2018).

5 In *Abdur'Rahman v. Bredesen,* the plaintiffs filed their petition on July 26, 2002, and the trial court issued its decision on June 2, 2003.

6 In *West v. Schofield*, the plaintiffs filed their petition on November 20, 2013. The trial began on July 7, 2015, and the trial court issued its decision on August 26, 2015.

The Petitioners, already shouldering the heavy burden imposed by *Glossip,* the cloak of secrecy surrounding executions, and the fast pace of the proceedings, were also impeded by the State's evasiveness about the availability of pentobarbital until the eve of trial and by its last minute decision to eliminate pentobarbital as an execution protocol. The parties took discovery depositions throughout June, with the Petitioners reasonably assuming that Protocol A (pentobarbital) was an available alternative execution method under *Glossip.* Just a few hours before the parties filed their trial briefs on July 5, 2018, the Department adopted a revised execution protocol that abandoned Protocol A, leaving only Protocol B. But the Department, according to testimony from its Commissioner, had known that pentobarbital was unavailable for executions for about two months before it retained pentobarbital as a lethal injection method in January 2018. Even so, the State failed to notify the Petitioners and failed to take a consistent position on the availability of pentobarbital until the eve of trial.

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

***18** The Department's Commissioner testified on June 5, 2018, that the Department would "search out all options to obtain pentobarbital," but the Department's records tell a different story. Those records show that the Department's

designated drug procurer only looked for pentobarbital over a four-month period from March 2017 through July 2017, There appears to have been no activity after July 2017 until June 20, 2018, when the drug procurer emailed a potential supplier, stating that the Department was "still searching for USP grade pentobarbital" and "circling back around with folks" to check on availability for purchase. That said, Texas officials used pentobarbital on July 17, 2018, to execute Christopher Young; on June 27, 2018, to execute Danny Bible; on May 16, 2018, to execute Juan Castillo; on April 25, 2018, to execute Erick Daniel Davila; on March 27, 2018, to execute Rosendo Rodriguez III; on February 1, 2018, to execute John David Battaglia; on January 30, 2018, to execute William Rayford; and on January 18, 2018, to execute Anthony Shore. [7] And in Georgia, officials used pentobarbital to execute Carlton Michael Gary on March 15, 2018, and Robert Butts, Jr., on May 4, 2018. [8] Most recently, pentobarbital was used in Texas on September 26, 2018, to execute Troy Clark; and on September 27, 2018, to execute Daniel Acker. [9]

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

8 *Id.*

9 *Id.*

The State's retention of pentobarbital as an execution protocol until July 5, 2018, and its refusal to take a firm position on the availability of pentobarbital for Irick's August execution refutes the State's argument that the Petitioners had actual notice as early as February 2018 that pentobarbital was not available. Petitioners could have reasonably inferred the availability of pentobarbital from the Department's adoption of it in January 2018, the Department's retention of it until July 5, 2018, *and* the State's representations in the trial court.

As the trial court accurately observed, the availability of pentobarbital was essential to the case, and without the State answering the question as to the availability of pentobarbital, the trial court proceedings were meaningless. For the State to provide the answer on the eve of trial while effectively evading the question for months was patently unfair to the Petitioners.

For all these reasons, the Petitioners were denied due process in the form of a fundamentally fair process. "At its core, the right to due process reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). An essential requirement of due process is notice and an opportunity to be heard. *Phillips v. State Bd. of Regents,* 863 S.W.2d 45, 50 (Tenn. 1993) (citations omitted). The purpose of notice is to give the affected party the opportunity to marshal its proof. *Id.* (citation omitted). " 'Due process is flexible and calls for such procedural protections as the particular situation demands.' " *Id.* (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). The factors we consider in determining whether a party has been deprived of due process are 1) the private interest affected; 2) the risk that the procedures in place would erroneously deprive the affected party of that private interest; and 3) the government's interest, including any fiscal or administrative burdens that would be caused by additional or substitute procedural requirements. *Id.*

There could hardly be a more substantial private interest at stake than making sure that the Petitioners are not made to suffer intolerable pain when the State puts them to death and that their federal and state constitutional rights to be free from cruel and unusual punishment are protected. Resetting the scheduled execution dates would have gone a long way in giving the Petitioners a fair and meaningful opportunity to be heard and would not have placed any appreciable fiscal or administrative burdens on the State.

In the end, the difficulties of meeting the inconsistent and unworkable *Glossip* requirements and the cloak of secrecy surrounding Tennessee executions; the extraordinary and unnecessary time constraints imposed by the Court due to the impending, and seemingly unalterable, execution dates; and the State's evasiveness about its execution method and its last-minute changes to the lethal injection protocols combined to deny the Petitioners due process in the form of a fundamentally fair process.

II.

***19** This is the Court's first opportunity to review a trial court decision on the constitutionality of the midazolam-based protocol. The Petitioners, faced with the prospect of suffering needlessly while being put to death by the State, deserve meaningful appellate review of the trial court's ruling. Meaningful review includes giving counsel adequate time to review trial testimony, research and brief the issues, and effectively advocate for their clients in their appellate briefs and at oral argument. Only then can the Court, after reviewing the record from the trial court, reading the parties' briefs, listening to the oral arguments, and studying applicable legal authorities, render its decision. The Court should not make its decision in haste, but after thoughtful and careful deliberation. The parties and the public deserve no less. Here, the super-expedited schedule imposed by the Court denied the Petitioners meaningful appellate review.

To begin with, the Court unreasonably reduced the time for the Petitioners to file the record with the appellate court clerk from a minimum of 105 days (or more if an objection to the record is filed or if the record needs to be supplemented) to nine days (seven days excluding a weekend). This was rather extraordinary given that the trial lasted ten days, with twenty-three witnesses testifying and 139 exhibits admitted into evidence. The record filed with the appellate court clerk consisted of twenty-nine volumes of court filings, thirty-two volumes of trial transcripts, and nineteen volumes of trial exhibits, totaling well over 10,000 pages. In reducing the Petitioners' time for filing the record, the Court failed to consider that filing the record is a three-part process, involving the parties, the trial court clerk, and the trial court judge. [10] The trial court had no opportunity to review and approve the record, and the parties had no chance to point out any errors in the record. Not surprisingly, the record—prepared in great haste—is not completely accurate. The Lead Petitioners [11] noted that their counsel "corrected apparent transcription errors," but that they did "not have the physical ability to correct all of the errors in this record prior to September 6, 2018." Likewise, the Miller Petitioners pointed to specific "transcription errors [that] change[d] the substance of testimony." [12]

10 *See Abdur'Rahman v. Parker,* No. M2018-01385-SC-RDO-CV (Tenn. Aug 13, 2018) (Lee., J., dissenting) (reviewing the time frames afforded each participant to fulfill their role, including sixty days for the Petitioners to file a certified transcript of the proceedings with the trial court clerk, forty-five days for the trial court clerk to assemble and transmit the record to the appellate court clerk after the filing of the transcript; and approval of the transcripts and exhibits by the trial court judge within thirty days after the expiration of the time for filing objections).

11 "Lead Petitioners" refers to the twenty-nine original petitioners who filed a Notice of Appeal in the Court of Appeals on July 30, 2018. "Miller Petitioners" refers to the four remaining petitioners, David Earl Miller, Nicholas Todd Sutton, Stephen Michael West, and Larry McKay, who filed a Notice of Appeal in the Court of Appeals and in this Court on August 23, 2018.

12 For instance, on page three of their brief, the Miller Petitioners called the Court's attention to an error in Volume XLII, page 1795 of the transcripts of proceedings ("It was a very firm decision that because there was no memory created does [sic-doesn't] mean that the suffering was not occurring.").

Next, the Court cut in half the parties' briefing period from seventy-four days to thirty-seven days (twenty-six days, excluding weekends and Labor Day). *Abdur'Rahman v. Parker*, No. M2018-01385-SC-RDO-CV (Tenn. Aug 13, 2018) (Lee, J., dissenting). The Lead Petitioners had only fifteen days to review the record and to prepare and file their brief, while the Miller Petitioners had just ten days to review the record and to prepare and file their brief and the State had fifteen days to brief the case. *Abdur'Rahman v. Parker,* No. M2018-01385-SC-RDO-CV (Tenn. Aug 27, 2018) (Lee, J., dissenting).

***20** The detrimental effects of the limited briefing schedule are evident from the parties' briefs. The Miller Petitioners admitted in their brief that they did not have time to brief fully the trial court's errors:

> Due to the "compressed super-expedited" briefing schedule, the Miller Plaintiffs primarily raise in this brief due process violations because those errors undermine the integrity of the entire proceeding below. Undersigned counsel acknowledges the rule on waiver that usually applies when an issue is not fully briefed on appeal, however, *counsel does not have the time or resources to brief all significant errors which occurred in the proceedings below and are reflected in the Chancery Court's final order.*

(Emphasis added). The Miller Petitioners also noted in their reply brief that it was "prepared under an extreme time limitation and likely contains errors," and that it lacked an introduction, all relevant facts, legal authority, record cites and an exhaustive analysis. Predictably, given the time constraints, the Lead Petitioners had to late-file their brief's table of authorities. The State even had to file a substitute brief to correct erroneous page references in the table of contents, in the table of authorities, and in its response to the issues raised by the Miller Petitioners, as well as citation errors.

Previous appeals of constitutional challenges to the State's lethal injection protocols have not been rushed or decided hastily. This case was pending only fifty-six days from the time the Court reached down and assumed jurisdiction on August 13, 2018, until it released its opinion today. Yet the appeal of the 2002 challenge to the State's protocol using sodium pentothal, pancuronium bromide, and potassium chloride was pending in this Court for 231 days. [13] *See Abdur'Rahman v. Bredesen,* 181 S.W.3d 292 (Tenn. 2005), *cert. denied*, 547 U.S. 1147, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006). The appeal of the 2013 challenge to the State's protocol using compounded pentobarbital lasted 391 days in this Court. [14] *See West v. Schofield,* 519 S.W.3d 550 (Tenn. 2017), *cert. denied sub nom. West v. Parker,* —— U.S. ——, 138 S.Ct. 476, 199 L.Ed.2d 364 (2017), *cert. denied sub nom. Abdur'Rahman v. Parker,* —— U.S. ——, 138 S.Ct. 647, 199 L.Ed.2d 545 (2018), *reh'g denied,* —— U.S. ——, 138 S.Ct. 1183, 200 L.Ed.2d 328 (2018).

13 In *Abdur'Rahman v. Bredesen*, this Court granted the plaintiff's application for permission to appeal on February 28, 2005, and filed its opinion on October 17, 2005.

14 In *West v. Schofield*, this Court granted the State's motion to assume jurisdiction on March 2, 2016, and filed its opinion on March 28, 2017.

The Court does not cure the unfairness of this super-expedited appeal by allowing the Lead Petitioners to file a brief with an argument section that exceeded the fifty-page limit in Tennessee Rule of Appellate Procedure 27 and by granting both parties fifteen more minutes for oral argument.

Given the gravity of the issues in this appeal, the extensive record, and the required legal analysis, the Court's accelerated schedule deprived the Petitioners of meaningful appellate review. This mad dash to the finish line was unnecessary. Nothing prevented the Court from giving the Petitioners, who are facing possible torture during their upcoming executions, appellate review that is fair and meaningful.

III.

***21** Because these proceedings have not been fundamentally fair to the Petitioners, I dissent.

All Citations

--- S.W.3d ----, 2018 WL 4858002

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VOL. XVI

THE CHANCERY COURT
DAVIDSON COUNTY, TENNESSEE

HONORABLE ELLEN HOBBS LYLE, CHANCELLOR

MARIA M. SALAS, CLERK AND MASTER

Abu-Ali Abdur' Rahman, et. al
Plaintiff/Appellant

VOLUME 16 of 19

CERTIFIED **TRANSCRIPT** OF **Cause**	Appearance No. 18-183-III **CHANCERY COURT**	Vs No. M2018-01385-SC-RDO-CV SUPREME COURT **TRANSMITTED ON:** August 21st, 2018	Execution No **SUPREME COURT**	APPEALED TO **Next Term,** **20**

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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(c).

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.

[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

[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-HEII, 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-

[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

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
October 3, 2018 Session

ABU-ALI ABDUR'RAHMAN ET AL. v. TONY PARKER ET AL.

Appeal from the Chancery Court for Davidson County
No. 18-183-III Ellen H. Lyle, Chancellor

No. M2018-01385-SC-RDO-CV

JUDGMENT

This case was heard upon the record on appeal from the Court of Appeals, jurisdiction having heretofore been assumed pursuant to Tennessee Code Annotated section 16-3-201(d)(3), and upon the briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that none of the errors alleged by the Plaintiffs, Abu-Ali Abdur'Rahman et al., require reversal.

In accordance with the opinion filed herein, it is, therefore, ordered and adjudged that the judgment of the Chancery Court of Davidson County denying relief to the Plaintiffs is affirmed.

It appearing that the Plaintiffs are indigent, the costs of this appeal are taxed to the State of Tennessee, for which execution may issue if necessary.