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

Nos. 18-6739, 18A528

IN THE SUPREME COURT OF THE UNITED STATES

DAVID EARL MILLER, et al.,

Petitioners,

v.

TONY PARKER, et al.,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION AND REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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INTRODUCTION

Respondents urge this Court to deny review, asserting this Court has already declined to review the state court judgment challenged in this case, and therefore Petitioners must be executed by a demonstrably more painful, lengthier process. Respondents argue *Bucklew* is merely a case about an inmate with unique medical problems and its holding will be irrelevant here. BIO at 18-19.

Respondents are wrong. The prior denials of certiorari do not establish the rightness or wrongness of the lower court opinion or the cert-worthiness of later cases. Petitioners timely raised known available alternatives as soon as the Defendants changed the face of the protocol; even if the two-drug alternative should have been raised sooner, due process does not sanction an interpretation of *Glossip* that bars consideration of the evidence of the known and available less painful alternative. Finally, while *Bucklew* concerns an as-applied challenge, its outcome hinges entirely on the application of *Glossip*. *Glossip* created uncertainty about how to establish both prongs of its test. That uncertainty is manifest in this case where the state court faulted Petitioners for relying upon evidence in the Defendants' possession and for relying upon the accuracy of the protocol.

Glossip does not support this outcome, where Plaintiffs presented two known and available alternatives and the state court arbitrarily refused to consider the proof. Due process demands more. This Court should grant review to clarify the *Glossip* standard for when and how a condemned inmate must establish a known

and available alternative, and to affirm that even inmates challenging the method of their execution are entitled to due process. Further, the procedural and evidentiary rulings in this case are similar to the rulings in *Bucklew* where this Court granted review. This case should likewise be considered for full review because it is a perfect vehicle to establish the workability of the *Glossip* standard. In *Glossip,* this Court held that when raising a method of execution challenge, the condemned inmate is required to "plead and prove a known and available alternative" that significantly reduces the risk of pain and suffering. *Glossip v. Gross,* 135 S. Ct. 2726, 2739 (2015).

Here, Petitioners established the availability of a significantly less painful protocol based upon use of pentobarbital by offering evidence of notes and emails and text messages generated by the Department of Corrections' drug procurer that show he negotiated with drug companies about the cost, quantity, and availability of pentobarbital, and also, by reliance upon Tennessee's new lethal injection protocol which retained the one-drug pentobarbital protocol as the primary method of execution. The trial court rejected this proof, faulting Plaintiffs for not calling their own expert to testify about the availability of pentobarbital. (R. XVI, 2239, Appx. B at 33a). The state supreme court affirmed this holding, faulting Plaintiffs for failing to offer "direct proof" and noting "all their experts" acknowledged they had not been retained to testify about the availability of pentobarbital. *Abdur'Rahman v. Parker*, No. M2018-01385-SC-RDO-CV, 2018 WL 4858002, at *12 (Tenn. Oct. 8, 2018). Thus, Petitioners seek certiorari on whether *Glossip* requires

the proof to come from a specific source in a specific form. This case squarely raises the question of whether the evidence establishing an alternative must come from a specific source, an issue this Court will soon answer in *Bucklew v. Precythe*, No. 17-8151, 2018 WL 1757763 (U.S. Mar. 15, 2018) (Petition for Writ of Certiorari); *Bucklew v. Precythe*, No. 17-8151, 138 S. Ct. 1706 (Mem) (U.S. Apr. 30, 2018).

Plaintiffs also presented testimony of a two-drug alternative, that eliminates the paralytic agent which needlessly causes the inmate to suffocate for an average of 14 and up to 20 minutes. Defendants acknowledged it was feasible to eliminate the second drug, which suffocates the inmate, because it is unnecessary to achieve death. Experts testified removal of the drug would significantly reduce the pain and suffering of an inmate. The state trial court found Tennessee's protocol needlessly prolongs the period of suffering but that *Glossip* mandated the denial of relief, regardless of the proof presented. The state court failed to consider this evidence because it had not been raised in the facial challenge to Tennessee's prior lethal injection protocol. Thus, Petitioners seek certiorari on whether *Glossip* and the due process clause allow a court to refuse to consider evidence that was not presented in a facial challenge to a prior protocol.

1. The issues in this case are properly before the Court for review.

In the state court, approximately 30 Plaintiffs joined the lawsuit challenging the constitutionality of Tennessee's method of execution. *Abdur'Rahman*, 2018 WL 4858002, at *2. This Court declined to intervene in the executions of former Plaintiffs Irick and Zagorski, who both sought certiorari and stays of execution.

Zagorski v. Parker, No. 18-6238 (18A376), 2018 WL 4900813 (U.S. Oct. 11, 2018); *Irick v. Tennessee*, No. 18A142, 2018 WL 3767151 (U.S. Aug. 9, 2018). Respondents reason, denial of review is warranted here, however this argument is wrong for two reasons.

First, the denial of certiorari "imparts no implication or inference" concerning this Court's view of the merits of the issues. *Hughes Tool Co. v. Transworld Airlines Int'l,* 409 U.S. 363, 365 fn.1 (1973). Review is appropriate and warranted. Initially, the denial of review of a prior case is irrelevant to whether this Court will review this case. In *Glossip v. Gross,* this Court was confronted with a case where several death row inmates filed suit. This Court denied a stay to inmate Warner, who was executed, but then later granted review of Glossip's case, even though it arose out of the same lower court judgment. *Glossip v. Gross,* No. 14-7955, 2015 WL 1045426, at *25 (U.S. Mar. 9, 2015) (Brief of Petitioners). Similarly, this Court may properly determine that review is warranted, even though it declined to review prior cases.

Second, Petitioners West, Sutton, and Miller are procedurally distinct from former Plaintiffs Irick and Zagorski. When the State unveiled its new protocol on the eve of trial, West, Sutton, and Miller objected and moved to amend their complaints to raise another alternative method of execution (the two-drug protocol). When the trial court denied their motion, they urged the court to reconsider this ruling. The challenge to the new protocol proceeded over their objection. Plaintiffs Irick and Zagorski did not raise the same objections and their petitions to this Court raised different issues. Given their distinct procedural history and questions

presented, Petitioners West, Sutton, and Miller raise different issues than Plaintiffs Irick and Zagorski. *See generally* Petition for Certiorari at 3-17.

2. The state court found midazolam and vecuronium bromide needlessly prolong the execution.

Respondents wrongly contend the trial court found Petitioners failed to show the three-drug midazolam protocol will cause extreme pain and suffering. BIO at 20, fn.7.

In fact, the trial court found the following:

> 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 expanded before that with injection of midazolam and vecuronium bromide.
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> . . .
>
> The Court finds 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.

(Trial court order R. XVI, 2254-55, Appx. B at 48a-49a).

In other words, the trial court found midazolam and vecuronium bromide needlessly increase the severity and length of suffering. It denied relief, however, with the prognostication that "this Court would not consider the painful ordeal that [Tennessee inmates] face[ ] sufficiently torturous to violate the Eighth Amendment." *Irick v. Tennessee*, 2018 WL 3767151, at *2 (Sotomayor, J., dissenting from denial of stay application); (Trial court order R. XVI, 2239, 2251-2252, Appx. B at 33a, 45a-46a).

This Court has recognized that death by suffocation occurring over several minutes is constitutionally unacceptable:

> Failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.

Baze v. Rees, 553 U.S. 35, 53 (2008).

The reasoning of *Baze* is on all fours with Petitioners' case. The proof established vecuronium bromide is a paralytic agent that does not hasten death. (Tr. XXV, 162). It is a "neuromuscular junction blocking agent" that causes the inmate to suffocate. (Tr. XXVIII, 507). "[Y]ou want to breathe, but you can't because you can't work your muscles." (Tr. XXVIII 510-11). The Defendants agree the suffocation component is unnecessary. Defendant Parker admitted vecuronium bromide is unnecessary to carry out executions and he can easily remove it from the protocol. (Tr. XXXVII, 1315-16).

Accordingly, while the trial court held *Glossip* prevented it from granting relief, it also found midazolam does not sufficiently anesthetize and that the paralytic causes a prolonged period of suffocation.

3. The state court improperly refused to consider proof of a second known and available alternative.

Petitioners raised a facial challenge to Tennessee's January 8, 2018 Protocol. Petitioners alleged Protocol B (the three-drug midazolam protocol) was unconstitutional because midazolam will not render the inmate insensate during the lengthy period of paralysis and suffocation. Petitioners alleged that Protocol A

(a one-drug pentobarbital protocol) was a known and available alternative to Protocol B. It bears repeating: Petitioners raised a challenge to the *face* of the protocol.

A facial challenge is a challenge to the protocol "as written" and the "Protocol must be assessed *on its face* ...." *West v. Schofield*, 460 S.W.3d 113, 126-27 (Tenn. 2015). A facial challenge does not address how the protocol may be applied "hypothetically ... on some uncertain date in the future ...." *Id.* at 126. "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008).

On the eve of trial, Defendants changed the face of the protocol and removed Protocol B, which Petitioners alleged was a known and available alternative to Protocol A. Within hours after the new, facially different protocol was revealed, Petitioners Miller, Sutton, and West moved to amend their facial challenge to include the two-drug protocol (removing the paralytic agent but still using midazolam and sodium chloride). The state court ruled the Petitioners should have anticipated that the State would change the protocol and eliminate Protocol A, the protocol that Petitioners asserted was an available alternative to the three-drug

protocol (Protocol B). Petitioners Miller, Sutton, and West urged the state court to reconsider this ruling but the state court declined to do so.[1]

Respondents couch the issue as a mere application of state rules and posit that Petitioners should have raised the second alternative execution method sooner. There are problems with this argument. First, Petitioners raised a facial challenge. A facial challenge is limited to the four corners of the document, which listed a constitutional method of execution (the one-drug protocol) and an unconstitutional method (the three-drug protocol). Petitioners relied upon the face of the document and argued the one-drug protocol was a known and available alternative that significantly reduced the substantial risk of unnecessary pain under the three-drug midazolam protocol. The argument that Petitioners should have presented the second known and available alternative sooner overlooks that Defendants changed the face of the protocol and *Glossip* does not require Petitioners to predict such gaminess or to allege an entire universe of alternatives. Essentially, Respondent argues Petitioners should have known that Defendants promulgated a protocol it never had any intention of carrying out and should have anticipated that the one-drug option was illusory. This is an invalid argument against Petitioners' facial challenge.

Arguendo that Petitioners should have anticipated the change to the face of the protocol and should have alleged another method of execution alternative, due process does not countenance imposing the extreme hardship of refusing to consider

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[1] Plaintiffs Irick and Zagorski did not join in this objection.

proof of the two-drug protocol. Expert testimony established the vecuronium bromide suffocates the prisoner. Defendants testified they could eliminate vecuronium bromide and that it is not necessary to cause death. Defendants were not prejudiced by the later presentation of the two-drug alternative. This is evident on the record. Respondents did not object when evidence of reduced suffering under a two-drug protocol was presented. Respondents fully cross-examined Petitioners' expert witnesses and maintained throughout the trial that they bore no burden of proof. The net result of the state court's ruling is that even though Petitioners presented evidence of an available, significantly less-painful means of causing death, they should still be suffocated for an average of 14 and up to 20 minutes because the two-drug protocol was not pled in anticipation that Defendants would change the protocol on the eve of trial.

4. Petitioners raise issues similar to those in *Bucklew* that merit review.

Respondents contend *Bucklew* is solely about a condemned person who has severe medical issues. Thus, Respondent contends, *Bucklew* is irrelevant to this case. However, the issues in *Bucklew* bear remarkable similarity to the issues Petitioners raise. The state court here faulted Petitioners for establishing availability by relying on the face of the protocol, by offering documents generated by the Defendants, and by not presenting expert testimony on the issue of availability.

In *Bucklew*, the Court is going to explain the *Glossip* standard and how it is to be applied. More specifically, the Court will clarify confusion regarding the

burden of proof and how the *Glossip* analysis is to be conducted. The lower court in *Bucklew* held that the inmate did not carry his burden because he relied on evidence from the State's expert and did not present that evidence through his own expert. The following questions will be answered:

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

Bucklew, 2018 WL 1757763, at *i (Petition for Writ of Certiorari); and,

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

Bucklew, 138 S. Ct. at 1706.

This Court's forthcoming merits determination on these issues will bear directly on the merits of Petitioners' case. The state trial court faulted Plaintiffs for not presenting proof through their own expert witnesses. The state trial court failed to engage with the evidence that Plaintiffs discovered from Defendants and presented at the hearing; it discounted that evidence, characterizing it as Plaintiffs' "attempt[] to prove their case solely by discrediting State officials." (R. XVI, 2241, Appx. B at 35a). Plaintiffs' evidence, however, established on its face that Defendants knew of at least one source for pentobarbital. The proof was admitted into evidence for its truth. (Tr. XXXVII, 1334-35). Instead of accepting the proof for its truth, the state court rejected it because Plaintiffs did not call their own witness

on the issue of availability. *Glossip* does not require the Plaintiff to present his own witness to establish availability.

This Court's opinion in *Bucklew* will address the manner of proof regarding the availability and effectiveness of an alternative method of execution (*Glossip* second prong) and is relevant to the issues here. This Court should grant review to clarify *Glossip* does not overrule traditional methods of proof. The similarity between the cases is apparent.

CONCLUSION

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

Dated: November 23, 2018

Respectfully submitted,

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