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

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID EARL MILLER,

Petitioner,

v.

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

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

When David Miller took the life of Lee Standifer, the maximum punishment which could be inflicted under Tennessee law was death by electrocution. Under Tennessee's electrocution protocol, it takes a minimum of six minutes to declare death. The punishment is now so unusual that no state authorizes the electric chair as the primary execution method and no other country in the world permits executions by electrocution. For decades it has not been inflicted on any person without consent. Electrocution is so cruel that the two courts to fully examine the pain, suffering, and mutilation it creates found it is a cruel and unusual punishment.[1]

On July 5, 2018, Tennessee implemented an execution method harsher than electrocution; a three-drug protocol utilizing midazolam—a drug that has no pain-killing properties. Respondents do not dispute this contention, nor the following facts regarding the effects of the new lethal injection protocol. The first drug, midazolam, causes an inmate's lungs to fill with fluid and produces a sensation of drowning. The second drug, vecuronium bromide, paralyzes an inmate causing a feeling of being buried alive. The third drug, potassium chloride, signals nerves to ignite and creates an experience of being burned alive as it courses through the circulatory system. It eventually depolarizes the heart muscles which deprives the

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[1] *State v. Mata*, 745 N.W.2d 229 (Neb. 2008); *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001).

brain of oxygen and causes death. The only execution using this protocol in Tennessee lasted 20 minutes.

Under Tennessee law, the presumptive execution method is the three-drug midazolam protocol, and Defendants notified Miller it would be used on him.[2] Miller could only avoid the greater punishment of the three-drug protocol (which violates the Ex Post Facto Clause) by consenting to electrocution, his original punishment, which violates the Eighth Amendment. Miller succumbed to the threat of 20 minutes of severe pain and suffering. In a message to the Warden marked "URGENT," Miller wrote on the Warden's letter that said Miller would be executed under the three-drug protocol: "I waive lethal injection and wish to be electrocution [sic]."

The court below held Miller voluntarily waived his right to challenge the constitutionality of electrocution under the Eighth Amendment. It also found Miller failed to demonstrate a substantial likelihood of success on his Ex Post Facto claim and Eighth Amendment challenge to electrocution.

The following questions are presented:

(1) When an inmate alleges that both his original and later-imposed punishments for the same crime violate the Eighth Amendment but the later-imposed punishment will cause greater pain and suffering, does the Ex Post Facto Clause require the inmate to also show the later-imposed punishment is "'sure or very likely' less humane?"

(2) Is a waiver of Eighth Amendment rights invalid when induced by a State's threat to impose a harsher punishment than allowed at the time of the crime?

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[2] *See* Tenn. Code Ann. § 40-23-114.

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The court of appeals 2-to-1 decision affirming the district court's denial of a preliminary injunction will be reported at *Miller v. Parker*, No.18-6222, ___ F.3d ___ (6th Cir. December 3, 2018), and is attached as Appendix D. The circuit court's November 28, 2018 order denying stay pending appeal and dissent are found at *Miller v. Parker*, No. 18-6222, ___ F.3d ___, 2018 WL 6191350 (6th Cir. Nov. 28, 2018). They are attached hereto as Appendix A. The order of the district court denying preliminary injunction appears at *Miller v. Parker,* No. 3:18-CV-01234, 2018 WL 6003123 (M.D. Tenn. Nov. 15, 2018); and its order denying reconsideration appears at *Miller v. Parker*, No. 3:18-CV-01234, 2018 WL 6069181 (M.D. Tenn. Nov. 20, 2018). They are attached hereto as Appendix B and Appendix C, respectively.

JURISDICTION

Jurisdiction over the final judgment on the merits of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

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

The Eighth Amendment to the United States Constitution provides that:

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

Article I, section 10 of the United States Constitution provides that:

"No State shall ... pass any ... ex post facto Law, ... [.]"

STATEMENT OF CASE

Unless this Court intervenes, David Earl Miller will be executed on December 6, 2018.

In Tennessee, lethal injection is the presumptive method of carrying out the punishment of death. Tenn. Code Ann. § 40-23-114(a). "Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection." Tenn. Code Ann. § 40-23-114(b).

On November 1, 2018, Tennessee executed Billy Ray Irick utilizing a new, three-drug lethal injection protocol that administers, in a serial fashion, midazolam, vecuronium bromide and potassium chloride. The execution of Irick lasted 20 minutes. During the lethal injection—and after the "consciousness check"—Irick's body jolted, he gasped for air, he hacked and coughed, his face turned deep purple and he moved his head. (R.1, PageID# 20 ¶¶72-73; PageID# 21-25 ¶¶78-105.)[3]

On November 2, 2018, Mr. Miller, with three other Tennessee death row inmates sentenced to death prior to January 1, 1999, filed a complaint in the United States District Court for the Middle District of Tennessee pursuant to 42 U.S.C. § 1983 alleging five causes of action:

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[3] Cites to the record of the district court case below, *Miller, et al. v. Parker, et al.*, No. 3:18-cv-01234 (M.D. Tenn.), are indicated by "R. [ECF document number]" and cites to filings in the instant appeal are indicated by "Doc. [ECF document number]"

1. The method of execution to be imposed on the Plaintiffs (Tennessee's July 5, 2018 Lethal Injection Protocol) violates Article I, §10 of the Constitution, the Ex Post Facto Clause, because it inflicts a greater amount of suffering than the maximum allowable punishment at the time of the crimes (electrocution);

2. Tennessee's Electrocution Protocol creates a substantial risk of unnecessary and severe pain and suffering and mutilation in violation of the Eighth Amendment and there exist feasible and readily available alternatives which significantly reduce the risk of pain;

3. Tennessee's July 5, 2018 Lethal Injection Protocol creates a substantial risk of unnecessary and severe pain and suffering in violation of the Eighth Amendment and there exist feasible and readily available alternatives which substantially reduce the risk of pain and this claim is not barred by the doctrine of *res judicata* as to Plaintiffs Miller, Sutton and West (because they did not raise the same claim in *Abdur'Rahman, et al. v. Parker, et al.*, M2018-01385-SC-RDO-CV (Tenn.)) or as to Plaintiff King (because he was not a party to *Abdur'Rahman*);

4. In order for Plaintiffs to avoid the harsher Ex Post Facto punishment of Tennessee's new midazolam-based three-drug protocol, Defendants require Plaintiffs to "choose" electrocution for their executions and thereby waive the right to challenge electrocution as violating the Eighth Amendment, and this waiver is involuntary;

5. Defendants' failure to afford Plaintiffs' counsel with telephone access during their executions violates the right of access to the courts.

(Complaint, R. 1).[4]

The facts in this case are not contested.

With respect to the Ex Post Facto violation:

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[4] Plaintiffs sought to enjoin Respondents from denying their counsel access to a telephone during executions. (Motion for Temporary Restraining Order (After Notice) and/or Preliminary Injunction ("Motion for TRO"), R.7, PageID# 1344-87; Request for Hearing, R.18, PageID# 1403-05). The Court granted this injunction (R.20) and Respondents will comply with its terms (R.30).

> Miller has presented plausible and yet-unrebutted assertions that the three-drug protocol causes 18-20 minutes of pain and suffering, substantially longer than the six minutes of pain and suffering caused by electrocution. The state has not addressed the merits of this new evidence [regarding the harm inflicted by the three-drug midazolam protocol], other than to point to recent decisions finding that similar lethal-injection protocols did not inflict cruel and unusual punishment.

Miller v. Parker, No. 18-6222, slip op. p.8 (6th Cir. Dec. 3, 2018) (Appx. D at 23a) (White, J., dissenting from denial of Miller's stay motion). The dissent below held: "based on Miller's unrebutted evidence, the state's failure to respond to that evidence, and the district court's recognition of serious questions concerning whether the three-drug protocol is less humane than execution, Miller has presented a substantial likelihood of success on his ex post facto claim." *Miller v. Parker*, No. 18-6222, slip op. p.8 (6th Cir. Dec. 3, 2018) (Appx. D, 23a). (White, J., dissenting from denial of Miller's stay motion).

Regarding the constitutionality of electrocution: "Miller's lengthy and detailed complaint presents similar evidence [establishing electrocution is a cruel and unusual punishment], and, tellingly, the state does not respond to Miller's evidence or arguments on the merits." *Miller v. Parker*, No. 18-6222, slip op. p.7 (6th Cir. Dec. 3, 2018) (Appx. D at 22a) (White, J., dissenting from denial of Miller's stay motion). "Nor did the state dispute that Miller has identified several feasible and readily available alternative methods of execution that would substantially reduce the risk of pain." *Miller v. Parker*, No. 18-6222, slip op. p.9 (6th Cir. Dec. 3, 2018) (Appx. D at 24a) (White, J., dissenting from denial of Miller's stay motion).

Along with the complaint, a Motion for Temporary Restraining Order (After Notice) and/or Preliminary Injunction, (R.7), was filed and on November 8, 2018, Miller filed a Request for Hearing. (R.18). Miller was under the compulsion to submit to the punishment of electrocution because of the threatened Ex Post Facto imposition of an even harsher punishment under the new lethal injection protocol. Miller sought an injunction preventing Respondents from presenting him (during the pendency of the complaint) with a waiver of his right to challenge electrocution. He also sought an injunction preventing Respondents from carrying out (during the pendency of the complaint) his December 6, 2018 execution by means of either method provided by Tennessee law because: (a) the presumptive method of the July 5, 2018 Lethal Injection Protocol violates the Ex Post Facto Clause, and, (b) the alternative method of electrocution violates the Eighth Amendment.

On November 9, 2018, Respondents filed their response in opposition (Resp. in Opp. to Mot. for TRO and/or Prelim. Inj., R.19, PageID# 1406-33).

On November 15, 2018, the district court denied Plaintiffs' motion in all aspects but one: it granted an injunction on the access to the courts claim. (Memo. and Order, R.20, PageID# 1708). The district court also denied Miller's Request for Hearing. (Req. for Hrg., R.18; Memo. and Order, R.20, PageID# 1708).

On November, 19, 2018, Miller filed a Motion for Reconsideration. (R.23, PageID# 1713-15). The Motion for Reconsideration was denied by the district court the following day. (Memo. and Order, R.28, PageID# 1881-83).

Notice of appeal to the United States Court of Appeals for the Sixth Circuit from the district court's final order denying reconsideration (R.28) and the district court's Memorandum and Order denying a preliminary injunction (R.20) was filed on November 20, 2018. (Notice of Appeal, R.29, PageID# 1884-85).

On November 24, 2018, Miller sought a preliminary injunction from the court of appeals to prevent Respondents from giving any effect to any purported waiver of Miller's right to challenge the constitutionality of electrocution and to enjoin Respondents from carrying out Miller's execution on December 6, 2018.

On November 26, 2018, Respondents filed a partial response in opposition addressing only the relief requested as to waiver. They asserted the request for an injunction on this basis was moot because Miller had, in fact, elected to be executed by electrocution. Miller filed a reply the same day.

On November 27, 2018, Miller filed his appellate brief and a motion for an expedited briefing schedule and appellate review.

On November 28, 2018, the court of appeals issued a published Order wherein the panel, in a 2-to-1 vote, denied Miller's motion to stay the execution date. The court granted the motion for expedited briefing and review.

On November 29, 2018, before noon EST, Respondents filed their appellate brief. Miller filed a brief in reply at 10:10 p.m. EST.

On December 3, 2018, the court of appeals, in another split decision and based on the same reasons it denied the stay of execution, affirmed the district

court's order denying preliminary injunctive relief. *Miller v. Parker*, No.18-6222, ___ F.3d ___ (6th Cir. December 3, 2018) (Appx. D, 16a-19a).

Miller now files this petition for writ of certiorari and accompanying request for a stay of execution.

REASONS FOR GRANTING THE WRIT

I. The decision below disturbs firmly established precedent interpreting Article I, Section 10, of the United States Constitution, the Ex Post Facto Clause.

The court of appeals' 2-to-1 decision improperly interjects Eighth Amendment principles and procedural requirements into what was heretofore an area of settled Ex Post Facto jurisprudence. It requires a showing that the after-the-fact punishment is "'sure or very likely' to be less humane than [the original punishment]." *Miller v. Parker*, No. 18-6222, slip op. p.3 (6th Cir. Dec. 3, 2018). (Appx. D, 18a). The court below improperly expands this Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), to add new elements and/or procedural requirements to long-standing Ex Post Facto jurisprudence.[5] Review is required to rectify this overreach and prevent other courts from exporting elements of *Glossip* into other constitutional claims.

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[5] In *Glossip*, the Court required prisoners to establish that a method of execution presents a risk that is "*sure or very likely* to cause serious illness and needless suffering." *Id.* at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)). The court of appeals' mis-application of *Glossip* to an Ex Post Facto analysis is another example of how *Glossip*, as interpreted by death-penalty states, "permits States to immunize their methods of execution—no matter how cruel or how unusual—from judicial review and thus permits state law to subvert the Federal Constitution[.]" *Arthur v. Dunn*, 137 S. Ct. 725 (2017) (mem.) (Sotomayor, J., with whom Bryer, J., dissent from denial of certiorari).

"An ex post facto law possesses two elements: (1) 'it must apply to events occurring before its enactment,' and (2) 'it must disadvantage the offender affected by it.'" *Dyer v. Bowlen*, 465 F.3d 280, 285 (2006) (quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)), and Miller has demonstrated both. First, Tennessee's July 5th Protocol applies to Miller although his crime occurred in 1983. Second, the midazolam-based three-drug protocol provides no pain relief and requires 20 minutes to effectuate death and this is more onerous (i.e., it is a greater punishment) for Miller whose original punishment of electrocution provides no pain relief and requires six minutes. *Dobbert v. Florida*, 432 U.S. 282, 299 (1977) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); *see also Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925) (An act violates the Ex Post Facto Clause if it makes more burdensome the punishment for a crime).

From the time of this Court's earliest jurisprudence, it has recognized that "[e]very law that . . . inflicts a greater punishment, than the law annexed to the crime, when committed" violates the Ex Post Facto Clause. *Calder v. Bull*, 3 U.S. 386, 390 (1798). It applies even when the increased punishment falls with the maximum punishment available for a crime. *Peugh v. United States*, 569 U.S. 530, 539 (2013) (citing *Lindsey v. Washington,* 301 U.S. 397 (1937) ("[W]e have never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause")). "[This Court's] precedents make clear that the coverage of the *Ex Post Facto* Clause is not limited

to legislative acts. *Id.* at 545 (citing as example *Garner v. Jones*, 529 U.S. 244, 257 (2000)). So it is that this Court itself has acknowledged that changes to a state's method of execution which increase the pain and suffering the inmate will experience appear to violate the Ex Post Facto Clause. *Weaver v. Graham*, 450 U.S. 24, 32 n.17 (1981) (citing *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915)). Furthermore, while this Court has held that, where the increased punishment is not certain to be imposed, the risk that it will be imposed must be significant, *see Garner v. Jones*, 529 U.S. at 251, it has never held anything more than that the after-the-fact punishment be "greater" when the imposition of the later punishment is certain.

Under this more than two-century old test, the likelihood Miller can establish his Ex Post Facto claim is substantial. Respondents here did not contest Miller's well-pled facts in support of his Ex Post Facto claim. *See Miller v. Parker*, No. 18-6222, slip op. p.8 (6th Cir. Dec. 3, 2018) (Appx. D at 23a) (White, J., dissenting from denial of Miller's stay motion). Those facts, which are to be taken as true, flow from the facts found by the chancery court in a prior case where both Miller and Respondents were parties, *Abdur'Rahman*: (1) midazolam-based three-drug protocols take an average of 14 and up to 18 minutes to cause death; (2) inmates may feel pain from the second and third drugs; (3) midazolam does not elicit strong analgesic effects; (4) eyewitness credibly testified about executions in other the states using a midazolam-based lethal injection protocol where there were signs such as grimaces, clenched fists, furrowed brows, and moans that indicate inmates

felt pain after the midazolam had been injected; and (5) inmates executed under midazolam based protocols face a certainty of "dreadful and grim" pain. (Order & FFCL, *Abdur'Rahman v. Parker*, No. 18-183-II(III) (Davidson County, Tennessee Chancery Court, Jul. 26, 2018, R.1-8, PageID# 507)).[6]

The *Abdur'Rahman* Court also credited the testimony of Petitioners' experts including, Dr. David Greenblatt, whose testimony was unequivocal.[7] Midazolam in

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[6] The *Abdur'Rahman* Davidson County Chancery Court technical record and transcripts of proceedings are filed with the Tennessee Supreme Court in *Abdur'Rahman, et al. v. Parker, et al.*, M2018-01385-SC-RDO-CV ("*Abdur'Rahman* Appeal"). Cites to the Technical Record are "Vol." followed by the corresponding Roman Numeral for the volume number, and "p. or pp." for the consecutively numbered pages of the Technical Record that are cited. Cites to the transcript of proceedings are "Tr. Vol." followed by the corresponding Roman Numeral for the volume number, and "p. or pp." for the consecutively numbered pages of the transcript volume that are cited.

[7] Dr. Greenblatt graduated from Harvard Medical School in 1970. (Tr. Vol. XXVIII, p. 471; Greenblatt *Curriculum Vitae*, Ex. 38, Vol. V, p. 628). In 1979 he joined the faculty at Tufts University School of Medicine. There he has taught and done research in clinical pharmacology for 39 years. (Tr. Vol. XXVIII, pp. 473-74; Ex. 38, Vol. V, p. 628). He is licensed to practice and board certified in clinical pharmacology. (Tr. Vol. XXVIII, p. 474). Currently, he holds the position of Louis Lasagna Professor of Pharmacology and Experimental Therapeutics at Tufts University School of Medicine. (Ex. 38, Vol. V, p. 628; Tr. Vol. XXVIII, p. 474-75). Dr. Greenblatt has published more than 775 original research articles in peer-reviewed journals, including at least 200 on the benzodiazepine class of drugs and 30 on research specifically on midazolam. (Tr. Vol. XL, pp. 1534-35; Ex. 38, Vol. V, pp. 631-87). He has been editor-in-chief for The Journal of Clinical Psychopharmacology and Clinical Pharmacology in Drug Development, and a board member of many other scientific and medical research journals. (Tr. Vol. XXVIII, p. 476; Ex. 38, Vol. 5, p. 630). In 1985, Dr. Greenblatt co-authored the article entitled "Midazolam: Pharmacology and Uses" which reviewed the research on midazolam at that time, including the research that was done in preparation to submit midazolam for FDA approval. (Ex. 40, Vol. 5, p. 711). It has been cited more than 1,000 times. In addition, he was part of a group of researchers that developed a method for measuring levels of midazolam in plasma in the early 1980's (Tr. Vol. XXVIII, p. 480) and participated in a number of studies

any amount will neither prevent the inmates from feeling pain created by Tennessee's three-drug midazolam-based protocol. Midazolam works by causing the pathway through which calming chloride ions reach the brain to open and close more frequently. Even when those pathways open and close as frequently as physically possible, they will not allow those calming ions to flow freely, as they do when barbiturates hold the pathways open. Midazolam does not, and cannot, render an inmate insensate to the pain of vecuronium bromide and potassium chloride. [8]

Midazolam, in the massive dose and high concentration called for by Tennessee's July 5, 2018 Lethal Injection Protocol, causes pulmonary edema meaning that each time midazolam circulates through the condemned inmate's lungs, they will fill with more and more fluid and make it more and more difficult

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of the drug including factors that influenced how it is distributed, metabolized, and cleared in the body. (Tr. Vol. XXVIII, p. 481). He is, in short, one of the foremost experts on midazolam in the world.

[8] During *Abdur'Rahman*, the State's expert witness, Dr. Roscoe Lee Evans, was forced to retreat from the opinions he had offered in earlier trials, including *Glossip*. He admitted midazolam is not an analgesic. (Tr. Vol. XLV, p. 2148). He admitted that *Miller's Anesthesia* is an authoritative text and that it teaches that "benzodiazepines lack analgesic properties and must be used with NSAID drugs to provide sufficient analgesics." (Tr. Vol. XLV, p. 2157). Evans admitted that Dr. Greenblatt is the one of the leading scholars in the area of benzodiazepines in the country. (Tr. Vol. XLV, p. 2168). Dr. Greenblatt's research is the research which establishes that midazolam has a ceiling effect. (Ex. 40, Vol. V, pp. 711-25). Evans did not challenge Dr. Greenblatt's research and methodology, instead he deferred to it. (Tr. Vol. XLV, p. 2168). Finally, Evans admitted that the only study he had offered to support his core opinion that the studies establishing ceiling effect did not consider the massive dose of midazolam used in lethal injections, the Hall Study, actually suggests that, even with massive doses of midazolam used in lethal injections, the ceiling effect limits its effectiveness just as determined in the research of Dr. Greenblatt and others. (Tr. Vol. XLV, p. 2168).

for the inmate to breathe. Fully sensate to what he is experiencing, the inmate will feel "[he is] suffocating and . . . want to breathe, but . . . can't because [he] can't work [his] muscles." The inmate will be paralyzed by vecuronium bromide and then injected with potassium chloride, a process Dr. Greenblatt described as "extremely painful" and other experts described as the equivalent of being "burned alive from the inside" as it passes through the inmate's veins. The only time this protocol has been used in Tennessee it took 20 minutes to declare death. (Complaint, R.1-11, PageID# 545; Tr. Vol. XXVIII, pp. 449, 496-88, 509-10, 511, 541-42, 546; R. XVI, 2255).

Miller also alleged, and can demonstrate, that electrocution inflicts intolerable pain and mutilation. *See State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008); *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001). However, under Tennessee's current electrocution protocol, this pain will continue for no more than six minutes. (Execution Procedures for Electrocution, R.1-2, PageID# 179).

Miller has clearly established a likelihood he will prevail on his Ex Post Facto claim and yet, the court below denied relief. The court's final order, referenced its published order denying preliminary injunctive relief, and did so in a published opinion with precedential value. *Miller v. Parker*, No. 18-6222, slip op. p.3 (6th Cir. Dec. 3, 2018) (Appx. D, 18a). In doing so, it imported a test from *Glossip* to replace the bright line rule set out in *Calder*. The court found "debatable" the question whether 20 minutes of suffering is greater than six minutes of suffering and denied relief on the bases that Miller did not show "the new protocol is 'sure or very likely'

to be less humane than electrocution." *Miller v. Parker*, 2018 WL 6191350, at *1. (Appx. A, 2a); *Miller v. Parker*, No. 18-6222, slip op. p.3 (6th Cir. Dec. 3, 2018) (Appx. D, 18a).

The lower court's new, sure or very likely standard does a grave injustice here, where Miller established a 14-minute increase in pain and suffering. That standard interjects uncertainty into what has for centuries been among the clearest of constitutional prohibitions. Under the lower court's new rule, the question is no longer whether a newly-enacted penalty is greater than the former penalty, it is whether it is "sure or very likely" to be less "humane." The danger of interjecting such a rule where it is not required can be seen nowhere more prominently than it is here, where the court below found it "debatable" whether twenty minutes of torture was greater than six minutes of torture.

This Court should act to preserve the rule in *Calder*, to maintain the simple inquiry envisioned by the Framers, and to do justice in this case. Tennessee's July 5, 2018 protocol violates the Ex Post Facto Clause. Certiorari should be granted and a stay entered to preserve this Court's jurisdiction.

II. This case presents issues of great importance that should be addressed because they will continue to arise under the unprincipled precedent set forth in the majority's decision below.

Miller has consistently asserted that the coercive effect of the Ex Post Facto punishment of Tennessee's new lethal injection protocol renders any waiver of the right to challenge the constitutionality of electrocution invalid. Here, the State does not dispute that Miller will suffer more under the 20-minute lethal injection protocol versus the 6-minute electrocution protocol. The State does not dispute that

the harsher, 20-minute lethal injection protocol *will be used unless* Miller requests electrocution. Defendants have testified and the Tennessee Supreme Court found that the new midazolam protocol was implemented—not because it is believed to be more humane—but because Tennessee said it was unable to acquire other drugs. *Abdur'Rahman v. Parker*, 558 S.W.3d 606, ___, 2018 WL 4858002, at *6 (Tenn. 2018); *see also Zagorski v. Haslam*, 2018 WL 4931939, at *4 (M.D. Tenn. Oct. 11, 2018) ("There are "serious questions . . . concerning whether the lethal injection protocol ... is more or less humane than electrocution."). After the district court twice denied a stay of execution and after the Warden notified Miller the execution would be carried out with the harshest method of execution, Miller sent a message marked "URGENT" to the Warden stating: "I waive lethal injection and wish to be electriocuton [sic]." In order to avoid greater pain under Tennessee's default method of execution, Tennessee's July 5th Protocol required Miller to invoke his originally-imposed sentence of death by electrocution, therefore, this action was not voluntary.

Defendants have compelled Miller to waive his right to be free from the cruel and unusual punishment of electrocution by threatening him with a harsher punishment. This situation will recur as other Tennessee death row inmates near their scheduled execution dates. The majority decision below held that "because Miller has elected to be executed by electrocution, he has waived any challenge to his execution by that method."[9] *Miller v. Parker*, No. 18-6222, slip op. p.4 (6th Cir.

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[9] *Cf. Nancy Jean King, Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. Rev. 113, 173 (1999) (arguing the Eighth Amendment should

Dec. 3, 2018) (Appx. D, 19a). Even so, waiver cannot transform an unconstitutional punishment into a constitutional punishment.[10] *See, e.g.,* Steven A. Blum, *Public Executions: Understanding the "Cruel and Unusual Punishments" Clause,* 19 HASTINGS CONST. L.Q. 413, 451 (1992) ("One may not consent to cruel and unusual punishment. For example, even if given the choice of punishments between torture and death, the prisoner could not choose torture."); Jeffrey L. Kirchmeier,

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not be waivable because it "not only protects the defendant from becoming the target of indecent acts but also protects society from the degrading effects of tolerating barbarous penalties").

[10] Prior to *Stewart v. LaGrand*, 526 U.S 115 (1999) (per curiam), this straightforward principle enjoyed a wide consensus. Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 Wash. & Lee L. Rev. 3, 64, n.353 (2015). Courts "rejected the argument that the government may cloak unconstitutional punishments in the mantle of 'choice.'" *Dear Wing Jung v. United States*, 312 F.2d 73, 75-76 (9th Cir. 1962) (finding unconstitutional a sentence giving the defendant a choice between imprisonment and banishment). *See also Campbell v. Wood*, 18 F.3d 662, 680-81 (9th Cir. 1994) (en banc) (rejecting the State's argument that the defendant's choice of hanging in preference to lethal injection waived Eighth Amendment objection to hanging); *Commonwealth v. McKenna*, 383 A.2d 174, 180 (Pa. 1978) ("[W]e decline to apply the rationale of . . .[previous cases accepting waivers on procedural grounds] in a situation where a finding of waiver will result in the imposition of a sentence of death . . . in a manner clearly contrary to the express law of the land."); *see also State v. Brown*, 326 S.E.2d 410, 411-12 (S.C. 1985) (holding that allowing sexual offenders the choice between imprisonment and castration is unconstitutional because castration itself is cruel and unusual punishment). The majority decision in *LaGrand*, has been construed in a manner undermining the norm that waiver cannot transform an unconstitutional punishment into a constitutional punishment. *See LaGrand*, 526 U.S. at 121 (Stevens, J., dissenting) ("In my opinion the answer to the question whether a capital defendant may consent to be executed by an unacceptably torturous method of execution is by no means clear. I would not decide such an important question without full briefing and argument."). Even after *LaGrand*, however, legal scholars maintain this bedrock principle. Christopher, 72 Wash. & Lee L. Rev. at 64 n.353 (collecting authorities).

Let's Make a Deal: Waiving the Eighth Amendment, 32 Conn. L. Rev. 615, 651-52 (Winter 2002) ("The Eighth Amendment requires that the awesome power to punish is 'exercised within the limits of civilized standards,' and permitting waiver of the Eighth Amendment ban on cruel and unusual punishment would harm society and weaken the Eighth Amendment.") (citation omitted).

This Court's intervention is required because the Constitution does not require anyone, including Miller, to waive his Eighth Amendment right to challenge the constitutionality of his original punishment to avoid imposition of an Ex Post Facto punishment. It is a fundamental precept that the Constitution places no burden on persons to sacrifice one constitutional right to protect another. *Simmons v. United States*, 390 U.S. 377, 394 (1968) ("In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."). At issue here is the well-established rule that the Fifth and Fourteenth Amendments are violated when the government obtains a waiver of constitutional rights through a credible threat of legally unjustified violence. *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991); *United States v. Ray*, 803 F.3d 244, 265 (6th Cir. 2015).

The decision below avoids these basic principles by presuming that Tennessee's execution protocols for both lethal injection and electrocution are constitutional and by avoiding an inquiry into the coercive circumstances leading to Miller's "choice" of electrocution. *Miller v. Parker*, No. 18-6222, slip op. p.3 (6th Cir. Dec. 3, 2018) (Appx. D, 18a). The court below has never determined the

constitutionality of either method of execution in Tennessee.[11] On the other hand, the law presumes against the waiver of constitutional rights. *See Brookhart v. Janis*, 384 U.S. 1 (1966).

As explained under Reason I, *supra*, the lower court's decision side-steps a traditional Ex Post Facto analysis and addresses Miller's challenge to the new lethal injection protocol under the lens of the Eighth Amendment. In addition, although Defendants do not contest Miller's factually-supported allegations, the decision summarily concludes that Tennessee's new lethal injection protocol is constitutional because the court has upheld a similar protocol from the state of Ohio in a case where different parties presented different facts. *Miller v. Parker*, No. 18-6222, slip op. pp.3-4 (6th Cir. Dec. 3, 2018) (Appx. D, 18a-19a). Reliance on the outcome of a fact-intensive inquiry in another case is improper in this capital case where Miller's life hangs in the balance. *See Ohio Bell Tel. Co. v. Pub. Utils. Comm.*, 301 U.S. 292, 300 (1937).

The majority decision below also presumes Tennessee's electrocution protocol is constitutional based on a line of cases summarily rejecting challenges to the

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[11] In contrast, Miller presented the court with substantial facts supporting his allegations which Defendants have not contested and which establish a prima facie case warranting further development, and therefore, a stay of execution. *See Miller v. Parker*, No. 18-6222, slip op. p.5 (6th Cir. Dec. 3, 2018) (Appx. D at 20a) (White, J., dissenting) ("Miller's 125-page complaint alleges and provides facts supporting that both electrocution and lethal injection using the three-drug protocol violate the Constitution and that the three-drug protocol is the harsher and less humane of the two methods of execution.").

constitutionality of electrocution that lead back to this Court's 1890 decision in *In re Kemmler*, 136 U.S. 436 (1890).[12] *See Miller v. Parker*, No. 18-6222, slip op. p.4 (6th Cir. Dec. 3, 2018) (Appx. D, 19a). The facts upon which Miller relies here are completely different from the facts upon which this Court's nineteenth-century decision in *Kemmler* relied. In a fact-intensive inquiry, like the inquiry into pain and suffering inflicted by a method of execution, a prior decision relying upon substantially different facts does not control. *Ohio Bell Tel. Co. v. Pub. Utils. Comm.*, 301 U.S. 292, 300 (1937). On the other hand, the outcome in cases decided upon substantially the same facts is evidence of a likelihood of success. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coffindaffer*, 183 F. Supp. 2d 842, 851 (N.D. W. Va. 2000) (finding a likelihood of success based upon cases decided on similar facts). Courts presented with facts similar to those alleged by Miller have found electrocution violates state constitutional provisions which are materially similar to the Eighth Amendment. *State v. Mata*, 745 N.W.2d 229 (Neb. 2008); *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001). The court of appeals could not determine the

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[12] The lower court also failed to address the evolving standards component to Miller's Eighth Amendment challenge. *See Miller v. Parker*, No. 18-6222, slip op. p.6 (6th Cir. Dec. 3, 2018) (Appx. D at 21a) (White, J., dissenting from denial of Miller's stay motion) (explaining Miller has shown a substantial likelihood of success despite the Court's decision in *In re Kemmler* because: "In typical cases, the passage of time is not enough to find that a Supreme Court case no longer controls. But the Supreme Court itself has made clear that the Eighth Amendment's prohibition against cruel and unusual punishments demands that we revisit from time to time past judgments of what methods are acceptable to accomplish the ultimate punishment of death.").

constitutionality of Tennessee's Electrocution Protocol without factual development about executions in Tennessee's electric chair.

For these reasons, review should be granted because Miller has demonstrated a substantial likelihood of success on the merits and to prevent the involuntary forfeiture of constitutional right from future Tennessee inmates.

CONCLUSION

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

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Respectfully submitted,

Stephen M. Kissinger by DHR w/permission

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