Nos. 18-6739, 18A528

IN THE
SUPREME COURT OF THE UNITED STATES

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

v.

TONY PARKER, et al.,
Respondent.

ON APPLICATION FOR STAY OF EXECUTION AND ON PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Court should grant Petitioner Miller a stay of execution under the All Writs Act, 28 U.S.C. § 1651, or 28 U.S.C. § 2101(f) pending disposition of a petition for writ of certiorari, when the Petitioners failed to prove an essential element of their Eighth Amendment method-of-execution claim under *Glossip v. Gross*, 135 S.Ct. 2726, 2733 (2015), namely, that there is an alternative method of execution that is feasible, readily implemented, and that significantly reduces a substantial risk identified in Tennessee's method of execution *and* when this Court has already denied a separate petition for writ of certiorari seeking review of the same judgment.

2. Whether, under *Glossip,* inmates raising a facial challenge to one of two methods contained in a State's lethal injection protocol must present evidence of the availability of the alternate method independent from any evidence within the State's possession.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

OPINIONS BELOW

The October 8, 2018, judgment of the Tennessee Supreme Court affirming the trial court's judgment, which concluded that death row inmates failed to establish that Tennessee's three-drug lethal injection protocol constitutes cruel and unusual punishment, is not yet published but can be found at 2018 WL 4858002. *Abu-Ali Abdur'Rahman et al. v. Parker et al.*, No. M2018-01385-SC-RDO-CV (Tenn. Oct. 8, 2018). Pet. App. A. The Tennessee Supreme Court denied petitioner Miller's request for a stay of execution in that same decision. Pet. App. A, at 11a.

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257, 28 U.S.C. § 1651(a), and 28 U.S.C. § 2101(f).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Twenty-eight U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Twenty-eight U.S.C. § 2102(f) provides in pertinent part:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

STATEMENT OF THE CASE

Petitioners are three Tennessee death row inmates, who, along with thirty other inmates, initiated a declaratory judgment action in the Tennessee courts challenging the constitutionality of the State's midazolam-based three-drug lethal injection protocol. The trial court dismissed the inmates' action after finding that they had failed—during the ten-day trial on the merits of their claims—to show that Tennessee's lethal injection protocol is unconstitutional or otherwise unlawful. Pet. App. B, 25a-26a. The Tennessee Supreme Court affirmed the judgment of the trial court on October 8, 2018. Pet. App. A. Two other plaintiffs from that same action have already, separately, petitioned this Court for relief by challenging the Tennessee courts' disposition of their claims. This Court rejected both requests.[1] Like the earlier petitions, this latest petition presents no substantial question for review by this Court and should, like the earlier petitions, be denied.

Petitioner David Earl Miller is scheduled for execution on December 6, 2018. *State of Tennessee v. David Earl Miller*, No. E1982-00075-SC-DDT-DD (Tenn., Order, Mar. 15, 2018). Petitioner West is scheduled for execution on August 15, 2019. *State of Tennessee v. Stephen Michael West*, No. M1987-00130-SC-DPE-DD (Tenn., Order, Nov. 16, 2018). Petitioner Sutton is scheduled for execution on February 20, 2020. *State of Tennessee v. Nicholas Todd Sutton*, No. E2000-00712-SC-DDT-DD (Tenn., Order, Nov. 16, 2018).

Petitioners seek review by writ of certiorari of the Tennessee Supreme Court's judgment upholding the constitutionality of the State's lethal injection protocol. In addition, because

[1] On October 11, 2018, the Court denied a petition for writ of certiorari from that judgment and an application for stay of execution by inmate *Edmund Zagorski*. *Zagorski v. Parker*, No. 18-6238 (18A376), 2018 WL 4900813 (U.S., Oct. 11, 2018). Before that, on August 9, 2018, the Court denied the application for a stay of execution by inmate Billy Ray Irick. *Billy Ray Irick v. Tennessee*, No. 18A142, 2018 WL 3767151 (U.S. Aug. 9, 2018).

Petitioner Miller is facing execution on December 6, 2018, he has also filed an Application for a Stay of Execution. *Miller v. Parker, et al.*, No. 18A528 (U.S.). This brief in opposition addresses both requests.

Petitioner David Earl Miller was convicted by a Tennessee jury in 1981 and sentenced to death for the first-degree murder of twenty-three-year-old Lee Standifer. On direct appeal, the Tennessee Supreme Court affirmed the conviction but reversed the death sentence and remanded the case for a new sentencing hearing. *State v. Miller*, 674 S.W.2d 279 (Tenn. 1984).[2] On re-sentencing in February 1987, the jury again sentenced Miller to death based upon a finding that the murder was especially heinous, atrocious, or cruel. The Tennessee Supreme Court affirmed, and this Court denied certiorari. *State v. Miller*, 771 S.W.2d 401 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990). Miller later unsuccessfully sought state post-conviction and federal habeas relief. *Miller v. State*, 54 S.W.3d 743 (Tenn. 2001), *cert. denied*, 536 U.S. 927 (2002); *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 2739 (2013).

Petitioner Stephen Michael West was convicted by a Tennessee jury in 1987 for the first-degree premeditated murders of Wanda Romines and her daughter, Sheila Romines, aggravated kidnapping of both victims, and aggravated rape of Sheila Romines. He was sentenced to death for each of the murders and forty years in prison for each of the rape and kidnapping convictions. The Tennessee Supreme court affirmed, and this Court denied certiorari. *State v. West*, 767 S.W.2d 387 (Tenn. 1989), *cert. denied*, 497 U.S. 1010 (1990). West unsuccessfully sought state post-

[2]The Tennessee Supreme Court determined that re-sentencing was required because the jury had considered inadmissible evidence during the sentencing hearing. *Miller*, 674 S.W.2d at 284.

conviction and federal habeas relief. *State v. West*, 19 S.W.3d 753 (Tenn. 2000); *West v. Bell*, 550 F.3d 542 (6th Cir. 2008), *cert. denied*, 559 U.S. 970 (2010).

Petitioner Nicholas Todd Sutton was convicted and sentenced to death by a Tennessee jury in 1986 for the first-degree murder of Carl Estep. The Tennessee Supreme Court affirmed, and this Court denied certiorari. *State v. Sutton*, 761 S.W.2d 763 (Tenn. 1988), *cert. denied*, 497 U.S. 1031 (1990). Sutton unsuccessfully sought state post-conviction and federal habeas relief. *Sutton v. State*, No. 03C01-9702-CR-00067, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999) (perm. app. denied, Dec. 20, 1999), *cert. denied*, 530 U.S. 1216 (2000); *Sutton v. Bell*, 645 F.3d 752 (6th Cir. 2011), *cert. denied*, 566 U.S. 938 (2012).

When Petitioners' efforts to upset their convictions and death sentences proved unsuccessful, they turned their attention to Tennessee's method of execution, joining other death row inmates in a series of challenges to Tennessee's lethal injection protocols. Those challenges have never succeeded on the merits; they have succeeded only in delaying the execution of Petitioners' criminal judgments, each of which has been final for more than three decades.

In 2012, the Tennessee courts rejected a legal challenge by death-sentenced inmates to the constitutionality of Tennessee's lethal injection protocol, which then called for a three-drug combination of sodium thiopental, pancuronium bromide, and potassium. Citing this Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), the Tennessee Court of Appeals held that the inmates had failed to show that the protocol exposed them to an intolerable risk of severe and unnecessary pain and suffering and that they failed to prove an alternative method of execution that is feasible, readily implemented, and that significantly reduces any such risk. *West v. Schofield*, 380 S.W.3d 105 (Tenn. Ct. App. 2012), *cert. denied*, 569 U.S. 927 (2013).

In 2013, the Tennessee Department of Correction replaced the three-drug protocol with a single-drug protocol using pentobarbital, a change necessitated by the unavailability of one of the chemicals essential to carrying out a sentence under the previous three-drug protocol. That challenge also failed in the trial court. On appeal, applying this Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the Tennessee Supreme Court ruled that the State's method of execution did not violate the Eighth Amendment and was not otherwise unlawful. *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017), *cert. denied, West v. Parker*, 138 S. Ct. 476 (2017), and *Abdur'Rahman v. Parker*, 138 S. Ct. 1183 (2018).

But during the three-year pendency of that litigation, pentobarbital too became unavailable to the Tennessee Department of Correction for use in executions, necessitating yet another change in the Department's lethal injection protocol. The Tennessee Supreme Court described this course of events in its October 8, 2018 opinion:

> The *Glossip* Court recognized the practical difficulties in obtaining lethal injection drugs:
>
> > *Baze* cleared any legal obstacle to use 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.

Abdur'Rahman, 2018 WL at *6. Pet. App. A, at 7a. *See also State v. Irick,* 556 S.W.3d 686, 688 n.2 (Tenn. 2018) (observing that the State's "revisions of its lethal injection protocol, as well as

the litigation and delay resulting therefrom, are attributable to the success of anti-death-penalty advocates in convincing pharmaceutical companies not to provide drugs for executions").

On January 8, 2018, the Tennessee Commissioner of Correction approved a revised lethal injection protocol to ensure that the Department of Correction could comply with its statutory obligation to carry out death sentences by lethal injection when ordered to do so by the Tennessee Supreme Court. The revised protocol provided for the use of either of two alternative chemical combinations, as determined by the Commissioner: Protocol A, which called for the use of the single drug pentobarbital; or Protocol B, which called for a three-drug sequence, consisting of midazolam (a sedative in the benzodiazepine family of drugs) followed by vecuronium bromide (a paralytic agent) and potassium chloride (a heart-stopping agent). *Abdur'Rahman*, 2018 WL 4858002, at *2. Pet. App. A, at 3a. The midazolam-based three-drug protocol is substantially the same as the protocol reviewed by this Court in *Glossip*. It is identical to the protocol that was at issue before this Court when it denied certiorari in *Zagorski v. Parker*, No. 18-6238 (18A376), 2018 WL 4900813 (U.S., Oct. 11, 2018), and denied a stay of execution in *Irick v. Tennessee*, No. 18A142, 2018 WL 3767151 (U.S. Aug. 9, 2018).

On February 20, 2018, Petitioners and thirty other inmates filed another state-court declaratory judgment action challenging Protocol B, the midazolam-based three-drug protocol.[3] Being aware of several impending execution dates, including Petitioner Miller's, the trial court established an expedited litigation schedule to allow for adjudication of the inmates' claims by those dates. The inmates amended their complaint twice before trial. Both amendments

[3] The suit did not challenge Protocol A, using pentobarbital, which had already been held to be constitutional.

designated a single-drug pentobarbital protocol as the "available alternative" under *Glossip*.[4] *Abdur'Rahman*, 2018 WL 4858002, at *3, 10. Pet. App. A, 4a, 11a-12a. The pleadings did not allege that any other method of execution would significantly reduce the substantial risk of harm alleged with respect to the midazolam-based protocol.

On July 5, 2018, the Commissioner of Correction removed Protocol A from the State's execution protocol and made additional changes not relevant to this proceeding. The amendment left intact the only method under review in this case, *i.e.*, the midazolam-based three-drug protocol.

A ten-day trial commenced on July 9, 2018, during which Petitioners and the other inmates presented four expert witnesses and twelve lay witnesses. *Abdur'Rahman*, 2018 WL 4858002, at *3. Pet. App. A, 4a. After the close of proof at trial, Petitioners moved to amend their Second Amended Complaint under Tenn. R. Civ. P. 15.02 to assert that the removal of vecuronium bromide from the three-drug protocol is a known, feasible, and available alternative method of execution.[5] But the trial court denied the motion because Petitioners failed to meet the Rule 15.02 requirements for a post-trial amendment, since, as the trial court found, the issue was known or could have been known before trial, and the issue had not been tried by consent of the parties. Pet. App. A, at 4a, 12a-13a.

On July 26, 2018, the trial court dismissed Petitioners' Second Amended Complaint after finding that they had failed to plead and prove an essential element of their method-of-execution

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[4] Petitioners' initial Complaint alleged no alternative method of execution at all. Only when faced with the prospect of dismissal under Tenn. R. Civ. P. 12.02(6), did they include the single-drug pentobarbital alternative by amendment to the Complaint.

[5] Rule 15.02, Tennessee Rules of Civil Procedure, permits an amendment of the pleadings to conform to the evidence when an unpleaded issue has been tried by implied consent of the parties.

cause of action under *Glossip v. Gross*, 135 S.Ct. 2726 (2015), *i.e.*, that an available method of execution exists. Pet. App. A, at 5a.

> 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.

Pet. App. B, at 26a.

Petitioners appealed, and the Tennessee Supreme Court affirmed the judgment of the trial court on October 8, 2018. Pet. App. A, 5a, 16a.[6] The Tennessee Supreme Court concluded that "the evidence [in the record] 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." *Abdur'Rahman*, 2018 WL 4858002, at *13. Pet. App. A, 14a.

> [W]e 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-

[6] While the appeal was pending, Tennessee executed one of the plaintiff inmates, Billy Ray Irick, using the midazolam-based three-drug protocol. That execution was carried out only after the Tennessee Supreme Court had denied Irick's motion to vacate his execution date because he had failed to show, as required to obtain a stay of execution under Tenn. Sup. Ct. R. 12.4(E), "a likelihood of success on the merits" of his collateral litigation in state court. This Court also declined to stay Irick's execution on the same record and the same findings now before this Court. *Irick v. Tennessee*, No. 18A142, 2018 WL 3767151 (U.S. 2018).

> 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.

Id. Pet App. A, 14a.

On October 11, 2018, this Court denied a petition for writ of certiorari from the Tennessee Supreme Court's judgment and an application for stay of execution by inmate *Edmund Zagorski*. *Zagorski v. Parker*, No. 18-6238 (18A376), 2018 WL 4900813 (U.S., Oct. 11, 2018). Petitioners have now filed this separate petition for writ of certiorari and application for stay of execution from the same state-court judgment.

REASONS FOR DENYING A STAY AND DENYING REVIEW

Petitioner Miller's application for a stay of execution should be denied because he has no likelihood of success on the merits of his petition for certiorari. Nor can he meet his burden of showing a likelihood that his petition for writ of certiorari will be granted *and* that there is a significant possibility of reversal of the lower court's decision.

Petitioner Miller faces execution by the State of Tennessee on December 6, 2018, and he seeks a stay of execution under the All Writs Act, which empowers this Court to "issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). But reliance on the All Writs Act does not excuse an inmate who seeks a stay of execution "'to challenge the manner in which the State plans to execute him'" from "satisfy[ing] all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Dunn v. McNabb*, 138 S. Ct. 369 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). Miller has no likelihood of success on the merits of his petition, let alone the significant possibility of success required for a stay of execution.

Nor does 28 U.S.C. § 2101(f) provide a basis for a stay, because Miller cannot show, as he must, a likelihood that his petition for writ of certiorari will be granted *and* that there is a significant possibility of reversal of the lower court's decision. First, this Court has already denied certiorari review of the same judgment on the same record in *Edmund Zagorski*. *Zagorski v. Parker*, No. 18-6238 (18A376), 2018 WL 4900813 (U.S., Oct. 11, 2018). The latest petition is no more substantial than that one. Second, the Tennessee Supreme Court's decision conformed entirely with this Court's directives in *Glossip* and *Baze*. 135 S.Ct. at 2739 ("*Baze* . . . made clear that the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative.") (emphasis added).

A. There Is No Significant Possibility of Success on the Merits of Petitioners' Challenge to Tennessee's Lethal Injection Protocol.

Petitioner asks this Court to stay his execution pending the disposition of a petition for writ of certiorari in this Court challenging the decision of the Tennessee Supreme Court that upheld the constitutionality of the State's lethal injection protocol. His application should be denied because he can show no likelihood that review by this Court, even if granted, will result in reversal of the state court's decision. Indeed, this Court has already denied certiorari review of the same state-court judgment at issue in this petition.

"[A] stay of execution is an equitable remedy," and "equity must be sensitive to the State's interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Inmates like Petitioner who seek to challenge how the State plans to carry out their sentences must show "a significant possibility of success on the merits" of that collateral litigation. *Id*. Petitioner cannot make that showing here because he failed to prove an essential element of his Eighth Amendment method-of-execution claim in the state trial court. And that failure was not just one of degree: Petitioner presented *no credible evidence* that his proposed

method of execution—the single drug pentobarbital—is available to the State of Tennessee for use in executions. *Abdur'Rahman*, 2018 WL 4858002, at *13. Pet. App. A, at 13a-14a. "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." *Id.* And the trial court "found convincing" and fully credited the testimony of the officials of the Tennessee Department of Correction ("TDOC") that "TDOC would use pentobarbital if it were available, because [the Tennessee Supreme Court] recently upheld the one-drug protocol using pentobarbital." *Id.* As both the trial court and the Tennessee Supreme Court pointed out, given that recent holding, it "defies common sense" that TDOC would not use pentobarbital if it were available. *Id.* The Tennessee Supreme Court found the trial court's credibility determination to be supported by the record. *Id.* That ruling is legally unremarkable and provides no basis for a grant of certiorari, let alone reversal of the decision.

Moreover, Petitioners' protests about the State court's application of Tennessee procedural rules exceeds this Court's certiorari jurisdiction, because the authority to determine such questions properly rests exclusively with the Tennessee Supreme Court, which fully considered and rejected Petitioners' claims. *See C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967).

Petitioners insist, nevertheless, that review is necessary to resolve an "important and recurring burden-of-proof issue." Application, at 2. But they are incorrect. The law is clear. The burden of proof is on the challenger. Petitioners point to no decision whatsoever suggesting confusion surrounding that clear mandate.

In *Glossip*, this Court instructed that prisoners "cannot successfully challenge a method of execution" unless they (1) establish that the method presents a risk that is "sure or very likely to cause serious illness and needless suffering" and (2) identify an alternative that is "feasible, readily

implemented, and in fact significantly reduce[s] a substantial risk of severe pain." 135 S. Ct. at 2737. This Court was clear that "the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative" to the method they are challenging. *Id.* at 2739 (emphasis added). This is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S.Ct. at 2731 (emphasis added). The burden of establishing these elements rests entirely with the inmate challenging a State's method of execution. Prisoners cannot successfully challenge a method of execution unless "they establish" the two requirements outlined in *Baze* and *Glossip*. 135 S.Ct. at 2737.

Nor is this case in any way a "perfect companion" to *Bucklew v. Precythe*, No. 17-8151 (U.S.). Application, at 2. *Bucklew* raises a question about a plaintiff's burden to prove "an adequate alternative method of execution *when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition*." Petition for Writ of Certiorari at (i), *Bucklew v. Precythe*, No. 17-8151 (U.S. Mar. 5, 2018) (emphasis added). None of the plaintiffs in this case, including the Petitioners here, raised that sort of claim in the State courts. Instead, Petitioners asked the Tennessee state courts to declare as a matter of law that the State's midazolam-based three-drug protocol *on its face* violates the Eighth Amendment. And "identify[ing] a known and available alternative method of execution that entails a lesser risk of pain [is] a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S. Ct. at 2731 (emphasis added).

Moreover, unlike this case, the point of contention in *Bucklew* was not whether the inmate's proposed alternative—lethal gas—was a feasible and available alternative. *See Bucklew v. Precythe*, 883 F.3d 1087, 1094 (8th Cir. 2018) (cert. granted). Instead, the point of contention was the comparative risk of harm between the State's existing method of execution (lethal injection)

and the inmate's proposed alternative (lethal gas), considering the inmate's unique congenital medical condition. *Id.* at 1093. The contours of any comparative analysis have no bearing here whatsoever, because Petitioners failed to meet the threshold showing that pentobarbital is even available to the Tennessee Department of Correction. *Bucklew* thus provides no basis for this Court to interfere with Tennessee's interest in enforcing Petitioner Miller's thirty-one-year-old death sentence.

This 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*, 135 S. Ct. at 2732. The state trial court's rejection of Petitioners' challenge to Tennessee's lethal injection protocol is in line with this Court's decision in *Glossip* and the decisions of other federal appellate courts that have uniformly rejected Eighth Amendment challenges to lethal injection protocols that use midazolam as the first drug in a three-drug combination. *See Glossip*, 135 S. Ct. at 2739-40 (observing that "numerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from the administration of the paralytic agent and potassium chloride"). *See also In re: Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017) (reversing order enjoining three-drug protocol using midazolam and explaining that "[Ohio's] chosen procedure here is the same procedure (so far as the combination of drugs is concerned) that the Supreme Court upheld in *Glossip*"), *cert. denied*, 137 S. Ct. 2238 (2017); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir. 2017) (concluding that evidence fell short of showing a significant possibility that Arkansas protocol is "sure or very likely" to cause severe pain and needless suffering), *cert. denied*, 137 S. Ct. 1275 (2017); *Arthur v. Comm'r, Ala. Dep't of Corr*., 840 F.3d 1268 (11th Cir. 2016) (inmate "ha[d] not carried his heavy burden to show that Alabama's current three-drug protocol—which is the same as the protocol in *Glossip*—is 'sure or

very likely to cause' [inmate] serious illness, needless suffering, or a substantial risk of serious harm"), *cert. denied*, 137 S. Ct. 725 (2017).[7]

B. A Stay of Execution Will Harm the Significant State Interests.

A stay of execution is an equitable remedy, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. *Hill*, 547 U.S. at 584. This Court cautioned in *Baze* that adherence to the feasible alternative requirement was necessary to avoid transforming courts into boards of inquiry "with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51.

> 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. *See Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government").

Id.

Three rounds of litigation—over more than a decade—aimed at undermining Tennessee's efforts to carry out lawful criminal sentences clearly illustrate the danger warned against in *Baze*. Tennessee has a strong interest in enforcing its criminal judgments without undue interference

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[7] Although not necessary to its disposition of Petitioners' Eighth Amendment claim, the trial court also found that the Petitioners failed to prove the other element of *Glossip*—that the protocol "presents a risk that is 'sure or very likely to cause serious illness and needless suffering and give rise to sufficient imminent dangers.'" *West*, 519 S.W.3d at 563-64 (citing *Glossip*, 135 S.Ct. at 2737). The trial court explained that "the Inmates have not established the other *Glossip* prong that with the use of midazolam there is an objectively intolerable risk of harm." Pet. App. B, at 44a. The Tennessee Supreme Court did not reach this issue in its decision because *Glossip* did not require it to.

from the federal courts. Tennessee courts have closely hewed to this Court's decisions, which clearly outline the essential elements of an Eighth Amendment method-of-execution claim. At this juncture, Petitioners have long since completed state and federal review of their convictions and sentences. The State's interests in finality are "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998).

C. A Stay of Execution Will Not Aid This Court's Jurisdiction Because There is No Basis for Certiorari Review.

A stay of Petitioner Miller's execution is also not necessary to preserve this Court's ability to consider a petition for certiorari from the state court's decision because neither of the issues presented by Petitioners is worthy of review.

In their first question presented, Petitioners argue that the Tennessee courts imposed an evidentiary requirement upon them not required by *Glossip*. But that argument is based on the false premise that the State courts rejected their claim "because Plaintiffs did not call their own witnesses." Petition, at 19-20. That is plainly inaccurate and unsupported by the State courts' rulings. Moreover, Petitioners' arguments simply rehash the same inferences that have already been rejected by the trier of fact after hearing the witnesses and proof first-hand at trial.

Contrary to Petitioner Miller's assertion, the trial court did not "struggle" with the "availability question and the burden of proof" required in a method-of-execution claim. Application, at 2. Just the opposite is true: the trial court explained clearly and correctly the burden imposed by *Glossip* and the justification for it, as outlined by this Court in *Baze*. Pet. App. B, at 25a.

Moreover, the trial court did not reject Petitioners' claim because they "did not call their own witnesses." Petition, at 19-20. The trial court rejected Petitioners' claim because "the greater weight and preponderance of the evidence is that pentobarbital is not available to the [State of

Tennessee]." Pet. App. B, at 43a. Not a single one of Petitioners' multiple medical and pharmaceutical experts offered any testimony on the "this critical element of the trial." Pet. App. B, at 35a. Instead, Petitioners sought to prove an essential element of their claim, i.e., that pentobarbital is available to the State for use in executions, "solely by discrediting State officials." Pet. App. B, at 35a. But that effort failed because the trial court ruled that those State officials had given "credible testimony," Pet. App. B, at 39a, which detailed the exhaustive, albeit unsuccessful, efforts of the Tennessee Department of Correction to obtain pentobarbital for executions. Pet. App. A, at 13a-14a. The Tennessee Supreme Court found that determination fully supported by the evidentiary record.

> 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. . . . 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. . . . 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. 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.

Abdur'Rahman, 2018 WL 4858002, at *13. Pet. App. A, at 14a.

In sum, Petitioners' first question provides no basis for certiorari review. *Glossip* plainly outlines an inmate's burden for succeeding on an Eighth Amendment method-of-execution claim. This Court held in *Glossip* that a prisoner bears the burden of identifying a feasible, readily implemented alternative that effectively addresses and in fact significantly reduces a substantial risk of serious harm or severe pain. *Baze*, 553 U.S. at 52; *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.") (emphasis added). This is "a requirement of *all* Eighth Amendment

method-of-execution claims." *Glossip*, 135 S.Ct. at 2731 (emphasis added). Because Petitioners failed to meet that requirement here, the Tennessee Supreme Court correctly concluded that they "failed to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment." *Abdur'Rahman*, 2018 WL 4858002, at *15. Pet. App. A, at 16a.

In their second question presented, Petitioners argue that the State courts denied them an "opportunity to amend their complaint with as-applied challenges," Pet. 21, and refused to consider evidence of a two-drug alternative that was not included in their initial, First Amended, or Second Amended Complaints. Pet. 23. The first point faults the trial court's denial of Petitioner's request to amend their Complaint (for a third time) under Rule 15.01, Tenn. Rules of Civil Procedure. *See* Pet. App. 10a-11a. The second point faults the trial court's denial of Petitioners' motion, made at the close of the plaintiffs' proof at trial, to amend their (already twice amended) complaint to include an unpled alternative method of execution. *See* Pet. App. 11a-12a.

These arguments challenge nothing more than the State courts' application of Tennessee state procedural rules. Such a challenge provides no basis for certiorari review either. This Court has long recognized that a State's highest court is the best authority on its own law. *See C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967). There is certainly no cause for exception here.

In addressing Petitioners' procedural arguments, the Tennessee Supreme Court observed that trial courts have broad authority to decide motions to allow late-filed amendments and will not be reversed absent an abuse of discretion, which did not occur in this case.[8] Pet. App. A, at

[8] Petitioners had moved to amend their complaint ten days before the start of trial to add as-applied challenges for those plaintiffs, including Petitioner Miller, whose execution dates were set. Petitioners argued in the trial court that the late amendment was justified because they had learned only a week earlier of the State's intent to use compounded (rather than commercially prepared)

10a. Moreover, the Tennessee Supreme Court specifically upheld the trial court's determination that Petitioner's unpled alternative method of execution was not tried by consent of the parties.

> 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.

Pet. App. A, 12a-13a (emphasis added).

Petitioners' suggestion that they were lulled into believing that pentobarbital was available until it was formally removed from the protocol on July 5, 2018, is, on the record, demonstrably incorrect. As the Tennessee Supreme Court explained, the July 5 amendment only eliminated the one-drug pentobarbital protocol as a chemical alternative. *Abdur'Rahman*, 2018 WL 4858002, at *7. Pet. App. A, at 8a-9a. It left intact the three-drug midazolam protocol that had been the subject—and the only subject—of the litigation from the outset. And Petitioner Miller had known since at least February 2018 that the State of Tennessee would use the three-drug midazolam protocol. *Id*. Indeed, he had reached that conclusion himself a month earlier when he argued to the Tennessee Supreme Court that "[p]ublic records and the adoption of this new protocol suggest

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midazolam. The trial court denied the motion based on undue delay because the protocol explicitly provided for the use of one or more compounded drugs. Pet. App. A, at 10a-11a. The Tennessee Supreme Court concluded that the trial court did not abuse its discretion in denying the motion to amend. Pet. App. A, at 11a.

that Tennessee does not have access to pentobarbital." *State v. David Earl Miller*, No. E1982-00075-SC-DDT-DD (Response, filed Jan. 18, 2018). Respondent's Appendix ("Resp. App."), at 2. Moreover, Petitioners received actual notice in the course of this litigation through the affidavit of Respondent Parker, which was filed as an attachment to separate motions and 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." Resp. App. 13.

In short, neither of the two issues raised in this petition requires or warrants review by the Court. Indeed, on precisely the same record and similar issues, this Court has already twice declined to intervene when Billy Ray Irick and Edmund Zagorski sought stays of execution and has already denied certiorari when Zagorski sought review of the same Tennessee Supreme Court decision on the same record, raising substantially the same questions as those now presented by Petitioners. This petition provides no basis for a different result and should, likewise, be denied.

CONCLUSION

Petitioners' Petition for Writ of Certiorari and Petitioner Miller's Application for a Stay of Execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition was forwarded by United States mail, first-class postage prepaid, and by email on the 20th day of November, 2018, to the following:

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