APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

October 27, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JULIUS D. JONES, et al.,

Plaintiffs - Appellants,

and

JAMES A. CODDINGTON, et al.,

Plaintiffs,

v.

SCOTT CROW, et al.

Defendants - Appellees.

No. 21-6139
(D.C. No. 5:14-CV-00665-F)
(W.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **MURPHY**, and **MORITZ**, Circuit Judges.

Plaintiffs-Appellants are Oklahoma prisoners sentenced to death, with scheduled execution dates. Along with 30 other Oklahoma death-row inmates, they filed a Third Amended Complaint (TAC) in this 42 U.S.C. § 1983 lawsuit challenging the constitutionality of Oklahoma's lethal injection protocol. A trial is pending on a single remaining claim asserted in the TAC, and the 27 plaintiffs remaining in the suit who are not part of this appeal are scheduled to participate in that trial. But the district court dismissed all of Appellants' claims in the TAC and denied their motion for a preliminary injunction. They have appealed the district court's denial of their motion for a

preliminary injunction and have moved this court for a stay of execution pending our resolution of this appeal. We have jurisdiction, *see* 28 U.S.C. § 1292(a)(1), and we grant the motion for a stay of execution in part.

In our decision resolving an earlier appeal in this litigation, we explained the standards applicable to both a preliminary injunction and a stay pending appeal:

> We review a district court's decision to deny a preliminary injunction under a deferential abuse of discretion standard. Under this standard, we examine the district court's legal determinations de novo, and its underlying factual findings for clear error. Thus, we will find an abuse of discretion if the district court denied the preliminary injunction on the basis of a clearly erroneous factual finding or an error of law.
>
> A preliminary injunction is an extraordinary and drastic remedy. A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.
>
> A motion for stay pending appeal is subject to the exact same standards. In other words, in ruling on such a request, this court makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction.

Warner v. Gross, 776 F.3d 721, 727-28 (10th Cir. 2015) (citations, internal quotation marks, brackets, and footnote omitted).

We begin by addressing the likelihood of success on the merits, which the Supreme Court has identified as a "critical" factor in our inquiry. *Nken v. Holder*, 566 U.S. 418, 435 (2009). Although Appellants have asserted a likelihood of success on the merits of several of their claims, we need only consider the core claim in the TAC, for which a trial has been scheduled: Count II, which raises a direct Eighth Amendment challenge to Oklahoma's lethal injection protocol.

This claim requires a prisoner to meet two prongs. First, he must show that the State's chosen method of execution presents "a substantial risk of severe pain." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). Second, he must show that the risk is substantial in comparison to other known and available alternatives. *See id.*

In its summary-judgment order, the district court declined to rule as a matter of law that plaintiffs' claim failed the first prong. It set that issue for trial. For example, the district court stated that "[t]here is a fact issue as to whether midazolam performs as well, for execution purposes, as defendants claim it does." *Glossip v. Chandler*, No. 5:14-cv-00665-F, CM doc. 449 at 10 (W.D. Okla. 2021). It also recognized "a fact issue as to whether midazolam will reliably render the prisoner insensate to pain . . . for the length of time necessary to avoid a constitutionally unacceptable risk that the prisoner will be subjected to a constitutionally unacceptable level of pain." *Id.* at 11. The district court further stated that "the prisoners squarely attack the warden's unfettered discretion to deviate from the protocol, as well as—among other things—the adequacy of the consciousness check specified in the protocol," which it said was "unmistakably a central consideration in the Supreme Court's lethal injection jurisprudence." *Id.* at 14.

Notwithstanding this ruling, in denying the motion for preliminary injunction, the district court found that Appellants had failed to demonstrate a likelihood of success on the merits concerning the first prong. Because the district court had already ruled that the first prong must be resolved at trial, Appellants are likely to succeed on their position that denial of an injunction on that basis was an abuse of discretion.

As for the second prong, Appellants have made a strong showing that they complied with it. The TAC identified four alternative methods that all plaintiffs, including Appellants, alleged, as required by the pertinent test, were "feasible, available, readily implemented and would significantly reduce a substantial risk of severe pain." *Id.*, CM doc. 325 at 47. None of the plaintiffs, including Appellants, have ever withdrawn that allegation or withdrawn these methods from consideration. But the defendants propounded an interrogatory asking each individual plaintiff to further identify which of these alternative methods he proffered for use in executing him. Although the plaintiffs objected to this interrogatory, the district court overruled the objection and required them to answer it. The plaintiffs who answered the interrogatory did so by filing a supplemental response that included a listing of the four alternative methods identified in the TAC, with a blank line next to each method where a plaintiff could put his initials. Appellants refused to specify an alternative in response to the interrogatory. The district court therefore granted summary judgment against them on Count II, but permitted the other plaintiffs, who had "checked a box" in supplemental responses to interrogatories that designated one or more alternative methods for their own execution, to proceed to trial on Count II.

The inquiry is complicated by a second factor. In designating the alternative methods in the TAC, and in their response to the defendants' motion for summary judgment, all the plaintiffs reserved the right to challenge the alternative methods they had specified at some future date. The district court cited this as an additional reason for denying a preliminary injunction to Appellants.

But all the plaintiffs, including those whom the district court permitted to go to trial on Claim II, made the same reservation of a future challenge, and the district court held that reservation against only Appellants. As for the other plaintiffs, the court said in its summary-judgment order that it would ignore the very same reservations, stating that if it appeared at trial that any of the plaintiffs actually do reserve the right to challenge their proposed alternative execution methods, that would be fatal to their claim. *See id.*, CM doc. 449 at 18. In contrast, the district court cited the same reservations as fatal to Appellants, who made no more serious reservation of a future challenge than the other plaintiffs. This disparate treatment was an abuse of discretion.

The only real difference between those plaintiffs who survived summary judgment to go to trial and these Appellants, who lost on summary judgment and now face imminent execution, was that the other plaintiffs complied with the district court's instruction to supplement their interrogatory responses by specifying an execution method or methods to be used to carry out their death sentences; the supplemental responses listed the same four alternative methods as choices that were identified by all plaintiffs in the TAC. Appellants, citing religious scruples about assisting in what they viewed as "suicide," refused to answer the interrogatory by choosing one or more of the four alternative methods to be used in their particular case. The problem with granting summary judgment on this basis is that we find nothing in the relevant case law that specifically requires a prisoner to designate a method of execution to be used in his case by "checking a box" when the prisoner has already identified in his complaint the very

same alternative methods given as choices on the form.[1] Nor did Appellants' refusal to make such a designation by specifying each method they proffered for their execution in a supplemental interrogatory response somehow nullify or renounce the alternative methods they identified in the TAC. Thus, Appellants have shown a likelihood of success concerning the second prong of their claim as well. The district court abused its discretion in concluding to the contrary.

Appellants have also satisfied the other stay factors. They risk being unable to present what may be a viable Eighth Amendment claim to the federal courts before they are executed using the method they have challenged. Although Appellees cite the State's and the crime victims' interest in prompt execution, the delay in developing the new protocol, coupled with the relatively short time frame that will ensue until the district court has finished its trial, which is set to commence on February 28, 2022, weigh against Appellees' assertions of harm. And the public interest favors a stay, so that all the plaintiffs with identical claims in this matter are treated equitably by the courts.

[1] The leading cases in this area are *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); *Glossip v. Gross*, 576 U.S. 863, 877 (2015); and *Baze v. Rees*, 553 U.S. 35 (2008).

Appellants have requested a stay of execution pending the adjudication of this appeal. To accomplish that purpose and in aid of our jurisdiction, we partially grant the motion and stay the executions of John Grant, currently scheduled for October 28, 2021, and of Julius Jones, currently scheduled for November 18, 2021.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

21-6139, *Grant v. El Habti, et al.*
Tymkovich, Chief Judge, dissenting

John Grant murdered Gay Carter, a food-service supervisor at the Connor Correction Center, on November 13, 1998. Donald Grant murdered Brenda McElyea and Suzette Smith on July 18, 2001, during a robbery. Julius Jones murdered Paul Howell on July 28, 1999, in front of Mr. Howell's sister and daughters during a carjacking. Gilbert Postelle chased down and murdered James Alderson and Amy Wright on May 30, 2005, after they witnessed his accomplice murder two other victims. And Wade Lay murdered Kenneth Anderson during a bank robbery on May 24, 2004. They have all had their sentences reviewed on appeal and exhausted their rights to habeas review. Oklahoma has spent the past six years developing a method of lethal injection that it hopes will satisfy the Eighth Amendment's prohibition against cruel and unusual punishment. Having done so, Oklahoma has set execution dates for the five prisoners in this case.

The condemned prisoners now seek a preliminary injunction to delay their executions. A preliminary injunction is an extraordinary and drastic remedy that should not be routinely granted. *See Warner v. Gross*, 776 F.3d 721, 729 (10th Cir. 2015). The same is true of a stay of execution, which requires the movant to show, among other things, that he is likely to succeed on the merits of his claim. *See id.* Unlike the majority, I would deny the emergency motion because Plaintiffs fail to demonstrate a likelihood of success on Count II, the Eighth Amendment challenge to Oklahoma's lethal injection protocol. I also conclude that none of the other claims in the motion for stay has merit.

To mount a successful challenge under the Eighth Amendment, the prisoners must establish (1) the State's method presents "a substantial risk of severe pain" and (2) the risk is substantial in comparison to other known and available alternatives. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125–26 (2019). Plaintiffs fail to demonstrate either. The district court heard testimony from witnesses on the issue of whether Oklahoma's three-drug protocol using midazolam presented a substantial risk of severe pain and ultimately ruled that the prisoners failed to carry their burden. The court did not commit clear error in its conclusion.

The district court also ruled that the prisoners failed to show a likelihood of success in demonstrating the risk of severe pain under Oklahoma's proposed method of execution is substantial in comparison to other known and available alternatives. The court cited Plaintiffs' failure to identify an alternative method of execution that could be used in their case. Although the prisoners in this appeal identified four alternative methods of execution in the TAC, they added the caveat that they reserved the right to object to these methods.[1] *Glossip v. Chandler*, No. 5:14-cv-00665-F, CM doc. 325 at 47.

Plaintiffs contend they are not required to endorse an alternative method of execution; rather, they argue they must merely identify alternative methods for a

[1] Admittedly, Appellants' counsel gradually abandoned the reservation stated in their written pleadings during the preliminary injunction hearing. But permitting Appellants to obtain a stay here, on their shifting form of compliance with the Supreme Court's requirements, risks rewarding Appellants for playing delay games with the court rather than serving the true function of their *Glossip* claim: to avoid unnecessary and superadded pain associated with an unconstitutional method of execution. *See Bucklew*, 139 S. Ct. at 1129; *Glossip v. Gross*, 576 U.S. 863, 879-80 (2015).

necessarily comparative exercise. I disagree. The alternative methods of execution are not theoretical measuring sticks, but rather practical alternatives the State may be required to implement. *See id.* at 1126 ("To decide whether the State has cruelly 'superadded' pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by 'compar[ing]' that method with a *viable* alternative.") (emphasis added). The Supreme Court made clear in *Baze v. Rees*, 553 U.S. 35 (2008), that prisoners cannot successfully challenge a "method of execution merely by showing a slightly or marginally safer alternative." *Id.* at 51. And it warned against "transform[ing] courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Id.*

Rather than attack the current method of execution with a hypothetical alternative, prisoners must proffer alternatives that are feasible, readily implemented, and that in fact significantly reduce a substantial risk of pain. *Id.* at 52. If plaintiffs meet these requirements and the State does not implement an alternative method without sufficient justification, the refusal to change methods can be viewed as cruel and unusual. *Id.* This consequence demonstrates that proffered alternatives serve an important, practical purpose.

Nothing in the Supreme Court cases expounding this area of law suggests that a prisoner may satisfy the second *Glossip* requirement by making such a conditional, hypothetical, or abstract designation. The requirement to specify alternatives is not designed merely to facilitate an abstract comparison between execution methods, but to

put an end to litigation by permitting the prisoner's execution to go forward using a constitutionally acceptable (but possibly imperfect) method. *See id.* at 51. To that end, the prisoner is required to designate an alternative method *that can be used in his case*. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1115 ((“[T]he inmate's proposal must be sufficiently detailed to permit a finding that the State court carry it out relatively easily and reasonably quickly.”); *id.* at 1130 (the Eighth Amendment “does not compel a State to adopt untried and untested . . . methods of execution” (internal quotation marks omitted)). If plaintiffs are unwilling to accept the methods of execution they proffer, alternative-method-of-execution litigation will devolve courts into the boards of inquiry the Supreme Court warned against, and the alternatives will fail to serve the practical purpose the Eighth Amendment commands.

In sum, the prisoners seek to avoid the practical inquiry required by the Supreme Court in these cases, and in essence ask the courts to accept pleading games rather than examine carefully whether the State has satisfied the Constitution. The district court correctly applied Supreme Court precedent and did not abuse its discretion in denying a stay of execution.

For these reasons, Plaintiffs fail to demonstrate a likelihood of success in meeting the two *Glossip* requirements. I would similarly reject the other grounds upon which Plaintiffs seek relief because they did not demonstrate a likelihood of success. Consequently, I would reject the motion for stay of execution. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RICHARD GLOSSIP, et al.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	Case No. CIV-14-0665-F
	)	
RANDY CHANDLER, et al.,	)	
	)	
Defendants.	)	

ORDER ON SECOND MOTION FOR PRELIMINARY INJUNCTION

On October 20, 2021, a motion for preliminary injunction was filed, doc. no. 506, by plaintiffs John Grant, Julius Jones, Donald Grant and Gilbert Postelle. By virtue of an order entered on October 22, 2021, doc. no. 519, plaintiff Wade Lay also became a moving party. The motion came on for hearing on October 25, 2021.

For the reasons stated at length on the record, pursuant to Rule 52(a)(1), Fed.R.Civ.P., the court concludes that movants have failed to establish any of the prerequisites to a grant of preliminary injunctive relief. Specifically, the court concludes that the movants have failed to establish the requisite probability of success on the merits of their claims. The court further concludes that movants have failed to demonstrate that, absent a preliminary injunction, they would suffer any non-speculative irreparable harm. The court further concludes that the balance of equities does not tip in movants' favor. Finally, the court concludes that entry of a preliminary injunction would not be in the public interest.

The court accordingly concludes that the motion for preliminary injunction by plaintiffs John Grant, Julius Jones, Wade Lay, Donald Grant and Gilbert Postelle is without merit. The motion is accordingly **DENIED**.

IT IS SO ORDERED this 25th day of October, 2021.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

RICHARD E. GLOSSIP, et al,

Plaintiff,

vs. Case No. CIV-14-665-F

RANDY CHANDLER, et al.,

Defendants.

TRANSCRIPT OF MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

OCTOBER 25, 2021

9:00 A.M.

Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

Tracy Thompson, RDR, CRR
United States Court Reporter
U.S. Courthouse, 200 N.W. 4th St.
Oklahoma City, OK 73102 * 405.609.5505

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Mr. Dale A. Baich (VTC), Ms. Jennifer Moreno (VTC), Federal Public Defender's Office - Phoenix, 850 W. Adams St., Suite 201, Phoenix, AZ 85007

Mr. Alexander L. Kursman (VTC), Federal Community Defender - Philadelphia, 601 Walnut St., Suite 545, West, Philadelphia, PA 19106

FOR THE DEFENDANTS: Mr. Bryan G. Cleveland, Mr. Andy N. Ferguson, Mr. Mithun Mansinghani, Mr. Zachary P. West, Attorney General's Office, 313 N.E. 21st Street, Oklahoma City, OK 73105

EXAMINATION INDEX

(PROCEEDINGS HAD OCTOBER 25, 2021.)

THE COURT: We're here in Civil 14-665, Richard Glossip and others v. Randy Chandler and others, for a motion hearing.

And obviously the first order of business is to have appearances of counsel who are here in the courtroom. Those are the appearances that I need at this point.

MR. STRONSKI: Jim Stronski, Cromwell & Moring, for plaintiffs, Your Honor.

MS. ROLLS: Emma Rolls from the Federal Public Defender's Office for the plaintiffs, Your Honor.

MR. MANSINGHANI: Mithun Mansinghani for the defendants.

MR. CLEVELAND: Bryan Cleveland for the defendants.

MR. WEST: Zach West for the defendants.

MR. FERGUSON: Andy Ferguson for the defendants.

MS. CRABB: Jennifer Crabb for the defendants.

THE COURT: Thank you.

Preliminarily, let me commend counsel on both sides for your work certainly above and beyond any reasonable expectation in getting this matter ready for hearing this morning on pretty short notice.

We, of course, had a telephone conference last Thursday that as a result of which it pointed in the direction of the need for a prompt hearing on a motion for a preliminary

injunction.

And you have certainly -- counsel on both sides have certainly lived up to the Court's high expectations in doing everything necessary to get the matter ready for a hearing fair to both sides this morning.

We do have some preliminary matters that I'm going to address. And my ruling on these preliminary matters will, I think, help counsel frame your opening statements.

As you're well aware, you were and are invited to give opening statements, 10 to 15 minutes, summarizing your expected presentation.

I am certainly mindful of the time factor that affects us all. That should not and will not affect the depths, if you will, of my consideration of the issues presented by this motion, but the answer is, yes, I certainly am mindful of the time factor that has a bearing on all aspects of this matter.

We do have, as a preliminary matter, the defendants' motion in limine, Docket Entry Number 520, that was filed last Friday, October 22nd.

The defendants' motion in limine is denied. I conclude that it is procedurally permissible for plaintiffs to proceed under Rule 65.

In reaching that conclusion, I rely predominantly on the language of Rule 65(a) and on the Supreme Court's decision in Doran v. Salem Inn, 422 U.S. 922, with the relevant discussion

at page 931. That's a 1975 decision.

As for the rule, the language of Rule 65 does not preclude a motion under that rule at any particular stage of proceedings in the district court.

A late-stage Rule 65 motion may carry with it some practical difficulties from the standpoint of the party seeking preliminary injunctive relief, especially if the Court has already addressed some of the issues raised by the motion. Thus, a late-stage motion under Rule 65 may, to some degree, be a request for the Court to examine rulings already made. But I conclude that that in and of itself does not make a late-stage Rule 65 motion untimely.

And in the Doran decision, the Supreme Court told us that, "...prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm." That's at page 931 of the Doran decision.

The irreparable harm the Supreme Court was focused on was the harm inherent in effectively denying a litigant at least an opportunity to seek provisional relief in the district court.

I must say also that the reasoning I have expressed -- I have just expressed is fortified by my belief that it is inconceivable that in these circumstances a litigant would have

no procedural means of seeking provisional relief. I will elaborate on that just a bit.

Summary judgment was granted on Count II. Rule 56(a), under which summary judgment was granted on Count II, states that "the Court shall grant summary judgment" on one or more claims if the movant shows that it is entitled to judgment as a matter of law.

The language of the rule is mandatory. In other words, once the defendants established in this case their entitlement to judgment as a matter of law on Count II against the plaintiffs, who expressly declined to designate a method of execution, entry of summary judgment on Count II resulted as a matter of course under the plain mandatory language of Rule 56.

That summary judgment under Rule 56 on Count II is still in place.

Taking into account the Rule 12 dismissal of some of the other claims and the summary judgment on the remaining claims, all of the claims of the plaintiffs who are before the Court today have been adjudicated by this district court.

But I cannot conceive that the combined effect of Rule 56 and the final judgment rule is that, in these circumstances, these five plaintiffs are precluded from seeking provisional relief.

Now, with that understanding, there are two other aspects of the matter that should be, likewise, understood for purposes

of this hearing. And the first matter is the standard to be applied to this motion for preliminary injunction.

The plaintiffs argue that a relaxed standard should be applied to this motion.

And I must say that when this matter was heard on the first motion for preliminary injunction in December of 2014, the possible applicability of a relaxed standard was certainly in play.

Now, back to the plaintiffs' present contention, describing the questions that they raise as "serious and novel," which is on page 6 of their motion, plaintiffs assert that the Court should apply a relaxed standard, arguing that it should be sufficient for them to "raise questions regarding the merits that are so serious, substantial, difficult and doubtful as to make them a fair ground for litigation." That is also on page 6 of plaintiffs' motion.

I disagree with that suggested standard to be applied to this motion for preliminary injunction. In Diné Citizens Against Ruining Our Environment v. Jewell, 839 F.3d 1276, with the relevant discussion at page 1282, a Tenth Circuit decision from 2016, which I would note is obviously subsequent to the first motion for preliminary injunction in this case, the Court of Appeals, with Judge McKay writing for the panel, discussed the Supreme Court's decision in Winter v. Natural Resources Defense Council, 555 U.S. 7, a 2008 decision, the Court of

Appeals concluded, and I quote, "Under Winter's rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible. We accordingly hold that the district court did not abuse its discretion in simply applying the Supreme Court's 'frequently reiterated standard' for preliminary relief, including the requirement that the plaintiff must show he is likely to succeed on the merits."

That is a straightforward application of the language of the Supreme Court in the Winter case at page 20.

I will also note that more recently, in an unpublished decision cited for its persuasive value, Northglenn Gunther Today's LLC v. HQ8, 702 -- Fed. Appx. 702, Tenth Circuit 2017 decision, the Court of Appeals observed that "the modified test is no longer good law in light of" the Winter decision. That's at star page 706.

Accordingly, consistent with the Circuit Court's decision in Diné -- in the Diné case, it will be necessary for the plaintiffs before the Court today to establish "a substantial likelihood of prevailing on the merits." That's from the Diné decision at page 1281.

I'm also mindful that when this case was in the Court of Appeals in 2015, the Court, after concluding that "plaintiffs failed to establish a significant possibility of success on the merits," expressly declined to address the other three factors.

It also declined to disturb this Court's denial of a stay, and denied an emergency motion for a stay pending appeal.

That was, of course, as everyone is well aware, the decision by the Tenth Circuit Court of Appeals in Warner v. Gross, 776 F.3d 721, with the relevant discussion at page 736.

That approach, taken by the Court of Appeals, in this case, in 2015, cannot be reconciled with application of a relaxed standard to the motion now before the Court.

The final preliminary matter that I think should be addressed is the question of just what is encompassed by plaintiffs' obligation to show a substantial likelihood of prevailing on the merits.

Plaintiffs argue that the defendants have effectively forfeited the opportunity to argue that plaintiffs have not satisfied the first prong of the Glossip test. Specifically, plaintiffs argue that, "Defendants concede that the first prong of Glossip is not relevant." That's in plaintiffs' response to the motion in limine at page 5.

This is incorrect. The defendants did point out that summary judgment was entered against these plaintiffs on the basis of the second prong of the Glossip test. That's in defendants' response to the motion for preliminary injunction, Docket Entry Number 521, at page 9.

The defendants have also argued, and this argument is now unsuccessful, that because summary judgment was entered on the

basis of the second prong of the Glossip test, evidence relevant to the first prong should not be received. Well, I have just overruled that position by overruling the motion in limine.

However, the defendants also argued that these plaintiffs "have failed to demonstrate that the State's method of execution poses a substantial risk of severe pain, even were they successful in their appeal regarding alternative methods." That's in Docket Entry Number 521 at page 20.

This argument continues on pages 20 and 21 by asserting that, "The mere fact that this Court declined to grant summary judgment against the plaintiffs in the lawsuit is a far cry from satisfying these movants' burden to show that they are sure or very likely to suffer severe pain. Indeed, as shown by numerous executions in other states, it is far more likely that Oklahoma's three-drug protocol will work exactly as planned."

My conclusion as to the scope of the matters before the Court is that the defendants have argued that my ruling in Glossip -- or the fact that the defendants have argued that my ruling on Glossip's Step 2 is dispositive does not mean that these plaintiffs, in seeking to show a substantial likelihood of prevailing on the merits, are relieved of the obligation to satisfy the first prong of the Glossip test. In other words, for this hearing, I conclude quite readily that both prongs of the Glossip test are in play.

And, of course, that is also apparent in terms of what the parties have contemplated from their witness and exhibit lists.

Now, soon after the motion was filed, I informed counsel as to what my expectations were for opening statements. I'll now hear from the plaintiffs.

MR. STRONSKI: Thank you, Your Honor. Jim Stronski for Plaintiffs from Cromwell & Moring.

As I mentioned in the conference, we do greatly appreciate the fact that you make yourself available in such short notice here.

And we're here on short notice, I might add -- and I want to emphasize because of what this -- what the Tenth Circuit did. We were actually negotiating an expedited briefing schedule on the merits to have it all briefed at the Tenth Circuit before Thursday in -- you know, well before Thursday when, on late Friday, the 15th of October, the Court dismissed the case, and we find ourselves down here.

And, again, I agree with Your Honor and I thank you for finding that at least we have a right to petition you for preliminary injunction.

As to the merits, I'm not going to reargue your ruling; I understand your ruling. I don't think it's useful to reargue it.

And I think we must recognize that for you to find on a likelihood of success of the merits, that we prevail on any of

the claims that you've dismissed, you're going to have to take a new look at those claims. I think you should. But -- and I think you should in light of the evidence you'll hear today.

But if you don't, I don't think, logically or legally, given your decision on the standard, which I understand we'll raise that if we have an issue with the Court of Appeals, but I think that ends the matter for us.

And I make that point up front because not only, you know, ideally do we get some temporary relief from Your Honor -- and I'll explain why I think it's appropriate -- but if we're not going to get it, obviously we need to know that as soon as possible because we need to file an appeal and seek an expedited -- a stay, and expedited relief at the Tenth Circuit.

In terms of -- of the standard -- and I'm going to reserve most of this for my closing -- but I think Your Honor can take a new look at the Glossip second prong because it was never about prisoner's choice. It was never about one prisoner wants the firing squad, one wants midazolam, one wants thiopental, one wants to be hung, all are feasible so they get their choice. It was never about choice.

It was about having a comparator that could be litigated, and as a matter of precedent, determined that that is acceptable. And the prisoners don't get a choice, then that's what they get if that's what the State wants to do.

And so it was never about prisoner choice. And I think

that takes it a step too far, that Glossip and Baze and Bucklew don't require, we hope and think the Supreme Court might disagree that's unnecessary because it invades -- it invades rights under the religious liberty statute that applies to incarcerated persons and it invades rights under the First Amendment, particularly the free exercise clause.

So that's our position legally, that you can take another look at this and you can -- you say we meet the merit standard.

With respect to the other parts of the standards, we've proceeded expeditiously. We've relied upon an understanding -- and the case was established, the schedule, so that we could complete the case before executions would restart.

The status quo is that executions have not restarted. And so given what the Tenth Circuit did, which it just happened, we are asking the Court to enter an injunction to preserve the status quo. And it's the most limited kind of injunction possible, simply until final judgment is entered, and it preserves the status quo that we believe at least if Your Honor doesn't take the representation of the prior Attorney General as applying to this, for us, in spirit, it did, and we've relied upon it for that purpose, and we relied upon it for that purpose thinking that we would build a robust case on the merits and try it and not be in a position of a PI.

And so that's all I'm going to say on the merits, Your Honor, now.

We have a witness who has observed two executions. Because, Your Honor, in your order on summary judgment, said you were interested in trial for hearing about experience of people who -- is evidence on execution to using midazolam.

And so while Oklahoma since 2015 has no experience, Alabama does. And so we have an individual who is going to testify about his experience observing two, one last week and one in December 2017.

And the protocol is identical in terms of the drugs, that is, 500 milligrams of midazolam, a period of about five minutes, a consciousness check, and then a paralytic and potassium chloride.

And so he will explain what actually happens under those circumstances.

And I think I probably used my ten minutes, Your Honor. And I'll answer any questions and look forward to summing up. Thank you.

THE COURT: Well, there's -- there are one or two matters of clarification that I would like to cover.

In the third-amended complaint, all of the plaintiffs stated that they "reserve the right following consultation with counsel to object to any proffered alternative." That's page 47.

And as we're all aware, in the Bucklew decision, Justice Gorsuch wrote for the Court that, "Glossip expressly held that

identifying an available alternative is 'a requirement of *all*" -- and the emphasis there was on "all" -- "'Eighth Amendment method-of-execution claims' alleging cruel pain." That's page 1126 of the Bucklew decision.

And then the Court in Bucklew described the prisoner's failure to identify an alternative as "a dispositive shortcoming." That's page 1121.

And I should add that that was foreshadowed, in my view, in Baze, where the Court disapproved an approach in which "each ruling is supplanted by another round of litigation touting a new and improved methodology." That's page 51 of the Baze decision.

Mr. Stronski, my question at this point is, is what language would you point me to from any of these cases that would entitle a prisoner, facing execution, to proceed with a lethal-injection challenge while reserving the right to litigate the constitutionality under the Eight Amendment of his proffered alternative method of execution, even if he did proffer an alternative method?

What language from these cases would you point me to, to suggest that the prisoner could have it both ways?

MR. STRONSKI: Your Honor, our clients don't want it both ways, we just have a small subset of clients who objected on religious grounds and have not designated one for them.

But they have -- I think what's important, Your Honor, in

answering your question, is they have not revoked or done anything to withdraw the comparative pleading that they signed onto.

What you read is it reserves the right at a later time to revoke. They didn't revoke the pleading that a firing squad, for example, is an example of something that would be -- meet the second prong of Glossip.

And so their failure to designate what they want in their case, again, it's not been about prisoner choice and that was not a revocation of that pleading.

THE COURT: Well --

MR. STRONSKI: It was -- yeah, so that's how we see it, at least, Your Honor.

THE COURT: Okay. The pending question is: What language in any of those three cases would you point me to, to suggest that the plaintiffs are entitled to proceed in that fashion?

MR. STRONSKI: If you go to, as an example, Bucklew -- and I'll read from this. It's at the Supreme Court, 139 S.Ct at 1126.

It says, "Distinguishing between the constitutionally permissible and impermissible degrees of pain" -- basic Glossip explained -- "is a necessarily comparative exercise."

And so our view is this has always been not about the prisoner choosing something for his own execution, but pleading

something that can be compared. And they've all done that and they haven't revoked it, Your Honor.

And I may have other quotes for you, but we think that is -- that is the reason -- and it would make no sense practically to give every prisoner a choice. I think what we -- what the courts want and what the states need here is some clarity, and by pleading an alternative that can be compared under Baze and Glossip and Bucklew, regardless if it is their choice for how their life ends, is all that's needed.

THE COURT: Let's move forward from the third-amended complaint to the summary judgment stage.

Of course, at the summary judgment stage, the status of the matter as to these plaintiffs was that they had expressly declined to designate alternative methods of execution and had asserted that the question of whether an "alternative might be considered constitutional when assessed against a proffered alternative to that alternative is a question for another day and not at issue here."

That's from page 42 of plaintiffs' summary judgment brief.

I took that as a reservation, consistent with the third-amended complaint, of the prerogative of litigating the constitutionality of an alternative. Was I right about that?

MR. STRONSKI: No, Your Honor. It was never our intent to revoke what we pled. And it was never our intent to do anything that would be inconsistent with what we understood

Baze and Glossip and Bucklew require.

THE COURT: Well, maybe you misunderstood my question.

The third-amended complaint reserves the right to challenge alternatives, and your summary judgment brief, as I read it, reserved the right to challenge the constitutionality of alternatives. Am I right about that?

MR. STRONSKI: It may have. It may have. But every alternative -- I mean, there isn't -- there isn't -- a method is not midazolam. A method is the application of midazolam in the context of other drugs and consciousness checks and so forth.

And so if there's reservation of a right in the future to object to something that might include something -- like the firing squad. The firing squads, since 1870s, has been held constitutional. But if you used a firing squad in a way that super-added pain, well, you shot people's extremities slowly and let them bleed to death, there would be a claim there, I would imagine.

THE COURT: Okay. Well, that --

MR. STRONSKI: And so the method matters, Your Honor. And that was just a preservation of an objection to the method but I think most importantly, these are reservations of the right to object later, and no objection was made, and the failure to fill something out in terms of how I would prefer my

life to end and objecting to that on religious grounds, is not an objection to the pleading that a firing squad is a viable alternative, and it is, Your Honor.

THE COURT: Okay. Well -- and I think we're -- we are getting the clarification that is appropriate.

One last question in light of that.

In the plaintiffs' Rule 59 motion, they did not retreat from what I took as an assertion of a reservation of a right to litigate the constitutionality of an alternative.

The motion for preliminary injunction says, at page 16, that the plaintiffs "do not argue that they cannot or should not be subject to execution by these alternative methods proposed by their co-plaintiffs, instead they argue only that they should not be required individually to elect any specific alternative for their own respective executions."

And as I say, that's at page 16.

Mr. Stronski, am I to understand that the plaintiffs who are before the Court today will have no objection to execution by any of those pled methods and will not in any event contest the permissibility under the Eighth Amendment of any of those methods, as long as they don't have to pick one of them?

MR. STRONSKI: That's correct. They are -- in that respect, Your Honor, they're situated identical to those who are going to trial in February.

THE COURT: Am I to understand that the plaintiffs

who are before the Court today do not intend, and in any event, will not propose alternatives to any of the methods pled in the third-amended complaint?

MR. STRONSKI: We have no intention of proposing new alternatives, Your Honor. I know of no client who wants to do that, if that's the question. I want to answer your question; I don't know if that was the question.

THE COURT: Well, under what circumstances would you -- would you foresee that any of the five plaintiffs before the Court today would be contesting the constitutionality or the permissibility on any basis, for that matter, of any of the methods pled in the third-amended complaint?

MR. STRONSKI: I can't imagine one. It would be a situation like my example with the firing squad, super-adding pain or doing something that was not conventional, Your Honor.

THE COURT: So it still could happen is what you're telling me.

MR. STRONSKI: It could happen with those who are still in the trial -- going to trial in February, Your Honor.

My point is I think -- and I want to answer your question, if I'm not, I'm just not understanding it -- but the individuals who are before the Court now in the preliminary injunction, with respect to the pleading of an alternative, are no different than those going to trial.

The difference is they've -- they haven't picked one of

them for their own execution; that's the only difference. And so there's no additional reservation of the right to challenge what they pled in the future, if that answers your question.

THE COURT: Thank you.

I'll hear from the defendants by way of opening statement.

MR. STRONSKI: Thank you.

MR. CLEVELAND: Good morning, Your Honor. Bryan Cleveland for the defendants. Mr. Mithun Mansinghani will be making the evidentiary presentation. Giving the opener here.

The motion before the Court today is movants' fourth attempt to reargue their claims which they've already lost on three times, in both of their summary judgment briefs and in their motion on reconsideration.

They have no likelihood of success on the merits for claims that this Court has already rejected multiple times and that no other courts have adopted. Accordingly, defendants don't believe that any injunctive relief is appropriate.

I wanted to also note briefly that plaintiffs had mentioned the Tenth Circuit. I wanted to note that their appeal ended at the Tenth Circuit at their own urging. In fact, the movants aren't in the exact same position because John Grant actually voluntarily dismissed his appeal at the Tenth Circuit, while then his other co-movants had actively argued that -- to the Tenth Circuit that they shouldn't be allowed to appeal now and sought dismissal of their appeal.

Mr. Stronski had mentioned some discussions of a motion for stay that they intended to file in the Tenth Circuit. I thought it was also worth noting for the record that they also were discussing that John Grant would not be part of any motion for stay because he was not going to pursue an appeal. Of course, alternative discussions, but want the record to be clear on what was happening at the Tenth Circuit.

And, ultimately, if equity here with this injunction sought, the families of the victims of movants' horrific crimes, have been waiting many, many years for justice --

THE COURT REPORTER: Mr. Cleveland --

MR. CLEVELAND: Yeah.

THE COURT REPORTER: -- would you please slow down.

MR. CLEVELAND: Oh, sorry.

-- with the families of the victims of movants' horrific crimes have waited many, many years for justice and we don't believe any more delay is appropriate.

Of course, the Court has already addressed the standard; won't rehash those. Wanted to know briefly we have essentially two categories of evidence for the Court today.

The first one would be the witness and exhibit related to midazolam, which is testimony of Dr. Joseph Antognini, a medical doctor who is also an expert in anesthesiology -- relates to Count II, because, of course, as you know, Count II addresses whether the movants have shown that the current

method is substantially likely to increase pain, as compared to a constitutional alternative.

Of course, the Court has already noted that -- decided summary judgment against them, that they didn't proffer a constitutional alternative. But Dr. Antognini will also address why they haven't proven their case under the first step either.

So in looking to describe both the use, actions and efficacy of midazolam in relation to Oklahoma's lethal injection protocol and the effectiveness of those procedures, and also will be testifying as to the behaviors and consciousness of persons undergoing sedation and anesthesia, including in light of his testimony regarding midazolam and how it works.

And in light of that, of course, his testimony will show that midazolam, as it has in -- I believe it's 37 executions so far, does render inmates unconscious and insensate to pain.

And so the plaintiffs for this motion would have to show that they're likely to succeed on both steps of the Glossip test, and they're unlikely to succeed on either.

Now, of course, for the remaining counts, I know there's been some discussion --

THE COURT: Before you get to the remaining counts, let me ask a question and I think naturally flows from what we just heard from Mr. Stronski.

MR. CLEVELAND: Right.

THE COURT: Admittedly, Mr. Stronski did not categorically rule out a future challenge to an alternative method, but he came close to it.

And so he came close to acknowledging or -- I hate to use -- I'm not going to use the word "conceding" -- but he came close to acknowledging or perhaps assuring the Court that the plaintiffs -- that the five plaintiffs before the Court today would not contest the use of any of the methods pled in the third-amended complaint, they just didn't want to have to pick one. Okay?

So where does that leave the State on Count II?

MR. CLEVELAND: A couple of different places, Your Honor. I mean, one, I think part of this is a discussion in the reconsideration motion, you may remember after summary judgment was granted that several of the movants had expressed they wanted to be able to start changing their mind about these alternatives post summary judgment.

So I point to that, too, but they had multiple opportunities in their own complaint in discovery when we asked them, in their summary judgment brief when they still refused to do it, and then when this Court ordered the responses and they still refused to comply at that point there.

THE COURT: And in fairness to the State -- forgive the interruption.

In fairness to the State, I will say that what we just heard and what we saw on page 16 of the plaintiffs' brief in support of this motion is yet another shift. There's no doubt about that.

MR. CLEVELAND: Uh-huh.

THE COURT: And so that's got its own potential consequences.

Because, yes, there was a clear reservation in the third-amended complaint, a clear reservation at the summary judgment stage, so, yeah, we do have yet another shift, and there's no need to persuade me of that.

You may continue.

MR. CLEVELAND: Yeah. And, I mean, the only point I was trying to make, Your Honor, there is, of course, we'd still first stand on our objection that it's too late in the day to change their strategy, like we said in the reconsideration brief in here. That's not a basis for reconsideration and that's not available to these movants, as the Court already decided at the reconsideration motion.

And then, of course, my second point would also be that the whole, "well, we might not challenge it unless we do," still sounds to me like a reservation. That's the concern that I believe we had addressed in summary judgment, is that there's this shell game that it feels like they're playing with the alternatives, where they refuse to give any detail to try to

force the defendants to do so then they can object to all of our details, which is part of why we discussed in summary judgment briefing that it felt like they were intentionally excluding the details because they were reserving the right to continue this challenge and endless litigation, exactly the way Bucklew poses.

And it still sounds to me like that's what plaintiffs are doing, from the discussion that we just had here today. So it still sounds insufficient under the law in the case of Glossip, as well as under Baze and Bucklew.

THE COURT: You may continue.

MR. CLEVELAND: And then, of course, under Counts VI and VII, it's the ex post facto Oklahoma Constitution, Federal Constitution and the Fourteenth Amendment due process claim, under those they've made some discussion of midazolam or lethal injection, but as this Court has already acknowledged, and every court that's considered the issue has, a change in the method of execution is not a change in the penalty, which remains death. Doesn't mean they can't raise an Eighth Amendment challenge, just there's no end-run under those claims, so I don't think midazolam needs to be considered under there. To the extent the Court disagrees, obviously that evidence is available.

Count VIII seems like it's not relative to the evidence they don't assert in midazolam --

THE COURT: I'm going to ask you to slow down, please.

MR. CLEVELAND: Sorry.

Count VIII appears that it's not relevant to the evidence because they don't assert midazolam under there, and also it's just an argument that the Supreme Court is infringing them with the alternative requirement, which is foreclosed by Supreme Court precedent.

Then Count IX, the Tenth Circuit has already rejected under Warner v. Gross, their arguments there, that midazolam is novel; not true, because it's been used 37 times. My count is accurate. And then on top of that, states aren't foreclosed from using novel methods, but should the Court need to reach it, midazolam is not going to inflict pain, as the testimony of Dr. Antognini will show.

The other exhibit that will have, of course, the counter exhibit to their transcript about Attorney General Hunter's -- of Former A.G. Hunter's remarks -- one -- you know, not going to belabor it, because I know you know that conversation too. Just wanted to note for the record the only agreement between State and plaintiffs was in October of 2015 when investigations were ordered and had agreed to wait 150 days after restarting of the case before seeking executions.

Obviously, we're aware that at the March 2020 off-the-record conference that Former A.G. Hunter had said that he

would not rush the Court. Understanding there was never any specific terms of exactly what he meant by that, and, like, how long it was supposed to last. And it's been about two years. I think this is definitely not rushing, as was represented there.

And, of course, as the transcript notes, that the courts acknowledged, there was certainly never an agreement until the case was complete --

THE COURT REPORTER: You'll just have to slow down, please.

MR. CLEVELAND: Where it says here, the transcript will show there was certainly never an agreement until the case was complete; however, it's going to be construed from Former Hunter's remarks, and even as plaintiffs' counsel had agreed with that at the conference we just had a few days ago, with the representation the Court had made about what happened.

It's been almost two years, well past 150 days, no rushing has occurred, there's nothing from Former A.G. Hunter's remarks that forecloses proceeding here.

And, of course, would note, finally, equity, they -- you know, if they were concerned about execution dates being requested, they could have brought this up when we requested the execution dates in August or when they were granted until September, but they waited until now. Appears to us again to be another dilatory motion.

With that, I believe that's the evidence, Your Honor.

THE COURT: Thank you, Mr. Cleveland.

We'll have plaintiffs' first witness.

MR. STRONSKI: Thank you, Your Honor.

Your Honor, we call Spencer Hahn to the stand virtually.

THE COURT: And I would expect that is Mr. Hahn that we see on the screen; is that correct?

MR. STRONSKI: Correct, Your Honor.

THE COURT: Very well.

The clerk will please administer the oath.

(WITNESS, APPEARING VIRTUALLY, WAS DULY SWORN.)

SPENCER HAHN,

DIRECT EXAMINATION

BY MR. STRONSKI:

Q. Good morning, Mr. Hahn.

A. Good morning.

Q. Please introduce yourself to the Court.

A. My name is Spencer Hahn. I'm an Assistant Federal Defender with the Middle District of Alabama Federal Defender's Program. We are the sole office that has a capital habeas unit, so we represent folks on death row in their federal habeas cases across the state.

Q. Mr. Hahn, are you familiar with the Alabama execution procedures?

A. I am.

MR. STRONSKI: Your Honor, we attached in our exhibits the execution procedures dated April 2019, which are the current ones, but we have one here we'd like to hand up which has court markings on it, so I think it's easy to authenticate. It's the same thing.

But may I hand that up and may we use that?

THE COURT: And this would be --

MR. STRONSKI: Exhibit 2.

THE COURT: What exhibit number is this?

MR. STRONSKI: Two, Your Honor.

THE COURT: Any objection?

MR. MANSINGHANI: No, Your Honor.

THE COURT: It will be received.

MR. STRONSKI: Your Honor, should I hand up more than one? One for your clerk?

THE COURT: Please give two to the courtroom deputy here.

MR. STRONSKI: Okay.

COURTROOM DEPUTY: By the way, is this the same as what's in my book?

MR. STRONSKI: It's the same, except for a heading and a cover page. It is the same document, though; the protocol is identical.

THE COURT: Well, if it's different in any respect, then we should have copies of it.

MR. STRONSKI: Let me hand it up.

THE COURT: And by the way, now that we're at the stage of receiving exhibits, just as a word to the wise, it's my intent to give both sides considerable leeway in their presentations. It is my intent to give both sides the opportunity to make the fullest record that they care to make, again, within the confines of their witness and exhibit list.

With the possible exception, and I say only possible exception of something that's just rank hearsay, like a newspaper article -- and, again, I'm not even foreclosing that at this point because it's not been offered -- but with certain possible exceptions, I would not want either side to expect that I'm going to be -- have a small strike zone, if you will, on what exhibits are admissible.

I want both sides to have every reasonable opportunity to make the fullest record that we can under the circumstances.

With that, you may proceed.

MR. STRONSKI: Thank you, Your Honor.

Q. (BY MR. STRONSKI) Mr. Hahn, please go to Exhibit 2 entitled Execution Procedures, Confidential, April of 2019, and it's attached to a document in Case 217 CIV-02083-KOB, Document 140, dated October 16, 2019.

Do you have that in front of you?

A. I do.

Q. What is Exhibit 2, Mr. Hahn?

A. So this is a redacted copy of the execution protocol that the State of Alabama employs to execute people on Alabama's death row --

Q. Does it --

A. -- containing --

Q. I'm sorry. Go ahead. Go ahead.

A. It contains provisions for both electrocutions and lethal injections.

And this was released in this format pursuant to an Eleventh Circuit decision brought as a result of the media seeking a copy of this.

Q. And this is the current protocol used presently; is that correct?

A. As far as the drugs and the consciousness check, it is. There have been two changes that have not been publicly released. They concern a spiritual advisor issue that went to the United States Supreme Court recently. And they swapped out the existence of a prison chaplain for the presence of a spiritual advisor of the inmate's choice.

But as far as drugs and consciousness check, they are identical.

Q. Thank you. Thank you.

If you could go to page 9 of Exhibit 2 and specifically the paragraph labeled P, as in Patrick.

Are you there?

A. I am.
Q. Okay. Does this disclose what drugs are administered and in what amounts in Alabama's current lethal injection protocol?
A. It does.
Q. Okay. And what drugs does Alabama use?
A. They use midazolam as the first drug in what we call, traditionally, the three-drug protocol. They use rocuronium bromide as the paralytic, which is traditionally the second drug, and they use potassium chloride as the third and final.
Q. And when is the consciousness check done?
A. After the administration of 500 milligrams of midazolam.
Q. If the prisoner is believed to have passed the consciousness check, what then is done?
A. I'm sorry, I couldn't hear that last bit.
Q. All right. If the prisoner is believed to pass the consciousness check, what then is done?
A. Okay. So if the prisoner is deemed to be unconscious or nonresponsive, a dose of saline is pushed through the line, followed by the paralytic.
Q. Okay. If you go to the last two pages of this document, they are Annex D.
Tell me when you're there, sir.
A. I am there.
Q. Okay. Does Annex D disclose specifically the amount of milligrams of midazolam that are in the syringes that are

administered?
A. Yes.
So when we were talking about page 9 earlier that talks about millimeters, what they've done is they've suspended the 250 milligrams in 50 mls, and they've pushed two syringes of 250 milligrams each of midazolam.
Q. So it's a total of 500 milligrams of midazolam; is that correct?
A. That is correct.
Q. Have you recently observed an execution pursuant to this protocol?
A. Yes; last Thursday, October 21st.
Q. And whose execution was that?
A. Willie B. Smith III.
Q. And in what capacity were you present to observe?
A. I was there as one of his designated witnesses. I was Mr. Smith's attorney for much of the last two years concerning a challenge to various end-stage challenges.
Q. Concerning Mr. Smith's IQ, do you know if it was evaluated?
A. I do.
Q. What was his evaluated IQ?
A. The State's expert placed it at 72, and his expert placed it at 64.
Q. Okay. From where did you observe the execution of Willie

Smith?
A. So there are three observation rooms: One is designated for victim's family members and that would be to -- with Mr. Smith lying on his back, that would be to his right; immediately in front of Mr. Smith is the Commissioner's viewing room, where official witnesses for the Department of Corrections watch; and then we are to Mr. Smith's left, along with one member of the media in this case.
Q. When you went to the room, was the curtain closed?
A. It was.
Q. How long were you in the observation room before the curtain opened?
A. We didn't have clocks or watches with us and you can't see the clock with the curtains closed, but I would estimate five minutes.
Q. When the curtain opened, please describe what you saw.
A. Sure.
I saw Mr. Smith lying on his back on a gurney, with his right and left arms out from his body on little rests.
He had -- they insert the IV through the left arm, so the IV was on the side that I was on, and I could see it running from his arm, back through the wall, into the control room.
Q. Let's talk about physical proximity.
How far were you away from Mr. Smith?
A. I was six feet from his left arm.

Q. Was there anything between you and Willie Smith to obstruct your view of the execution?
A. Just a window, but that was a clear plain window.
Q. Okay. Was it a large window?
A. Yes.
Q. Were there individuals in the execution room in addition to Willie Smith?
A. Yes, there were three corrections officers and Mr. Smith's spiritual advisor, Pastor Robert Wiley.
Q. I think I asked you: Was anything obstructing your view of Mr. Smith, but was anything obstructing your view of his left arm?
A. Nothing at all. The -- there were two corrections officers down at Mr. Smith's right -- near -- away from his feet. His spiritual advisor was down at the left, past his feet. And there was one corrections officer over his left shoulder. None of them blocked my view of his arm.
Q. Was Mr. Smith restrained?
A. He was.
Q. Please describe the restraints used.
A. Sure.

So the wrist is restrained. There is a restraint between the elbow and the shoulder on each arm and then there is a crisscrossing -- they look like seat belts -- restraints that you might see -- sometimes paramedics use when they strap

somebody down to a gurney -- crisscrossing his chest. And then he had a sheet, a white sheet, wrapped around his lower extremities, going up to about his bellybutton. And that was strapped down, as well.

Q. What was going on in the room when the curtains opened?

A. There were -- just the corrections officers were standing there. They were awaiting the warden coming in.

Q. Okay. And what happened when the warden came in?

A. So the warden came in and approached, walked around Mr. Smith's feet, back to the wall behind his left shoulder and grabbed a microphone from the wall and approached Mr. Smith, standing over his left shoulder, and read him the death warrant.

Q. Okay.

A. He then gave Mr. Smith an opportunity to give final words and Mr. Smith declined.

Q. Okay. What happened next?

A. The warden left the room, and for about a minute or two, nothing happened. And then Pastor Wiley was given the clearance to approach Mr. Smith. Pastor Wiley, pursuant to the agreement with the State, was permitted to touch Mr. Smith and did so, touched his leg, and began praying with Mr. Smith.

And would you like me to go on and describe what I saw next?

Q. Yes, please. Thank you.

A. So what I saw next was -- you can't really tell when the drugs began to be pushed, except by the reaction. And I saw Mr. Smith's left arm jerk inward, as if trying to go toward his body, which was physically impossible because it was strapped down in two places.

Almost immediately thereafter, he bucked up twice from the -- his torso bucked up twice, as if he was trying to sit up from the gurney, and his breathing became very labored, like a fish out of water. He was gasping and attempting to almost, like, just inhale as much as he possibly could. His chest became very large, in terms of breathing in and out. And that continued.

Q. And how did that compare to his breathing before that happened?

A. His breathing before that happened wasn't noticeable. It wasn't noteworthy. I was paying attention to his face and his eyes because I had told him to look at me and he did so.

Q. How many times did he try to move his arm?

A. He tried to move his arm once, and almost as part of the same movement, he bucked up once and then immediately bucked up a second time and began to have the labored breathing.

It was a bit like a fish out of water or -- I don't know if you've ever seen it in a movie or a TV show when they pull somebody out of a river or whatever and they give them CPR and they do that big inhalation when the CPR succeeds -- it was

like that except it just kept going over and over and over.
Q. Okay. How long did this fish-out-of-water gasping continue?
A. It continued until the administration of the paralytic, which follows the consciousness check. And the consciousness check occurs approximately three to five minutes after the administration of midazolam.
Q. Did the gasping that you described change in intensity or lessen in intensity during that time period?
A. It did not.
Q. Did it continue through the consciousness check?
A. It did.
Q. Did you observe the consciousness check?
A. I did.
Q. What did you observe?
A. So the first stage of the consciousness check is for the corrections officer who is over the left shoulder to approach near Mr. Smith's left arm, gets his face down close to Mr. Smith's face and announced his name, and the corrections officer said "Inmate Smith" loudly enough that you could hear it through the cinder block walls. Mr. Smith did not appear to react.

The second stage and second step is to reach out and brush the left eyelid; the corrections officer did that and Mr. Smith did not appear to react.

And the third and final step is to pinch the arm, and the corrections officer pinched the upper back of his left arm and Mr. Smith did not appear to react.

He did continue to have the labored heavy breathing throughout that process.

The corrections officer then stepped into position in a way that indicates that the consciousness check was passed. And about a minute or so after that, Mr. Smith stopped moving fairly abruptly.

Q. From the time he started the labored gasping, the fish-out-of-water breathing, to the time he stopped, how many minutes expired?

A. Four to six minutes.

Q. How long after Mr. Smith stopped any observable movements did they close the curtains?

A. It was probably eight to ten minutes. It was the longest -- I've observed three executions; it was by far the longest period of time between the cessation of movement and the closing of the curtains, which traditionally indicates that the prisoner has passed.

Q. Okay. How long from when the curtains opened to when they closed in the execution?

A. Approximately 20 minutes. It could have been as many as 25.

Q. Okay. I want to just ask you again about when he stopped

the gasping.

Did you see any movement at all from Mr. Smith when he stopped the gasping, fish-out-of-water breathing?

A. I didn't see anything. It was -- nothing was noticeable.

Q. Did there come a time in December 2016 when you observed another execution in Alabama?

A. Yes.

Q. Whose execution was that?

A. Ron Smith.

Q. In what capacity were you present to observe the execution of Ron Smith?

A. I was there as a designated witness by Mr. Smith, as part of his legal team.

Q. Was -- were the same drugs used for Mr. Ron Smith as used last week for Mr. Willie Smith?

A. Yes.

MR. MANSINGHANI: Objection, Your Honor. Foundation. The protocol he designated from 2019 and the execution he's referred to was from 2016.

THE COURT: Well, I think the pending question is, generically, were the same drugs used. And if there are more details that I ought to be aware of, that can be covered on direct or cross.

So that will be overruled.

Q. (BY MR. STRONSKI) You can answer the question.

Were the same drugs used in 2016 in the execution of Ron Smith as used in the execution of Willie Smith last week?
A. Yes.
Q. Okay. And was it also a 500-mg dose?
A. It was.
Q. And was the --
A. Wait. If I can just say, when you say "it," you mean midazolam? Was a 500-mg dose of midazolam.
Q. Yes, thank you for the clarification.
Was 500 milligrams of midazolam used in 2016?
A. Actually, a total of 1,000 was used for Mr. Ron Smith.
Q. Okay. So we'll get to that.
But the initial dose that he was given was 500 milligrams?
A. Yes.
Q. Okay. And in the execution of Ronald Smith, when in the sequence of drug administrations was the consciousness check done?
A. The same time; it was done at about three to five minutes after the midazolam 500 milligrams was pushed.
Q. Okay. And so in both cases, it was done immediately before the paralytic?
A. Well, I know we're going to get to this, but with Ron Smith, it was -- there was an intervening occurrence between the first consciousness check and the paralytic.
Q. Okay. Was the execution chamber -- and we will get to

that.

Was the execution chamber and observation room in which you sat the same as you described for Willie Smith?

A. Yes. And I sat in approximately the same spot. This time around, for Willie Smith, they had moved the chairs around a bit because of COVID. And so what they had done is they had set some distancing. But I sat in a chair in the same position and the same location as I sat for Mr. Smith --

Q. What -- apologies. Please finish.

A. I sat in essentially the same spot as I sat for both Mr. Ron Smith and Mr. Willie Smith.

Q. Okay. What was the -- your proximity to Mr. Smith, of Ronald Smith, during that execution?

A. Same, six feet.

Q. Was there anything obstructing your view of Ronald Smith?

A. No.

Q. Please describe what happened when the curtains opened.

A. Sure.

Mr. Smith was strapped down the same way -- or sorry -- I'm going to say Mr. Ron Smith was strapped down the same way as Mr. Willie Smith was strapped down.

Mr. Ron Smith had the tubing from the IV running from his left arm into the wall, the same as Willie.

And Mr. Smith looked in my direction, as I had instructed him to do, and I put up a hand so that he could see me and know

that I was there watching.

In this case, in the case of Ron Smith, at the time, the protocol called for the chaplain, prison chaplain, to be present. Mr. Smith was a devout Christian and had wished to have the chaplain pray with him prior to and during the administration of the first drug, midazolam. And so Chad Summers approached Mr. Ron Smith, knelt, and held his left hand while they prayed.

Shortly thereafter, the administration of midazolam began, I noticed Mr. Smith -- Mr. Ron Smith's arm jerk inward, toward his body, as if he was trying to pull it in close. Ron Smith then bucked upward several times and began to have the same type of labored, fish-out-of-water breathing.

The only noticeable difference between the two was Ron was asthmatic and he had a dry, sort of barking asthmatic cough. It sounds almost like a seal. If you've known somebody with asthma and you've heard them doing that, you'd know it's a dry, barking cough. That was punctuating the breathing for Ron Smith. That was not present for Willie Smith.

Q. So he would gasp in and then cough and bark out; is that what you observed?

A. That is correct.

Q. How much midazolam at that time had been administered?

A. 500 milligrams.

Q. Describe the consciousness check that was done.

A. The consciousness check for Ron Smith was similar to Mr. Willie Smith, in that this time, though, he called out his name three times, "Inmate Smith," he shouted it out three times. There was no visible reaction.

Then he did the eyelid stimulation; there was no visible reaction.

He then pinched the back of -- behind his shoulder. It was higher up on Ron Smith's body. And Ron moved his arm into the left, reacted to that pinch.

And at that point, the -- there was some radio noise in the guard's ear and the guard stepped back. And it was -- to me, that indicated that Mr. Smith had not -- Ron Smith had not passed the first consciousness check.

Q. Okay. Was -- what was done then?

A. Second dose of midazolam 500 milligrams was pushed, pursuant to the protocol.

When it went in, Mr. Smith calmed briefly, maybe for a couple of seconds, his body stopped moving a little bit, and then he resumed his heavy breathing and gasping and barking.

Another three to five minutes passed and a second consciousness check was performed, the same as the first.

I noticed movement after the third portion of the check, the pinch, but apparently the corrections officer did not, and the execution proceeded.

Q. Again, just to clarify, did the gasping continue through

both consciousness checks?
A. It did.
Q. Okay. What happened next?
A. They administered the paralytic. Mr. Smith -- his chest stopped moving noticeably and he stopped coughing and barking. And several minutes later, probably three to five, the curtains were closed and we were escorted out of the room.
Q. Once he stopped gasping for air and barking, did you observe any other movements from Mr. Ron Smith?
A. I did not.
Q. How long were you able to observe the execution of Ron Smith, from when the curtains opened to when they closed?
A. It was a little bit over 30 minutes because of the second consciousness check that was necessary, but there was less pre-curtain opening waiting and the curtains closed sooner -- or more quickly after the administration of the second and third drug.
Q. What were the similarities you observed in the physical reaction of each prisoner in these executions?
A. Well, the left arm attempting to move in toward the body and bucking off of the table -- or I'm sorry -- gurney, as well as the labored breathing and gasping.
The only appreciable difference between the two was that Ron Smith barked a cough about every other exhalation and required a second dose of midazolam and a second consciousness

check.

MR. STRONSKI: Thank you, Mr. Hahn.

No further questions, Your Honor.

THE COURT: Cross-examination.

MR. MANSINGHANI: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MANSINGHANI:

Q. Mr. Hahn, my name is Mithun Mansinghani. I serve in the Oklahoma Attorney General's Office.

How are you doing?

A. I am good. How are you?

Q. Doing well.

Mr. Hahn, you are not a medical doctor; is that correct?

A. That is correct.

Q. Do you have any medical training?

A. None at all.

Q. Do you have any medical or scientific basis to believe that any of the executions you witnessed involved inmates who were conscious or in pain after about five minutes following the injection of 500 milligrams of midazolam?

A. You said "do I have any medical or scientific knowledge"?

Q. That's correct?

A. Okay. No, just personal observation.

Q. Other than the two executions that you have testified about today, have you observed any other executions?

A. I have.
Q. And how many other executions have you observed?
A. One.
Q. And was that execution involving, to your knowledge, the use of midazolam?
A. It was.
Q. You've not witnessed an execution that involves a barbiturate, like sodium thiopental or pentobarbital?
A. I have not.
Q. And you don't know if the movements of inmates during executions involving barbiturates are the same or different than movements of inmates executed with midazolam, as you've observed?
A. I do not.
Q. With respect to the three executions you have observed, you were an advocate for each of those inmates; is that correct?
A. Yes, I represented each of them.
Q. And with the -- with respect to the two executions you've testified about, did any of the inmates cough up fluid during their execution?
A. No.
Q. With the two executions that you have testified about, the consciousness checks were performed by a corrections official; is that correct?

A. That is correct.
Q. And to your knowledge, none of those consciousness checks were performed by a physician?
A. They were certainly not performed by a physician.
Q. I want to go through some of the details with respect to the Willie Smith execution, so my questions will be about Willie Smith. And if I accidentally say "Mr. Smith," apologies for that.

You testified that you did not know when the midazolam was injected, except based on your assumption observing the reaction of Willie Smith?
A. Yeah, I inferred from his reaction.
Q. Okay. But you don't actually know when the midazolam was injected?
A. No.
Q. And based on your assumption, you believe his movements occurred immediately after the midazolam injection; is that correct?
A. I inferred that, yes.
Q. And then his movements stopped or his -- sorry, let me restart that question.

His labored breathing stopped after the administration of the paralytic; is that your testimony?
A. I inferred that from the lack of movement, yes. I did not see the paralytic get injected.

Q. You don't know if his labored breathing stopped because of the paralytic, you're just inferring that?
A. Yeah, based on the chain of circumstances, the movements, followed by the consciousness check, followed by the signal from the corrections officer, followed by the ceasing of movement, yes.
Q. With respect to the body bucking, do you have any basis to believe as to what caused the movements of the inmates you observed -- sorry -- of Willie Smith?
A. I have no medical basis, no.
Q. So it could be that the jerk or the buck was caused by a sensation that the drugs were being injected and either surprise or fear about the impending death from the inmate?
A. Well, anything's possible, I would say it's Mr. Smith -- his -- when they first opened the curtains, Mr. Smith looked over at me and he looked scared. He was -- as I testified to, his IQ was borderline Atkins level, and -- but he seemed to have calmed down with the prayer and the touch from his pastor. So while it's entirely possible, anything is possible, I believe it was the reaction of the drug.
Q. When you say "reaction to the drug," what do you mean?
A. I mean the drug taking effect on his system.
Q. I see.
So you don't believe it was just his reaction to the fact that he feels the drug going into his system and that caused

him either surprise or fear?
A. No.
Q. But you're speculating on that?
A. I am.
Q. Did you at all attempt to, verbally or through body movements, communicate to Mr. Willie Smith while you were in the witness room?
A. I did.
Q. And how did you do so?
A. I put my right hand up in sort of a fist against the glass so that he could see my presence there.
Q. What were you intending to communicate with that raised fist?
A. That I was there for him.
Q. Let's talk now about the execution with respect to Ronald Smith.
A. All right.
Q. You've testified that the execution involved 500 milligrams of midazolam and a protocol similar to the 2019 protocol admitted as an exhibit earlier.
What's your basis for believing that that was the protocol in effect at the time of Ronald Smith's execution?
A. Well, I was part of the team that was litigating a lethal injection challenge at the time and the almost identical protocol is the one that we're looking at as Exhibit 2 was the

subject of a confidentiality agreement, so I was not actually to produce that to anyone outside that confidentiality agreement, but the dosages, the typing, the type face, the spacing on all of this is identical between the one that was in effect in September of 2016 and this document labeled Exhibit 2.

Q. Do you feel comfortable that what you just testified to is not a violation of that confidentiality agreement?

A. I do. I've testified to the dosages and the dosages have been allowed to be testified to. It's the document itself and a lot of the stuff that's in it, that is now permissible, was covered by that agreement, but I don't feel right disclosing that agreement, despite the fact that nearly identical agreement -- or nearly identical document has been released pursuant to a federal court order.

Q. You claim that a thousand milligrams was used on -- of midazolam was used on Mr. Ronald Smith, how do you know that?

A. We received an after-action report from the prison and it's consistent with their policy and their procedure, which is that a -- in the unusual event -- if you look at -- I believe it's page -- let me find it here -- if you look at it, it says: In the unusual -- or "unlikely," I'm sorry -- in the unlikely event that a consciousness check is passed -- is not passed a second dose of midazolam 500 milligrams will be administered, followed by another consciousness check.

Q. You also claim with respect to -- sorry. You can finish.
A. I was just going to say that's page 10 of the document. It is part of paragraph P. It is the first full paragraph on what is page 10 at the bottom.
Q. You also claim that, for both executions, the labored breathing stopped after the paralytic was administered; is that correct?
A. After I inferred the paralytic was administered, yes. As I said, the paralytic got administered behind a wall.
Q. Right.
So you don't know when the paralytic was administered?
A. Only by inference. I don't know for a certainty, no.
Q. So your inference is that the paralytic was administered when his labored breathing stopped, but that the labored breathing stopped because of the paralytic; is that right?
A. Yeah, they seemed to kind of go together.
And when I say -- it wasn't just the labored breathing that stopped, I mean, it was the -- you know, any sort of movement at all. It was -- it was like a light switch got turned off.
Q. What sort of movement were either of the inmates that you've testified about engaging in immediately prior to what you infer is the paralytic being injected, other than the breathing movements?
A. Just head moving a little bit around.

Q. I think you've alluded to the fact that you've previously testified or submitted declarations about Ronald Smith's execution in cases challenging a state's lethal injection protocol; is that correct?
A. I don't think I alluded to it today, but I have indeed done so.
Q. Okay. And what -- can you approximately recount to us the dates and the states in which you testified?
A. Ohio; it would have been either December of 2016 or January of 2017. I testified twice in Ohio. A second time maybe a year after that.

I have also testified in Arkansas in 2017, a few months after I testified in Ohio. Those were both in -- well, let's see, the Ohio one was definitely in federal district court. The Arkansas one was also federal district court.

Tennessee, I testified in chancery court in the summer of 2018. And that concerned -- all three of those involved capital habeas unit attorneys litigating method-of-execution challenges.

Q. And in Arkansas, did you testify orally or did you submit a declaration only?
A. I testified in person.
Q. And did you also submit a declaration with respect to Mr. Ronald Smith's execution in Alabama?
A. I may have for somebody else -- so I would have used the

same declaration that I provided to the Southern District of Ohio to -- maybe the day or a couple days after Mr. Ronald Smith's execution I drafted a sworn declaration which I provided to Allen Bonhert and counsel there in Ohio, and I would have used the same one if I provided it to someone else.

Q. And in the Tennessee proceeding, do you remember the result of the proceeding you testified in regarding Mr. Ronald Smith's execution?

A. I believe the executions went forward. They ended up opting for electrocution, the folks who lost their suits there.

Q. So you believe the trial court ruled against the inmate in the Tennessee case?

A. Yeah, declined to issue an injunction. I don't know what the merit -- the merits of the litigation ended up being, but I know that the guys ended up getting executed by electrocution.

Q. Do you remember if that ruling was appealed?

A. It probably was; I couldn't say. I didn't follow it afterward.

Q. And in the Ohio proceeding you testified on, do you remember what the result of that proceeding was?

A. There was -- I believe there was a stay issued. It was Magistrate Judge Merz was covering it for -- he was designated by the parties to act as a district court judge, and I believe there was a stay issued, and I believe the Sixth Circuit vacated the stay in a reasoned decision.

And there may have been another stay or another decision that was issued. I know that the Sixth Circuit issued two decisions of some type, one after each time that I testified.

Q. And in Arkansas, do you remember the result of the proceeding you testified and submitted a declaration in?

A. Yeah, they lost, and their clients were executed.

Q. And then I know you don't remember whether or not you submitted a declaration in an Alabama case regarding Ronald Smith's execution, so I take it you don't remember the result of any proceeding you might have submitted a declaration in?

A. I don't, but I think it would have been noteworthy if an execution had been enjoined based on a lethal injection challenge because I think it would have applied across the board to a lot of folks that I represent.

MR. MANSINGHANI: No further questions, Your Honor.

THE COURT: Any redirect?

MR. STRONSKI: No redirect, Your Honor, but I didn't move --

THE COURT: Please work from the lectern.

MR. STRONSKI: Sorry.

We move Exhibit 2 into evidence, Your Honor.

THE COURT: Any objection?

MR. MANSINGHANI: No, Your Honor.

THE COURT: All right. Exhibit 2 will be received.

Thank you, Mr. Hahn.

THE WITNESS: Thank you.

THE COURT: Okay. It's 20 after 10:00. We've been going close to an hour and a half.

Does either side have any reason that we should not take about a 15-minute midmorning recess at this time?

What says the plaintiffs?

MR. STRONSKI: No, Your Honor.

MR. MANSINGHANI: No, Your Honor.

THE COURT: We'll be in recess for 15 minutes.

Court will be in recess.

(RECESS HAD.)

THE COURT: Good morning again. We're resuming in Civil 14-665, Glossip and others v. Chandler and others.

We'll have the plaintiffs' next witness.

And the clerk will please administer the oath -- well --

THE COURTROOM DEPUTY: This is defendants' witness.

THE COURT: Are we calling this witness out of time or do we have further evidence from the plaintiffs?

MR. STRONSKI: No further evidence, Your Honor, at this time.

THE COURT: Very well.

We'll have the defendants' first witness.

(WITNESS, APPEARING VIRTUALLY, WAS DULY SWORN.)

JOSEPH ANTOGNINI, M.D.,

DIRECT EXAMINATION

BY MR. MANSINGHANI:
Q. Good morning.
A. Good morning.
Q. Can you state your name for the record.
A. Joseph Frances Antognini, and the last name is spelled A-N-T-O-G-N-I-N-I.
Q. Thank you, Dr. Antognini.
What's your occupation?
A. I'm a physician.
Q. And what's your specialty as a physician?
A. I'm an anesthesiologist, board-certified anesthesiologist.
Q. And where are you presently employed?
A. My current employment is with a wound care company as a surgical wound specialist, which I just started about a month or so ago.
Q. How were you previously employed?
A. I was a professor of anesthesiology at UC Davis for about 25 years, and I practiced as an anesthesiologist and did research and taught at the University.
Q. What's your educational background?
A. I went to Berkeley for my undergraduate degree, then University of Southern California for my medical degree, then I went to UC Davis for my anesthesiology residency. Subsequent to that, I received an MBA at California State University in Sacramento.

Q. How long have you been a licensed physician?
A. My first license was issued in 1985, so that's 25 plus -- about 36 years, it looks like.
Q. And you're still a licensed physician?
A. That is correct, yes.
Q. How long have you been a board-certified anesthesiologist?
A. Since 1989, so that's 32 years, I guess.
Q. Have you ever published any scientific articles?
A. Yes.
Q. Approximately how many?
A. About 120 or so. Some of those include some case reports, but those are the -- my publications -- those are just the peer-reviewed publications. I have abstracts and book chapters that probably are another hundred or so is my guess. I'm not positive, but it's quite a few.
Q. What has been the general topic of those peer-reviewed articles and of your research?
A. My research focused on anesthetic mechanisms specific to -- or where anesthetics work to prevent movement in response to a noxious stimulus. That was the bulk of my research focus.
MR. MANSINGHANI: Your Honor, defendants are tendering Dr. Antognini as an expert witness in the field of medicine and in the field of anesthesiology and move to have him qualified as such.
THE COURT: Any objection?

MR. STRONSKI: No objection.

THE COURT: You may proceed.

MR. MANSINGHANI: Thank you.

Q. (BY MR. MANSINGHANI) Dr. Antognini, I e-mailed you some of the various exhibits that may be presented at this hearing.

Can you look at Defendants' Exhibit 1?

A. Could you refer -- I'm not sure.

Q. This is your expert report previously submitted.

A. Thanks.

Yes, I have it.

Q. Okay. Dr. Antognini, you're a little hard to hear, so can you just do a voice test real quickly?

A. Can you hear me now?

Q. Yes. Thank you.

A. I'll speak more loudly.

Q. Sure.

So do you recognize this document?

A. Yes, I do.

Q. And does it contain your CV?

A. It does. But as I want to just point out, the CV would have to be updated to reflect my new employment with the company that I just mentioned at the beginning, but otherwise it's accurate.

Q. Do you continue to hold to all of the opinions expressed in your report?

A. Yes, I do.

MR. MANSINGHANI: Your Honor, defendants move to admit Dr. Antognini's report and CV as Defendants' Exhibit 1.

THE COURT: It's already in the record. What would be the point of having it be a physical exhibit?

MR. MANSINGHANI: Just to ensure that it's in the record of this proceeding, but if you don't find it necessary, that's fine, as well.

THE COURT: Any objection?

MR. STRONSKI: I object. It's hearsay, Your Honor. He's here to testify, he can testify.

THE COURT: Yeah, I mean, you have a microphone there on your table, and for the benefit of all concerned, including a reviewing court, state your objection again, please.

MR. STRONSKI: The objection, Your Honor, is hearsay. And also he's here to testify, and I think that's the more appropriate way to take his evidence, instead of on this PI trying to sneak in an entire expert report.

THE COURT: Well, he's here subject to cross-examination, he has effectively adopted his report as filed the better part of a year ago in this case. It was filed on February 19th of this year. He's effectively adopted that as his direct testimony. He is subject to cross-examination.

As you, I think, readily inferred from my order on summary judgment, I read all of the expert reports that were referred

to by the parties in their briefs at that stage.

I'm not going to have a lobotomy, I am quite familiar with the gist of those expert reports.

And, again, let me refer for the third time to the fact that he is subject to cross-examination, so that objection will be overruled and Defendants' Exhibit 1 will be received.

MR. MANSINGHANI: Thank you, Your Honor.

Q. (BY MR. MANSINGHANI) Dr. Antognini, about how many times have you placed -- well, let me ask this question first: Have you ever placed a patient under general anesthesia for the purpose of surgery before?

A. Yes.

Q. And about how many times have you done that?

A. For general anesthesia, I guess it's probably between 7- to 8,000 in my career. It's hard to know for sure, but it's based on my experience. I think that's about right.

Q. And about how many times have you observed patients being placed under general anesthesia, even if you were not the physician doing so?

A. Perhaps another 500 to a thousand maybe. I'm not sure. But I certainly have observed other people inducing general anesthesia in which I was not the physician involved.

Q. What sort of movements do you see when a patient is under general anesthesia or can you see?

A. Well, you can see quite a few different types of movement

in terms of movements of the arms and legs and torso. That's pretty common under anesthesia.

And I think one of the misconceptions that lay people have about anesthesia is that patients -- basically they go off to sleep and just lie there motionless and that doesn't happen.

Patients sometimes move without any stimulation or at least any apparent stimulation, and sometimes they can move with stimulation, so quite a bit of movement can occur during anesthesia.

Obviously, we have drugs to help prevent that, but it's pretty common.

Q. What sort of drugs do you use to help prevent that?

A. Well, typically it would involve either more anesthetics -- or more of the anesthetic, I should say, and other drugs, such as opiates, and sometimes we would give a muscle relaxant or a paralytic, as is often is referred to.

Q. Do you sometimes see labored breathing or coughing while somebody is under general anesthesia?

A. Yes. Typically, we would place some type of airway device into patients for many of the surgeries, but right during the induction period, when we're giving the anesthetic drugs to induce the patient, patients often have labored breathing or their breathing is obstructed.

There's just a pretty wide variety of different types of breathing patterns during the induction of general anesthesia,

so it's -- it can -- you can see quite a bit there, again, but it's labored, deep breathing sometimes, shallow breathing, pretty much almost anything you could think of.

Q. Do those sort of breathing patterns indicate that the patient is not under general anesthesia?

A. No. In fact, it indicates that the patients are -- in the setting of when they are on the table and you're starting to give the medications, the anesthetic drugs, that indicates that the drugs are starting to have their effect.

There's quite a bit of research that's been published over the years showing that these drugs -- many of these drugs cause upper airway obstruction. The airway just sort of collapses and patients are trying to breathe with that obstruction. And so you get this pattern of obstructed breathing, snoring, people might describe it as labored breathing, so that's pretty common.

Q. And does movements while somebody is under general anesthesia indicate that they are conscious or aware of pain?

A. No. The movement patterns that we see are at fairly deep levels of anesthesia or can be and there's no indication that these patients are awake, and there are -- as I mentioned in my report, there are neurophysiological reasons why movement can occur despite an otherwise adequate level of anesthesia because movements can be generated within the spinal cord, as opposed to the brain itself.

Q. What if the movement is in response to a stimulus, was that an indication that they are conscious or aware of pain from the stimulus?
A. No. Movement in response to a noxious stimulus can be generated within the spinal cord. You can see that kind of movement in people who are brain dead. So there's no question that a movement response can be spinal mediated and does not indicate that somebody is awake and aware.
Q. So how do you know that if a patient moves while in surgery or under general anesthesia, more generally, that a patient is not awake?

Surely some movements could be an indication of consciousness and some could not be. How do you distinguish between the two?
A. Well, say, question basically of -- understanding the pharmacology of these drugs and their neurophysiological effects, so as an example, the drugs that we use cause brain depression, and when you study patients or volunteers who have been given these drugs and they are unconscious, they don't respond to stimuli, they're not conscious in the normal way that we think about consciousness, we know that that occurs at a certain dose of these drugs.

And so during anesthesia, when we are giving that dose of drug, or even higher, and we see movement in response to stimulation, we are going to infer that these patients are

unconscious, especially in the setting where if you have somebody under the anesthesia and they do not have -- or they have not been administered a paralytic or a muscle relaxant, if you talk to them and ask them to respond, they don't respond, and they may not respond to certain gentle stimulation. They only move -- perhaps just a reflex movement from a noxious stimulus. So all of those indicate that these patients -- individuals are unconscious, despite the movement response.

Q. Were you able to listen to the testimony of Spencer Hahn earlier this morning?

A. Yes.

Q. Mr. Hahn testified about the execution last week of Willie Smith; do you recall him testifying about this?

A. Yes.

Q. So if Willie Smith bucked upward or moved his arm after -- immediately after being injected with 500 milligrams of midazolam, would you take that to mean that he was in pain?

A. No, I would not.

Q. And would you take that to mean that he was not under general anesthesia later in his execution?

A. No, I would not take it, no, as an indication of that.

Q. Talk to me a little bit about the timing here.

Mr. Hahn's -- from what I believe -- let me just say: If Mr. Willie Smith was moved or jerked immediately after the administration of 500 milligrams of midazolam, why doesn't that

not tell you about midazolam's effect as an anesthetic?
A. Well, first, I just want to clarify your question a little bit, if I may, where you said "after the administration of 500 milligrams."

We don't know the timing of these events and it's entirely possible that these movements occurred during the administration of the drug.

So it takes -- based on my understanding of the injection times of these drugs, it takes, for the midazolam, maybe one or two minutes to be fully administered. So some of these movements may be occurring before the injection is completed.

I also want to point out what may be occurring here and what is -- certainly occurs in the clinical setting is that when an individual has an intravenous line in place and there's a small amount of fluid being -- basically being -- flowing through that intravenous line immediately before the injection is to begin, and then you start to make an -- you start to inject the drug, often that injection speed is fairly rapid.

And based on the speed in which I understand occurs in these -- in an execution setting, someone is going to feel that increase in the speed, so I have -- can only tell you, in my clinical experience, that patients know that something is being injected even before the drug has actually hit their brain. They just -- they know that something -- they can feel something going into their IV line.

And sometimes patients will react to that, they'll say, "Oh, I can feel that going in," and they'll move their arm. So I can only surmise that in the setting -- in an execution setting, where the inmate is lying there and they realize that, hey, you know, it's started, they may be moving essentially to try to -- you know, see if one last time they can try to get out of this.

So they may be awake during that first few seconds of injection and just reaction to that kind of struggle, basically, to get out of those straps.

I'm just, you know, sort of surmising what might be occurring, basically, but I hope that answers that.

Q. How long after midazolam enters the blood stream does it reach its peak anesthetic effect?

A. It -- well, first we have to -- so we talk about the sort of upslope of the effect, and then, as you said, about the peak. The upslope, when it actually starts to have an effect, it's maybe within 30 to 60 seconds. The peak effect may take two, three, four minutes, depending upon a variety of factors.

Q. And is the movements that Mr. Hahn described with respect to Mr. Smith consistent with what you might see in a patient in the operating room?

A. Yes.

Q. Do you know whether or not midazolam is considered to be painful on injection?

A. In some patients, they -- it is irritating. The studies that were done initially showed that certainly valium is a -- is painful -- can be a painful injection. Midazolam is much less so. But it can be a little bit irritating and painful. Some patients have described that, yes.

Q. Do patients describe it as extremely painful or mildly painful?

A. Most patients do not describe it as being painful. Those that describe it as being painful, it's mildly painful. It's not like with diazepam, it's much less painful than that.

Diazepam, valium, that really can sting, but the midazolam much less so.

Q. If Willie Smith had labored breathing after being injected with 500 milligrams of midazolam, would you take that as an indication that he was conscious or aware of pain?

A. No.

Q. And I think you may have testified to this before, but is that sort of breathing to which Mr. Hahn testified to, consistent with what you might see in a patient under general anesthesia?

A. Yes.

And if I may just clarify that, it is a little bit -- not -- myself not having seen any of these executions, I have to take these words -- you know, people say it was "labored," I heard the term "fish out of water."

What a lay person sees and describes, that description conjures up in my mind a certain -- what might be occurring, but if I were to observe it myself, I might say, oh, my goodness, that's this or it's that.

But, in general, the descriptions I have heard, these are indicative of just somebody who is undergoing the anesthetic and has had basically airway obstruction or something along those lines.

Q. So you believe the likely cause of any such breathing would be the anesthetic effect of the drug potentially causing airway obstruction?

A. That would be a very likely cause, yes.

Q. Would a likely cause be that the patient was experiencing pulmonary edema?

A. I do not think so, no. No.

Q. Why not?

A. Well, first off, these -- these effects that are being described -- again, we don't know the timing of these events, but it sounds as if they are occurring relatively quickly.

And the pulmonary edema basically would have -- it would take time to -- for that to occur, so -- if it occurred before death, so I just -- based on the timing of these events, I just don't think that's a likely possibility.

Q. And Mr. Hahn also described the execution of Ronald Smith; do you recall generally his testimony on this?

A. Yes.
Q. And do any of the movements or observations that Mr. Hahn described convince you that the inmates were in serious pain during their executions?
A. No, nothing there convinces me of that.
Q. Do any of the actions of the inmates that Mr. Hahn described convince you that the inmates were conscious minutes after their -- the administration of midazolam?
A. No, except that -- and I'm sorry if I get my -- the inmates mixed up here. I believe it was the second one he testified, where the -- he said a dose -- he believed a second dose of midazolam was administered because of a movement response to the stimulus.

So that movement response, as I said before, could simply be a reflective withdrawal that doesn't indicate consciousness, but they've obviously followed the protocol because they wanted to make sure that the inmate was unconscious, so apparently they waited until after the second dose.

Q. But you don't regard the movements in response to the consciousness check that Mr. Hahn described to be necessarily indicative of consciousness or that the movements were voluntary?
A. No. No.
Q. And same question with respect to pulmonary edema with Ronald Smith, does any of the breathing that Mr. Hahn

described, including the asthmatic barking cough, show that he was experiencing pulmonary edema?

A. No.

And in regards to the coughing, the other thing that can occur during anesthesia, during the anesthetic induction, is that people can accumulate saliva in the back of their throats. I've seen that many times in my career.

And some people have dry mouth prior to an anesthesia but other people, because of anxiety, can salivate quite a bit.

So if you have somebody -- and, generally, this inmate was described as being an asthmatic -- was, therefore, reactive airway, any small amount of stimulation around the voice box, basically, can -- would set off a -- sort of this paradox of coughing.

We've all experienced that when we've gotten something down our throat and we start coughing and we just keep on coughing.

During anesthesia, as you induce anesthesia, if that saliva were to get back in the throat, then, you know, that person is going to start coughing. And because of the drug's effect, they're not going to be able to clear it as well.

So, again, let me set the scene here of what happens when we're awake and what happens when someone is given all that midazolam.

If you're awake, maybe you're lying flat, and you get some

saliva back in your throat near your voice box and you start coughing -- I'm sure most of us in our life have experienced where we've had this paroxysm of coughing, where you just continue to cough for 5 or 10 minutes trying to get that cleared up. So it's very irritating.

So with this setting, you have an individual who is described as being an asthmatic. I haven't reviewed the medical records, so I don't know, but described as being an asthmatic, and if he has saliva back there, and on top of the fact he's unconscious from the midazolam, I could see that individual having this coughing fit, basically, related to that.

So that's a possibility I don't think has been considered here as to why he experienced that or why that was observed, I should say.

Q. Do you have any other observations from Mr. Hahn's testimony that I haven't covered yet with respect to your field and whether or not his observations are consistent or inconsistent with consciousness or awareness of pain for the inmates that were executed?

A. I don't -- I think we've covered the main things, which are the movement responses.

And then, of course, the testimony was that for both of the inmates, for the first inmate, I think that was Willie Smith, he testified that the inmate did not respond to the

consciousness check, and the second inmate had a response to the -- I believe the squeeze, but then afterwards, I don't know whether -- I think -- I'm not sure what his testimony was after the second dose of midazolam. But in any case, the consciousness checks indicated that there was no consciousness occurring.

Q. Now, I think you had testified earlier that one of the reasons that -- in your surgical practice that you do not consider movement to be necessarily indicative of consciousness is because you know the studied effects of the drugs being injected; is that correct?

A. Yes.

Q. So let's talk a little bit about midazolam.

Would you expect the inmates, based on your scientific knowledge and study, if they were injected with 500 or a thousand milligrams of midazolam, to be unconscious and unaware of any noxious stimuli involved in the execution protocol in Oklahoma or a similar execution protocol?

A. I would expect them to be unconscious and unaware of any noxious stimulus that would be applied.

Q. Can midazolam be used as the sole medication to induce anesthesia for otherwise painful medical procedures?

A. Yes, it has. And it's not used commonly for that, and I'll explain that in a moment, but as I mentioned in my report, and I have testified before in other settings, there are

studies that are out there where the drug midazolam was administered for procedures that were noxious and stimulating.

So, for example, endotracheal intubation, which is where we place a breathing tube into the windpipe, studies that I've cited there, just other studies have done that in preparation for surgery and they used midazolam as the only anesthetic-induction drug.

In procedures, such as cystoscopy, colonoscopy, there have been studies out there that have looked at midazolam alone.

The problem with using midazolam as a sole drug is that it is not from a pharmacokinetic respect the best drug. By that, I mean you would really have to give a lot of it to get somebody under anesthesia. We have much better drugs these days.

And so it was quickly abandoned as a drug that could be used, you know, in large part, for anesthetic procedures, and other drugs to minimize the amount of midazolam that would be needed.

And you couldn't -- you couldn't do -- when I testified to this before, you can't really do a major surgery with midazolam alone, simply because no one has studied that. It would require a large study. You would require a large amount of the drug to get to that point. And it wouldn't -- it's not clinically useful to achieve that, that is, to get to that point and give all that drug because it just takes so long to

wear off, so it was never studied for that purpose.
Q. So if I take it correct, the reason that midazolam is not used clinically as a sole drug to induce general anesthesia is because it would take too long to wear off?
MR. STRONSKI: Objection. Leading.
THE COURT: Sustained.
Q. (BY MR. MANSINGHANI) Let me try to reask that.
So could you give us, again, the reason why midazolam is not used in the clinical setting to -- as a sole drug to induce anesthesia.
A. Well, again, one is that you would need to give a relatively large amount. When I say that, I mean amount -- the amount that you would give is a lot less than that that is used in the execution protocols, but it would still be a large amount. It would take a while to wear off.
The dose, for example, that is recommended in the package insert is up to .6 milligrams per kilograms. Well, in a 100-kilogram adult, that's 60 milligrams. So that's about a tenth of the dose that is used in an execution. But even with that .6 milligrams per kilogram, patients can take a long time to wake up.
So we don't really want to give that kind of dose to a patient, and especially if it's a short procedure.
And the other thing is we just have better drugs currently. We've had better drugs for quite a long time. So

it just doesn't make any sense to administer larger doses or to do the studies to see whether we could, you know, get to that effect.

But there are other benzodiazepines that have been studied that indicate that patients would be rendered unconscious and insensate or not aware of a noxious stimulus.

Q. Now, you mentioned that midazolam is used as -- or has been used and studied as a sole anesthetic during intubation. Can you describe those studies and the significance of those studies that we're talking about today?

A. Yes.

I referenced in my report and my deposition back in January or February, whenever it was, a couple of studies. One is the Michaloudis study. That was the study where they were looking at the effect of various anesthetic drugs on an EKG or electrocardiogram parameter called the QT interval, as I recall. That was the main purpose of that study.

But as part of that study, essentially what they did is they had two groups: One group received midazolam for induction, the other group received -- I believe it was propofol. I can't remember off the top of my head.

And they gave the -- and I'm going to focus now just on the midazolam group. They gave midazolam, followed by, I believe, a muscle relaxant, succinylcholine, that's the relaxant they used.

And then they did endotracheal intubation and they looked at various parameters, including blood pressure and heart rate.

And, not surprisingly, blood pressure and heart rate go up when you place that endotracheal tube. And even with an adequate anesthetic, the typical anesthetic, you will see that, from a hemodynamic response, that blood pressure response.

But that response was, for the most part, no different in the midazolam group, as compared to the other group, which, again, I believe, was propofol, which is a general anesthetic.

So the upshot of that is that the patients receiving midazolam responded in the same way with the patients receiving the general anesthetic drug called propofol, and so that indicates to me that these patients essentially were anesthetized.

And the authors even concluded or wrote or reported, I should say, that the patients receiving the midazolam appeared to be adequately anesthetized. I think that was sort of their general terminology.

Another study that I talk about is the --

Q. Let me --

A. I'm sorry.

Q. Yeah, let me just ask you a follow-up question on the Michaloudis study and then we can move on to the next study that you were about to talk about.

Is propofol the drug that is typically used for major

surgeries as a general anesthetic today?
A. Yes, it can be. It's used a lot for the induction of anesthesia and it can be used pretty much alone for anesthesia.
Q. I interrupted you. You were going to discuss another study?
A. Yes.
The other study that I cited was Paul White. That was back in the early 80s, as I recall, and a similar type of setup, where he was comparing different drugs for induction and he used -- in one group, he used midazolam.
And that group -- and he looked at blood pressure and heart rate responses and so forth and things of that nature. And didn't really report any major difference among the groups.
The other groups received typical anesthetic drugs at that time, so I think one group received thiopental, I think there was a group that received ketamine, I think there might have been a fourth group that, I believe, received ketamine and midazolam.
I didn't review those studies in preparation for this testimony, but it's something along those lines.
But the -- my conclusion to that, similar to the other --
Q. Dr. Antognini?
A. -- midazolam group --
Q. Dr. Antognini?
A. Yes.

Q. You broke up a little bit, so could you start that sentence again?
A. My conclusion, basically, from that is that, similar to the Michaloudis study, the midazolam group had a similar response to group -- to patients that received other general anesthetic drugs.

So let me just be very clear about my use of these studies.

Yes, these patients received a very stimulating procedure, it was an endotracheal patient. That's where you put the plastic tube down the mouth into the windpipe.

And, yes, there's an increase in blood pressure and heart rate when that occurs. And even if somebody who is adequately anesthetized, you will see that response.

But the key here is that the midazolam group, the response there was same, more or less, compared to the other groups. If they were -- if they were not adequately anesthetized, I would expect their heart rate and blood pressure to be higher. But for the most part, they had similar results.

THE COURT: Doctor, for the benefit of the reporter, please spell the name of that last study you referred to, started with an M.

THE WITNESS: Okay.

Q. (BY MR. STRONSKI) Dr. Antognini, I think you may have to move back towards the screen on the computer for us to hear

you.
A. Oh, sorry. I'd have to look it up. I think it's M-I-C-H -- M-I-C-H-E-L-O-U-B-I-S (sic), I believe. I'm not positive about that.
Q. Dr. Antognini, if you could, look at your report which was Defendants' Exhibit 1 and on page 16, paragraph 26.
THE COURT: Okay. Just to save everybody time, it's there. It's -- for the benefit of the reporter, it's M-I-C-H-A-L-O-U-D-I-S.
We'll have the next question.
MR. MANSINGHANI: Thank you, Your Honor.
Q. (BY MR. MANSINGHANI) You mentioned that endotracheal intubation is a very stimulating procedure. How does it relate to other procedures that might happen in a surgery?
A. It is more stimulating, in the sense that the response -- the movement response that you see from it or you can see from it, the heart rate and blood pressure response that you can see from it, is more stimulating than a surgical incision, for example.
People have studied this over the years, looking at the amount of anesthetic drug that is needed to block movement to different types of stimuli. So, for example, to block -- let's say you wanted to know how much drug do I need to give to block movement from a surgical incision, so you study a group of patients and you say, oh, it's about -- let's say it's 10

milligrams to block.

Then you ask the question: Well, how much do I need to block the response to an endotracheal intubation of a patient, the blood pressure response, the movement response?

Turns out it might be 15 milligrams.

So you need more anesthetic, basically, to block that response. So the endotracheal intubation in that setting is very stimulating.

Now, I know there have been people who have argued, well, you can do endotracheal intubation on somebody who is awake or I've seen that -- or said, well, it's actually not that stimulating.

But an awake individual that's -- grab somebody off the street and you tried to put an endotracheal tube in them, that is very, very stimulating. It requires a lot of anesthetic, more than you would need to block the movement response -- I'm sorry, yeah, to block the response to a noxious surgical incision.

Q. Now, you mentioned the induction dose for midazolam. Can you remind us what the induction dose for midazolam is and where you get that information from?

A. Yes.

So if you look at the package insert, the general range is between 0.2 and 0.3 milligrams per kilogram, but you can go up to 0.6 milligrams per kilogram.

Q. And that's to induce general anesthesia?
A. That is correct, to -- as the package insert states.
So to make the math easy, if you just take a 100-kilogram adult, the induction dose could be between 20 and 30 milligrams, but you could go up to 60 milligrams in that 100-kilogram adult.
Q. When you say "package insert," what are you referring to?
A. The package insert is the written material that the FDA has approved to describe the actions, the pharmacology, the dosages, the side effects, contraindications of a drug, in this case, for midazolam.
Q. You mentioned that midazolam is used or can be used as a sole anesthetic for other procedures other than endotracheal intubation, and I believe you mentioned a cystoscopy. What's a cystoscopy?
A. A cystoscopy is basically where you would look into the bladder, urinary bladder, so it involves placing a tube through the urethra, and in a male, of course, it goes through the penis, in the female, they obviously have a very short urethra, so it goes through their urethra, and so you are able to visualize the bladder, basically, with that scope.
But it involves -- especially in men, obviously, it involves going through the penis and so that would be quite uncomfortable and require some type of anesthesia. It's not -- sometimes it can be done with just a little bit of some local

anesthetic there, it can be uncomfortable, but it -- nonetheless, it does require something as far as an anesthetic.
Q. Now, this tube could be a rigid tube or a flexible tube; is that correct?
A. That is correct.
Q. And the study you were referring to or the practice you were referring to, what is the general scientific conclusion about midazolam's use in cystoscopes?
A. Well, the -- essentially that you could use the midazolam as the drug -- the anesthetic drug, basically, for that procedure, and that it was tolerated by patients and they accepted that as a viable choice, as compared to not having anything at all. It was better for them to have midazolam, basically, than to have nothing at all.
Q. You mentioned studies relating to other benzodiazepines being used to place somebody under general anesthesia, what were you referring to?
A. Well, there's a newer anesthetic drug called -- or I should say, it's remimazolam -- I think I've got that right. And it is a benzodiazepine, so its pharmacology, the way the drug acts, is essentially identical to midazolam. But what's different about it is that it's metabolized in a different way and that means that it wears off very, very quickly, compared to midazolam or other benzodiazepines.
And there have been some studies that have looked at the

effect of that drug and, basically, they are able to give a lot more of that drug on a relative basis because they don't have to worry about the drug, basically, hanging around a long time. It's going to wear off very quickly. So you can give more drug if you know it's going to wear off more quickly.

And they've been able to look at responses to noxious stimuli and in I think some of these studies it's been basically like a pinch of the finger or maybe a shoulder pinch. I don't recall the exact details, but it was a noxious stimulus of some sort.

And those patients -- I can't remember all the patients -- were -- did not move to a noxious stimulus, but a fair number of them did not move to the noxious stimulus, indicating to me that they had gotten down to the level of general anesthesia that they were not moving to a noxious stimulus.

They were unconscious, they were not responding to verbal stimuli, they were not responding to simple touch, and as a final step, they weren't responding to a noxious stimulus.

So that type of drug allows you to give more of it, sort of study what happens on the -- when you achieve these large doses.

And I'm going to go back to what I said earlier about midazolam. Nobody could really study or is willing to study what happens in humans when you give these huge doses of midazolam, because it just -- it would take too long for the

drug to wear off.

So we don't know, with midazolam, basically what happens with these very large doses in humans, because for ethical reasons, we have not been able to study that.

Q. Now, in these remimazolam studies that you referenced, did they monitor brain activity?

A. I -- as I recall, they did, yes.

Q. And how do they monitor --

A. I'm sorry?

Q. Do you remember how they monitored brain activity?

A. If they monitored brain activity, it would be with electroencephalogram, that would be the main way that we monitor brain activity, an EEG.

Q. Do you remember the results of that study with respect to EEG activity?

A. I'm sorry, I actually don't remember the results of that study. I would have to review the study now to --

Q. That's fine.

THE COURT: How much longer do you have on direct?

MR. MANSINGHANI: I'm actually about to finish.

THE COURT: Okay. Go ahead.

Q. (BY MR. MANSINGHANI) So is it your expert opinion to a reasonable degree of medical certainty that a person given 500 milligrams of midazolam intravenously would be rendered completely unconscious and insensate to pain?

A. Yes, that is my opinion.
Q. Is it your opinion that such individuals would not experience any pain from the second and third drugs in Oklahoma's execution protocol?
A. It is my opinion they would not experience pain relative to the second and third drugs; that's correct.
Q. And if a person was experiencing pulmonary edema after being injected with 500 milligrams of midazolam, would you expect they would experience any pain or suffering from that condition of pulmonary edema?
A. I would not expect them to be suffering or experiencing any pain from that pulmonary edema, if it occurred.

MR. MANSINGHANI: Thank you, Dr. Antognini.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. STRONSKI:

Q. Hello, Dr. Antognini. How are you this morning?
A. Good morning. Good morning. Thank you, sir.
Q. I think you said that in clinical practice you don't use midazolam to maintain surgery or to even induce surgery, typically, because you have better drugs, right?
A. That is correct, yes.
Q. And is remimazolam one of those better drugs?
A. I think it's remi, but, anyway, yes, it is not -- right now, I don't know that it's actually approved in the United

States. I haven't followed that yet, whether it's actually been approved in the United States yet.

I have not used it, but it may not be a drug that -- it may become a drug that we would use and replace the midazolam.

THE COURT: Is that -- Doctor, is that -- refresh my recollection. Is that drug referred to in your report? If not, I need you to spell it.

MR. STRONSKI: I don't think it is, but I could be wrong.

THE COURT: Say that again.

MR. STRONSKI: I don't think it is.

THE COURT: Doctor, please spell that.

MR. MANSINGHANI: Paragraph 19, sorry.

THE COURT: Okay. It's in paragraph 19.

Go ahead.

MR. STRONSKI: Sorry, it is in paragraph 19.

THE COURT: Okay. Go ahead. The reporter will have a copy of that report.

Q. (BY MR. STRONSKI) And so did you say that drug is not approved or you don't know whether it is, correct?

A. I do not know whether it has been approved in the United States, that is correct. It's going through the process. It's very close to that process. It may have already been approved, I just haven't been following that myself. I don't know.

Q. Okay. And it has the same mechanism of action as

midazolam, correct?
A. That is correct.
Q. Because it's a benzodiazepine?
A. That is correct, yes.
Q. And is it true that benzodiazepines have a single mechanism of action specifically requiring the presence of the amino acid neurotransmitter GABA and the presence of GABA receptors?
A. That is correct. Yes.
Q. And other drugs, like the barbiturates and drugs that aren't benzodiazepines, act on other receptors in addition to those, correct?
A. That is correct, yes.
But I should clarify that. There are probably studies out there that show that benzodiazepine acts on some of those receptors but they're just not thought to be the main clinical effect.
Q. There probably are or there are? Are you aware of any study?
A. I'm not off the top of my head, I can't quote any of those, but I certainly would say to you that the -- and agree that the main effect of benzodiazepines is an action, not the GABA receptor which requires the presence of the GABA receptor and GABA, so that -- I agree with you on that.
Q. Would you agree with me also that in the human population

there is a variability in the presence of those two required moieties for this to work, the mechanism of action to work?
A. There is always variabilities, so, yes, I would maybe -- yes, I would say there is variability in regards to GABA and GABA receptors.
Q. And what happens in a particular individual if you've exhausted either -- either the number of GABA molecules or the number of receptors?
A. So I think -- if I may re-word your question. And I'm not trying to be tricky here, but I think you're trying to get to the soothing effect, and to use the term "exhaust the receptor" or "exhaust the amount of GABA" may not be the best pharmacology way of putting it, but I understand the intent of your question, which is that, at some point, if basically you're saturating the receptor, the GABA receptor, with the benzodiazepine and you only have a limited amount -- or a finite amount of GABA, then you can see in a study that you were -- where you are looking, like, in a petri dish, so to speak, and looking at the GABA function, you will see the effect of that drug start to level off, and so you'll see this so-called "soothing effect" on the pharmacology of that drug.
Q. Okay.
A. But -- go ahead, sorry.
Q. So the soothing effect is the pharmacology -- the benefits of the drug become less dose-dependent and you hit a ceiling,

even if you give more, you're not going to see materially different effects; is that essentially what you said?
A. Yes, except that I want to clarify that what I'm describing here is what you would see in a petri dish kind of setting in a basic science lab, where you're studying these receptors.
And that doesn't mean that that's what you would necessarily see -- seen clinically, because the amount of drug that you would give in a petri dish is kind of hard to translate that amount to what you were given clinically.
Q. Let me ask just ask you this question: So you're introducing something -- a different question -- but you're asking about an in vitro analysis, which is not in the body, it's not something live, it's in a petri dish, you're talking about petri dishes, so -- but that -- the concept is the same, right? In a human being or in a petri dish, there will be limitations on the action -- on the ability of an increasing dose of midazolam, to have increasing action, and it will be based on the limitations of the GABA, amino acid neuro transmitter, and/or the presence of the GABA receptors, correct?
A. Yes, that's correct.
Q. Have you -- let's talk about -- you talked about the package insert; do you remember that?
A. Yes.

Q. Okay. And the package insert is FDA-approved labeling, correct?
A. Yes, that's correct.
Q. And the package insert has indications, so a physician who doesn't have a background in a drug can follow the label indications, correct?
A. That is correct, they can.
Q. And they're backed up by studies. And the package insert will even talk about or at least reference the studies that were done to support those indications, correct?
A. That is correct.
Q. And if you were to use a drug for something other than those FDA-approved indications, it would be an off-label use, correct?
A. Yes.
Q. Okay. And so you're doing so without the benefit or the studies that supported the approval of the drug, correct?
A. Yes, that is correct.
Q. Okay. And the package insert does not include the maintenance of anesthesia as an approved FDA -- and supported by a study used in midazolam; isn't that correct?
A. That is correct. I believe it doesn't state anything in there about the -- that -- the use of midazolam for the maintenance of anesthesia.
Q. And you talked about some studies and you found two

studies, I think, a White and a Michaloudis; do you remember talking about those?
A. Yes.
Q. And those studies are very specifically focused on endotracheal tube insertions, correct?
A. They involve the endotracheal intubations, yeah. That wasn't the focus of the studies, but they did involve that.
Q. And in some of those cases, were those done in an emergency setting?
A. Yes. In the White study, those were urgent settings. I wouldn't say they were emergencies, per say, but they were urgent, they were nonelective, let's say, patients.
Q. So somebody is in a car crash, a motorcycle accident, they have trouble breathing and they're brought into an emergency room; is that the typical situation that is in the White paper?
A. Actually, I don't think that is. I think these were individuals that, for the most part, they had orthopedic injuries, let's say, which typically are not life-and-death, you know, I have to do it within minutes, but I didn't review the study to see if they had more-emergent cases than that, so I don't -- I can't answer that question. I don't remember that being the major component of their patients, that there was a true emergency.
Q. Okay. But if you are introducing an endotracheal tube, you're doing so to protect the airway, correct?

A. Yes.
Q. And that's -- that's often done in the context of an emergency?
A. Well, it sometimes is, but most of endotracheal intubations are done in an elective setting in the operating room.
Q. Okay. But those were not the cases that White discusses, correct?
A. They were done in the operating room but they weren't elective cases.
Q. Right.
Because if you had an opportunity to do an -- if you had an opportunity to prepare for something and it wasn't an emergency, you would use other drugs besides midazolam for an endotracheal insertion, correct?
A. Yes. Certainly in 2022, you would.
Q. And you've been a doctor for how long?
A. Well, I graduated in 1984, so that would be 37 years.
Q. Okay. Thirty-six or -- you testified, I wasn't sure if it was 36 or 37.
And how many endotracheal insertions have you been the anesthesia doctor on in your career?
A. Gosh, probably 6,000, maybe, 7,000. Most of the general anesthetics that I've been involved with would have involved endotracheal intubation, not all of them, but a lot of them,

so --
Q. And in all that time, you may have been involved in using midazolam on one occasion, right?
A. There -- I think in my career I used it twice, I believe, for induction of anesthesia.
Q. Okay. You talked about the package insert for midazolam, which says -- which recommends that you use .2 to .3 milligrams per kilogram but you can use up to .6; is that right?
A. Correct.
Q. Okay. And so that -- that's a 20-to-30-milligram dose; is that right?
A. In a 100-kilogram --
Q. Let me withdraw the question here.
To make things simple, if you have a 220-pound person, which is 100 kilograms, that is a 20-or-30-milligram dose, right?
A. That is correct.
Q. Okay. And in your 37 years of practice, the highest dose that you may have given somebody is 20 to 25 milligrams, maybe 30, but not higher than that, right?
A. That is correct.
Q. And you only did it once or twice with endotracheal inductions, correct?
A. Correct.
Q. And you've never used midazolam at obviously 500

milligrams, correct?
A. I have not.
Q. I know you have a lot of opinions about what midazolam would do at that dose and what it might do in the nonclinical execution scenario on that dose, but not only do you not have experience using 500 milligrams or anything over 25 to 30 milligrams, you don't have any experience observing any executions or the use of midazolam in executions, correct?
A. I do not. I've never observed an execution.
Q. And you're aware that plaintiffs have hired a medical doctor, who is also an anesthesiologist at Columbia Presbyterian, at Columbia University, and also is a -- in addition, is a certified pain specialist; are you aware of that?
A. Yes, I'm aware of that.
Q. And you are aware that Dr. Weinberger, the anesthesiologist and pain specialist at Columbia, disagrees with your opinions in this case?
A. I am aware of that, yes.
MR. STRONSKI: Your Honor, I'm going to try to use the overhead projector.
Q. (BY MR. STRONSKI) Doctor, you testified about a number of studies, but we didn't actually mark them or you didn't go through them or read them or anything like that, right?
A. Not during this testimony, I did not, no.

MR. STRONSKI: Your Honor, I'd like to use, for cross-examination, the document that was -- that is the Miyake reference that was testified about.

THE COURT: Spell that, please.

MR. STRONSKI: M-I-Y-A-K-E.

MR. MANSINGHANI: I don't believe that was the subject of his testimony today.

MR. STRONSKI: It's in his expert report, I thought he had mentioned it.

THE COURT: You may proceed.

MR. STRONSKI: It was the subject of his deposition.

Q. (BY MR. STRONSKI) Do you remember the Miyake reference, Doctor?

A. I do.

I just want to point out, if you are going to ask me to examine that document from what you see there, I'm having a hard time seeing anything on what you have up there, but I'll try to work through with you.

Q. I will work through it with you, too.

A. Okay.

Q. And I appreciate the limitations, so thank you for telling us.

And this is a study that you've read, correct?

A. Yes.

Q. Okay. And this also involves the intubation using drugs,

including midazolam, correct?
A. Yes.
Q. Endotracheal intubation?
A. Yes.
Q. Were paralytics used?
A. As I recall, yes, there were.
Q. Okay. So I think this talks about BIS readings, right? Or other EEG-type measurements. But there's no consciousness check in this, correct?
A. I don't believe that there was, no.
If -- I just want to just expand on that, because these patients received a muscle relaxant, a consciousness check is not really possible.
Q. And if the patients with the muscle relaxant were suffering pain, at least you wouldn't see that from any movements or other physical signs, correct?
A. Not from any movement or physical signs involved.
When you say "physical signs," remember they did have the electroencephalogram, the EEG, being recorded. I don't know if you consider that a physical sign or not, but they were being monitored with that.
Q. If we go to page 392 in the reference, I'm going to read the second full sentence in the left-hand column of page 392, this reference that you had reviewed.
It says: Midazolam exclusively exerts its anesthetic

effect through a benzodiazepine receptor, which is part of the amino butyric acid type-A, GABA A receptor, as shown by the complete reversal of its anesthetic effects by flumazenil, a specific benzodiazepine receptor antagonist, and then -- and so that is a reference to the GABA and the GABA receptor mechanism action being the exclusive one for midazolam, correct?

A. Yes.

Q. And do you disagree with that?

A. I'm not sure I -- I don't think so. I mean, if you want to reread that to me, basically all they said is that it acts as the GABA receptor and it's reversed by flumazenil, I agree with that.

Q. Right.

And it says it's the exclusive means of action. And you had referenced earlier in the cross-examination that there might be studies you were unaware of to suggest otherwise.

Do you disagree with this author, that it is the exclusive mechanism by which midazolam works?

A. I do not disagree with that. I think maybe you've -- well, I just say I do not disagree.

From the clinical perspective, it is -- I agree, action at the GABA receptor is the exclusive mechanism.

Q. And then it further -- it further says: On the other hand, other anesthetics, such as volatile agents, barbiturates and propofol, have numerous effect sites in addition to the

GABA A receptor and their anesthetic effects are not reversed by flumazenil; do you agree with that?

A. Yes.

THE COURT: Please spell the name of that last drug for the record.

MR. STRONSKI: Yes, it's F-L-U-M-A-Z-E-N-I-L.

Q. (BY MR. STRONSKI) And then at the end of the paragraph, it says: Saturation at the benzodiazepine receptor site would account for the small differences in EEG between patients receiving midazolam at 0.2 and 0.3 milligrams per kilogram respectively in the absence of burst suppression.

And so that sentence is referencing the fact when you increase the dose in this study of midazolam 50 percent from, in a 100-kilogram person, a 20-milligram dose, to a 30-milligram dose, you see a very small increase in pharmacokinetic effect. There's a very, very little additional effect.

That's what that study is saying, correct, Doctor?

A. That is one of its conclusions, it's not the only thing you can draw from that. And I'm not sure --

Q. Okay. Doctor, let's continue, please.

A. Okay.

Q. I'd like to mark -- I'm not marking.

MR. STRONSKI: I'd like to use in cross-examination the Divoll reference, which is Exhibit 928 in the depositions.

THE COURT: That's D-E-V-O-L?

MR. STRONSKI: It's D-I-V-O-L-L.

Q. (BY MR. STRONSKI) Do you remember the Divoll reference?

A. I do not.

Q. Do you remember the reference looking at benzodiazepine overdosages, looking at the plasma concentrations?

A. I remember that's -- a study like that being discussed at the deposition, that is correct. I don't remember that specific reference.

MR. STRONSKI: May I hand this up, Your Honor?

THE COURT: You may.

Q. (BY MR. STRONSKI) So there are a couple of numbers here to keep in mind when we look at this.

Now, if you go to page 382 of the Divoll reference, there are a number of individuals who came in with a drug overdose. And this is diazepam.

Diazepam is another benzodiazepine that works in the same way as midazolam, correct?

A. That is correct.

If I may remind you, you're away from the microphone and it's really difficult for me to hear you.

Q. Okay. Thank you for telling me that.

A. Sure.

Q. And so if you look at -- and we've done this before -- patient 7 and patient 8 on that page, 382 -- patient 7 had an

overdose, a 20-year-old male, and he had a blood level -- a plasma concentration, and that's expressed in a unit called nanograms per milliliter. Do you see that?
A. In that table, it's all blurry right now, so I --
Q. But is that a common table, the nanograms per milliliter?
A. Yes, that is correct.
Q. So that is one way of expressing blood concentrations of something, so it would be the nanograms per milliliter of plasma, correct?
A. Yes.
Q. Okay. If you were to convert that to milligrams, what would that be? If you look at Number 7, because 7 is 7,000 -- I'm sorry, 7, if you look at diazepam there, they're measuring 4,792 nanograms per milliliter in this patient's blood. If that were in milligrams per milliliter, what would that be?
A. It would be -- I'm sorry, it was 7,000?
Q. 4,792.
A. So to convert from nanogram to milligrams, you would divide by a million. So you can do the math there, but it's going to be a very small number.
Q. I'm sorry, micrograms.
A. Micrograms, okay. Then you would divide by a thousand.
Q. Okay. So if you were to --
THE COURT: He needs you to be close to the microphone.

Q. (BY MR. STRONSKI) So with -- so 4,792 nanograms per milliliter is 4.7 micrograms per milliliter, correct?
A. That is correct.
Q. And do you remember that we looked at the coma grade and that a coma grade of zero to one is essentially awake?
A. Yes, I remember that.
Q. Okay. And so this patient had 4,792 nanograms per milliliter of the benzodiazepine diazepam in their blood and they were awake, correct?
A. That is what they reported, yes.
Q. And that would be equivalent of 4.792 micrograms of diazepam in the blood and be awake, correct?
A. Per milliliter, that is correct, based on the numbers you have given to me.
Q. And then there's a Patient Number 8 who has 3,116 nanograms per milliliter and he also is awake, according to the coma score, correct?
If the coma score is zero to one, he would be awake, correct?
A. That is correct, yes.
Q. Okay. Do you recall looking at studies that suggested that diazepam might be two to three more times potent than the midazolam?
A. I think it might have that -- if you're talking about diazepam compared to midazolam, the potency?

Q. Yeah, the diazepam is -- which is more potent?
A. Midazolam.
Q. So midazolam is two to three times more potent; is that right?
A. Approximately, yeah.
Q. And then there is some studies that -- where .15 of diazepam was given and .10 of midazolam and they were sort of similar in effect, right?
A. There are -- yes, there is a -- I remember that study. I don't remember the specific details, but I remember that -- similar types of reporting, yes.
Q. Okay. So there is some observations that its effect actually is similar in potency in others that midazolam is two or three times more potent; is that fair?
A. Yes. There is that type of variability.
Q. Okay. I'd like to go next to Exhibit 941, which is the autopsy of Warner.
MR. STRONSKI: May I hand it up, Your Honor?
THE COURT: You may.
Q. (BY MR. STRONSKI) So we looked in your deposition at the autopsy of Mr. Warner; do you remember that?
A. I remember the deposition talking about it, yes.
Q. And what is the normal weight of human lungs in autopsy that are healthy?
A. Well, there's -- unfortunately, there is a bit of

variability in the literature about what is a normal weight because it depends on the methodology, but as I recall, it's anywhere from 2- to 400 grams per lung.
Q. Okay.
A. That's my recollection. I'd have to look at the study to know what the range is, but it's somewhere in that range. I think it's gone as high as 700 grams.
Q. Okay. And at some point, is a weight -- and you're not a pathologist, correct?
A. I am not.
Q. Have you conducted autopsies?
A. I have not.
Q. And so what is your basis for -- I'll withdraw that.
If we go to page -- well, let me ask you this: In terms of the lungs of Mr. Warner, did you review the autopsy report on his lungs and the weight of those lungs?
A. Prior to the deposition or --
Q. Prior to today.
A. Prior to today. Well, I certainly did -- if I did it, it would have been prior to the deposition. I haven't done it since then, so -- and I don't really remember -- I probably did but I'm just -- I'm sorry, I don't recall.
Q. Okay. Fair enough.
If we go to the last page of the report, this is the report of laboratory analysis.

In the results, it indicates midazolam 3.2 micrograms per milliliter of femoral blood. And so that would be the equivalent of 3,200 nanograms per milliliter, correct?
A. Yes.
Q. Which if midazolam -- and this is in Mr. Warner, who -- following his execution. If -- this is actually if midazolam and diazepam are approximately equal in their potency, this actually is less of benzodiazepine in the blood than patient 7 in the Divoll study who had 4,700, at least, of diazepam in the blood, correct?
Is that correct?
A. Yes, that is correct. Of course, you don't want me to answer fully, but, you know, there's a lot of things we could talk about related to that question, so --
Q. I'm sure that there are.
But in terms of the math, in terms of the understanding of the drugs, they both work the same way, right?
A. They do.
Q. Okay. And their relative potency is studied and understood, correct?
A. They're studied, understood, but we -- you and I have already agreed, I think, that there's variability in the potency, but, yes, I understand that.
Q. So we can all do the math, and we have one reported study where somebody who has 47 -- over 4,700 nanograms or more than

4.7 micrograms of diazepam in their blood is awake, correct?
A. That is what that study reported, yes.
Q. Okay. And if -- and doing the math, if they are approximately equal potent, that's actually a higher dose than was found in the blood of Mr. Warner in his autopsy, correct?
A. That is correct.
Q. You gave a whole bunch of opinions about things, and one of them was about pulmonary edema.
You didn't talk about flash pulmonary edema, did you?
A. In my deposition or here?
Q. No, here.
A. No, did not.
Q. You said pulmonary edema takes a period of time, but flash pulmonary edema is flash pulmonary edema because it happens quickly, right, Doctor?
A. Well, it does, but I didn't -- maybe you misunderstood my answer. You know, all I can tell you is, yes, it can occur quickly, if it occurs.
Q. Again, you've used midazolam maybe once or twice among the 7,000 or 6- to 7,000 endotracheal endoscopes you've done and you've also mentioned cystoscopes, where it has been used, and colonoscopies. Colonoscopies can be done with no anesthetic, correct?
A. There are -- yes, there are a lot of surgeries that can be done with no anesthetic, but it's not necessarily favorable.

Q. But you wouldn't -- you wouldn't take out an appendix without some anesthesia unless it was an unusual emergency, correct?
A. That's correct, yeah.
Q. But some people tolerate a colonoscopy without anesthesia, correct?
A. That has been reported, yes.
Q. And with cystoscopes, local anesthesia can be used instead of a general anesthesia, correct?
A. That is correct.
Q. And you have no study using midazolam to induce and maintain anesthesia for surgery, apart from these few instances of these procedures you've mentioned, correct?
A. That is correct.
Q. And it's never been studied -- it's not approved for that and it hasn't been studied for that, correct?
A. It is not approved for that, I'm not sure I would say that it's never been studied, I'm not positive about -- it might have been studied but never reported.
Q. But you just don't know? You just don't know --
A. Yeah, I don't.
Q. -- is that fair, you don't know?
A. Yeah, that's correct.
THE COURT: Very well.
How much do you have on redirect?

MR. MANSINGHANI: Maybe five minutes.

THE COURT: Very well.

You may proceed.

REDIRECT EXAMINATION

BY MR. MANSINGHANI:

Q. Thank you, Dr. Antognini. Just a few questions.

We've mentioned thiopental, is that also known as sodium thiopental?

A. Correct, yes.

Q. And, today, is sodium thiopental used to induce or maintain anesthesia in surgery, typically?

A. No, it's not available in the United States.

Q. Or any --

MR. STRONSKI: Outside the scope, Your Honor.

THE COURT: Well, I'm going to go with it for a while. We'll see how far out of bounds it gets.

You may proceed.

Q. (BY MR. MANSINGHANI) And are any barbiturates used to induce and maintain anesthesia today during surgery?

A. Not in the United States that I'm aware of. Maybe in other countries somewhere, but not in the United States.

Q. We talked a little bit about the ceiling -- potential ceiling effect of midazolam. Are you aware of any scientific evidence to establish a ceiling effect from midazolam in humans?

A. Well, the problem that we face with a ceiling effect, in trying to extrapolate between the petri study dishes that I was referring to and in humans, is that you can't achieve the necessary -- or you would have to give a large amount of the drug to achieve -- or to adequately study the soothing effect in humans.

So let me sort of elaborate on that.

The typical study that's done in a petri dish kind of setting, you would increase the dose of the drug by 10-fold several times, so you might go from 1 to 10 to 100 to 1,000, and then you observe the effect on the petri dish on the GABA receptor, let's say.

In humans, you don't really do that. You go in a very narrow range.

So, for example, the Miyake study we talked about a few minutes ago, they went up by 50 percent. They went from .2 milligrams per kilo, to .3 milligrams per kilogram -- per kilo -- 3 per kilo. You're not able to examine the full range there.

So to say that they've demonstrated a ceiling effect is a little bit of a stretch because they didn't study, you know, full range of the drug, like you would do in a petri dish.

So I think that was the elaboration that needs to be -- you need to understand that in terms of extrapolating from the basic science petri dish setting to what happens clinically.

Q. So we don't know what dose -- we don't know what dose a ceiling effect would occur at with respect to midazolam in humans?
A. That is correct. And I might -- I'm sorry.
Q. Go ahead.
A. I might add that the ceiling effect also -- it kind of depends on what end-point are we looking at. There are different end-points, where you might have a ceiling effect on one end-point but not another.

So, for example, you might have an end-point on the heart rate response to drugs, as opposed to someone being unconscious or not and --
Q. So do you have any -- go ahead. Finish your answer. Sorry.
A. And so basically the drug range that you use has to be sort of cyclic for the end-point that you're looking at.

And it's possible that you get to an end-point, in this case, unconsciousness, even though you may not have reached the ceiling effect of other end-points.

So it's not as cut and dry as we'd like to think.
Q. So speaking of those end-points, do you have any reason to believe that the ceiling effect of midazolam would take place at any point before a person is under general anesthesia?
A. No, I don't think that that is -- based on the data that I'm aware of, I don't think that's occurring.

Q. One last line of questioning.
A. Yeah.
Q. You were asked about the maintenance of anesthesia, as contrasted with the induction of anesthesia. What's your understanding of those terms?
A. Well, the "induction of anesthesia" is a way of referring to that you begin the process in getting them to the level that you want them to be at, approximately. I mean, obviously you have to make adjustments for patients and so forth.

And then the maintenance basically refers to the "maintaining" that state with a variety of different drugs.

I think one of the things that we don't -- or people sometimes don't appreciate when we're talking about these large doses of midazolam, is that, so with a small clinical dose of midazolam, the peak effect occurs and then the drug starts to wear off after maybe ten minutes or so, but with this large dose of midazolam, the drug effect is going to be there for a long time, just because it's going to take a lot longer for -- for that to occur. I should say it's going to take a lot longer for the drug to wear off, it's just at such a high concentration.

And I might just add, as way of clarification, there was a question related to my use of midazolam in the clinical setting and I had only used it maybe twice; that is true as an induction drug. But I have used lower doses of midazolam

thousands of times in the operating room prior to induction at a lower dose, so I am obviously very familiar with the actions of the drug.

Q. And in your previous usage, I think you estimated 20, 25, maybe 30 milligrams of midazolam, was that instance successful in inducing anesthesia for the purpose of intubation?

A. Yes.

Q. And in the Miyake study that was referenced in the past, if you remember, do you remember how long the patients in that study were intubated under -- after being anesthetized with midazolam?

A. So in that study, they followed the patients through, as I recall, 60 minutes.

So basically the setup was they would receive the midazolam, they would receive a muscle relaxant, they would be intubated, and then they were left alone, basically, for about 60 minutes. And they followed the electroencephalogram during that period of time.

So one of the reasons why that study is, I think, germane here is there is some opinion that -- opinions that, you know, people would be awake with midazolam.

Well, if this -- this lower dose of midazolam, .2 or .3 milligrams, these individuals or these patients were paralyzed with a paralytic, on a ventilator with an endotracheal tube, which is very stimulating, and their BIS levels were in the low

60s, on average, so that indicates to me that they were anesthetized, they were unconscious.

If these individuals were awake, because of the stimulation of that endotracheal tube and being, you know, awake but paralyzed, you would expect that BIS number to be a lot higher and it wasn't.

So it indicates to me that the midazolam, even at that low dose, was having its intended effect for quite a long time.

Q. When you say "this level," could you clarify to the Court what you mean by that?

A. Yes.

So the BIS -- the BIS is a number that is generated by a machine that monitors the brain waves, the brain activity. That number ranges from zero and 100, so when you are awake --

THE COURT: That's B-I-S?

THE WITNESS: B-I-S, yes.

THE COURT: Bispectral index?

THE WITNESS: Correct.

THE COURT: Go ahead.

THE WITNESS: It ranges from 100, if you're awake -- 95 to 100 when you're awake, and if you're comatose and brain dead, say, it's zero.

For general anesthesia, it's in the range of 40 to 60. And these individuals were in the low 60s, as I recall.

Q. (BY MR. MANSINGHANI) So would you say it's fair to say

that the Miyake study showed that the midazolam maintained anesthesia for 60 minutes during which those 60 minutes the patients were at an endotracheal tube?

A. Well, again, I want to just clarify that they were in the low 60s, I don't have the numbers in front of me, but the average was probably like 62 -- I forget exactly what the average was, but they maintained that level during that 60-minute period. And you would -- so that's indicative that the midazolam was not wearing off.

Q. And it's your opinion that -- is it your opinion that during those 60 minutes, based on the BIS levels, that those patients were not conscious, aware of pain or suffering?

A. That is my opinion, yes.

MR. MANSINGHANI: That's all I have. Thank you.

THE COURT: Any recross?

RECROSS-EXAMINATION

BY MR. STRONSKI:

Q. We were just talking about the Miyake reference, Doctor, and you referenced that in the context of petri dishes, but this is a study that used 0.2 and 0.3 milligrams per kilogram of midazolam in patients and didn't see much difference between the two.

That's not a petri dish, is it, Doctor?

A. Yeah, it's not, but I think you misunderstood my discussion on that.

So my comparison there was that when you look -- when you -- you asked about the ceiling effect, I wanted to clarify that you could look at the ceiling effect in two different ways: One is what happens in a petri dish and what happens -- what can you study clinically. And you can't study the ceiling effect as readily in the clinical study because you can't give these larger and larger doses of drug.

Q. Okay. You talked about -- or counsel asked you about the intubations that you did with endotracheal intubations, I think, twice with midazolam and was that successful; do you remember that?

A. Yes.

Q. Okay. And an intubation takes as little as 30 seconds, correct?

A. As little as 30 seconds, yes, that's correct.

Q. And then you use other drugs if a patient is on -- has an endotracheal tube or is undergoing surgery after that, correct?

A. That is correct, yes.

Q. This Miyake reference using BIS -- are you aware of any limitations on the use of BIS with respect to measuring the effect of drugs like midazolam?

A. It is just like any monitor, the BIS monitor, the EEG, is not going to be 100 percent accurate.

Q. Right.

And so you're relying upon this BIS monitor, which is not

100 percent accurate, to use your words, in patients that have the paralytic and, therefore, can't move and, therefore, there are no consciousness checks, correct?

A. That is correct, yes.

MR. STRONSKI: No further questions, Your Honor.

THE COURT: Very well.

Counsel, I presume that this witness may be excused; is that correct?

MR. MANSINGHANI: Yes, Your Honor.

MR. STRONSKI: Yes, Your Honor.

THE COURT: Okay. Very well.

The video feed as to Dr. Antognini may be terminated and that will conclude the testimony of this witness.

THE WITNESS: Thank you.

THE COURT: Now -- and that's the only witness listed by the defendants.

Am I to understand that all the evidence on both sides is now in?

MR. STRONSKI: For the purpose of this motion for plaintiffs, yes, Your Honor.

THE COURT: And what says the defendant?

MR. MANSINGHANI: Yes, Your Honor.

THE COURT: Okay. It's 20 after 12:00. I want to hold recesses to a minimum, but I'm going to use this midday recess to review my notes.

I certainly intend to hear final argument, if you will, from both sides, but I'm not going to do it now, I'm going to do it in one hour.

And in that hour, yes, I'm going to be reviewing my notes, but I assure both sides that I anxiously await final argument and I'm not going to reach any conclusions until I've heard final argument.

So with that, I have 20 after 12:00. Unless either side has some other cogent proposal, we will take our midday recess for one hour at this point.

Any objection from the plaintiff?

MR. STRONSKI: None, Your Honor.

THE COURT: From the defendant?

MR. MANSINGHANI: None, Your Honor.

THE COURT: Very well.

Court will be in recess until 20 after 1:00.

(RECESS HAD.)

THE COURT: Good afternoon. We're resuming in Civil 14-665, Richard Glossip and others v. Randy Chandler and others.

The evidentiary presentation has been completed, and for that reason, I'll now hear closing argument from counsel for the plaintiff.

MR. STRONSKI: Thank you, Your Honor.

Again, as I said earlier, we understood Your Honor's

ruling on the standard, and so I'm going to argue with respect to likelihood of success.

One issue that's important here is, in addition to that, the harm. So the harm to my clients, if we don't get a short stay, maintaining the status quo, that executions don't begin; a harm to the State, if there is such a short stay; and the public interest.

And to the extent there are constitutional issues and claims, and my clients had an expectation -- a reasonable expectation to counsel that in terms of the schedule and the representations of the State that we would not be put in this position and that we would allow -- be allowed to finish and at least raise our claims so that we could seek appellate review, we do think that this is a situation where the relative harms, the harm to -- of potentially executing somebody who may still have valid constitutional claims is a serious one, and the harm to the State in waiting until February, given the time they took to revise the protocol and everything else that was going on the last six years, is a lesser harm.

So I think --

THE COURT: Excuse me.

When you refer to the harm flowing from the potential imposition of an unconstitutional lethal injection protocol, which is basically what you're saying, does that not, in one sense, at least, circle us right back to the first question,

which is the merits?

MR. STRONSKI: It does.

THE COURT: A substantial showing on the merits.

MR. STRONSKI: Right, a substantial likelihood on the success on the merits.

I do believe that -- I was showing previously, before Your Honor could hear witnesses, was at least that there was a genuine issue of material fact on Glossip I and Glossip II.

The only difference between the six plaintiffs who were dismissed, and then Coddington is back in, I understand, for the trial, is that they didn't choose which method for their own execution.

And Your Honor -- (cell phone rings) and I apologize for that -- asked me if there are any other cites I would like to put on the record in terms of the relevant case law, Baze, Glossip, Bucklew, and I'd like to do that now because I think it's important.

And I think it goes to the central holding of these cases, which is that there needs to be some pleaded method that can be compared in terms of the pain and suffering. You can't look at pain and suffering in a vacuum. It has been to be compared to something else.

And that's what all these cases require, but they don't require choice, and they don't talk about choice, as far as I can tell.

So if you look at Bucklew, I read previously from Bucklew and I'd like to just emphasize a little bit more of what I read before.

And this is in -- Bucklew, of course, was an argument brought by the plaintiffs there that -- and as applied challenge -- didn't require Glossip I and II, and the Court said, no, it does.

But what the Court said, it said the first problem with the argument is that --

THE COURT: Now, where are you reading from?

MR. STRONSKI: Oh, sorry. I'm reading from -- I have the 139 S.Ct. 112 version. If you have that version, it's on page 2730. If you don't have that version, it's on page 11, I believe.

But do you have the Supreme Court Reporter?

THE COURT: I'm looking at the Supreme Court Reporter, 139 S.Ct. 1112. And you're on what page, now?

MR. STRONSKI: 2730.

THE COURT: That doesn't follow from --

MR. STRONSKI: Oh, you're right. You're right. 1126.

THE COURT: Okay. I'm there.

MR. STRONSKI: Okay. And so the first full paragraph after the first paragraph, which is B, so it's the second column, and there's a keynote or headnote 11, and I'm going to

read this and I think it's relevant.

The first problem with this argument is that it's foreclosed by precedent. "Glossip expressly held that identifying an available alternative is a requirement of all Eighth Amendment method-of-execution claims alleging cruel pain."

And then this is the key quote, at least, here: "And just as binding as this holding is the reasoning underlying it" -- and then this is what I quoted before. This is the reasoning for this Glossip II. Distinguishing between constitutionality -- constitutionally permissible and impermissible with degrees of pain, Baze and Glossip explained, is a necessarily cooperative -- comparative exercise.

And so it's not about the prisoner choice, it's not about the prisoner, it's not about that. It's about having pled something that can be compared.

THE COURT: And the comparative aspect of it, of course, you probably will recall, I emphasized quite a bit in my summary judgment order.

MR. STRONSKI: Right.

And our position, Your Honor, is that the six, who are now five, less Mr. Coddington, are, with respect to having satisfied this comparative -- this pleading of a comparator for the necessary comparative exercise, they're in the same position.

What they didn't do is choose firing squad over thiopental or something like that. They didn't -- but they pled and didn't withdraw that everything we pled was a feasible available alternative that would substantially reduce pain and, therefore, would meet the second prong of Glossip.

Also, I would cite -- so our position really is seeing this way, the six, who are now five, are or should be seen no different than those who are going to trial in February.

If you look at the next -- the page beginning at -- it's 11 -- page 1127 in Bucklew, and I'm looking at the Supreme Court Reporter, so I'm reading -- starting to read the last line of the first column.

It says, to determine whether the State is cruelly superadding pain, our precedents and history require asking whether the State had some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain.

So the question there is whether it had another method available to it, not specifically, again, the choice of the prisoner.

If we go to Glossip, Glossip -- and, again, this is the Supreme Court Reporter, 135 S.Ct. 2726, and I am -- I am at 2730, '70, end of '37 and -- it's the end of '37.

And so this paragraph beginning near the end of 2737, it states -- the Court states -- the challenge in Baze failed both

because the Kentucky inmates did not show that the risks they identified were substantial and imminent, and there's the cite, and because they did not establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk.

And so, again, it's the existence, it's not the choice, it's something that exists that can be compared to.

And so I think seen that way --

THE COURT: And forgive the interruption, but I'm keenly interested in hearing what the defendants have to say on that score. That's an attention-getting point.

You may continue.

MR. STRONSKI: Thank you.

And so accepting that as the operative law or what the operative law should be for Baze-Glossip-Bucklew, it goes a step too far, we believe, to ask the clients to choose their own method of execution.

And I think the plain meaning of these cases is consistent with that, but also would be construed that way to avoid an infringement on First Amendment rights, and so that is our -- that's one of our claims, too.

And I think -- you know, if this can be -- if this can be construed consistent with preserving the First Amendment rights and even the rights under the statute of religious liberty statutes to imprisoned persons, that is another way to

understand this.

And, again, if you -- anyway, so that -- that is -- in terms of the law, I think that's all I'd like to say on that at this point.

THE COURT: Okay. Let me come back to one point.

And, first, certainly, I would ask you to forgive my off-the-cuff summary, but there has perhaps been some significant shifting of position as to this matter of designation of an alternative method.

I -- my perception of these five plaintiffs' position today is that, on one hand, you argue -- and this does have my attention -- you argue that, well, we don't really -- we don't have to pick, all we have to do is prove there is one that might work, but we don't have to opt for that ourselves. I hear you on that.

There's a little problem potentially. And this is what I want to hear more from you on. There's a little problem with that potentially, as long as you have not forsworn a future challenge.

And this morning you stopped just short of forswearing a future challenge. It's the future challenge that the Supreme Court is very concerned about.

And I need you to help me on that.

MR. STRONSKI: Yes.

We forswear a future challenge, just as those who are in

the trial and going to trial on February 28th and whose cases weren't dismissed against them have done.

So my -- our position is that the five should be treated now and put back in the case and treated like the 26.

THE COURT: And how do I reconcile that with what I saw in the third-amended complaint and in your summary judgment response, where you said, oh, yes, we do reserve the right?

MR. STRONSKI: We reserve the right to -- not to challenge, to issue an objection.

THE COURT: Well, in the third-amended complaint, you said, "that the plaintiffs 'reserve the right following consultation with counsel to object to any proffered alternative.'" That's Document Number 325, at page 47.

Then at the summary judgment stage -- and you've heard me read it more than once, but you asserted at the summary judgment stage that the question of whether an "alternative might be considered constitutional when assessed against a proffered alternative to that alternative is a question for another day and not at issue here."

Okay. That was pretty recent.

And then now I've got the colloquy we just had on October 25th of 2021.

This is hard enough without moving targets.

MR. STRONSKI: Yeah -- no, and, again, in hindsight, I see that, Your Honor, and I apologize we weren't clearer.

The objection to a preferred method hasn't been made, so there was a reservation in the pleadings to reserve after consulting with counsel an objection to something that was pled. And that objection hasn't happened.

And we're going to trial and summary judgment was granted or not granted based on that record.

THE COURT: Okay. So, you know, in my summary judgment order, I used a fairly pejorative word, when you said that you reserve this contest over a proffered alternative to that alternative is a question for another day. I called that lame. Why should I not call your October 25th of 2021 change of position also pretty lame?

MR. STRONSKI: I can certainly see how you would see it that way, Your Honor. I think the language in the summary judgment opposition is perhaps, in hindsight, unfortunate because we clearly were and had pled and weren't withdrawing any of the pled alternatives, so the comparison could be done, and that would be the record to which this would be litigated before Your Honor and to the extent there is any appeal.

And so I think lawyers sometimes can be too lawyerly, but I think -- I think what -- what -- the important thing here is it was never our intention with respect to pleading alternatives to reserve anything different or more for the six or the five than those who went to trial.

And any right to reserve a right to object to something

pled, I suspect, has been waived now. It hasn't happened. The only thing that happened is that the five or six have not filled out an interrogatory choosing their own means of death.

It didn't revoke the pleading of the alternatives, which were several. And so that, I think, is the record, the lawyerly reservation of rights. I understand how you saw that and I apologize for that. But the record is --

THE COURT: This is not about apologies to me, this is may more important than that.

MR. STRONSKI: I understand that. I understand that. And that's why I want to be careful here and make sure that I express our position that the six have not revoked or waived anything that was pled, and their failing to fill out an interrogatory with respect to with their own execution was not -- does not have that effect and cannot be seen as having that effect.

It was simply that they didn't do something else that we believe that the plain meaning of, you know, Baze, Glossip and Bucklew don't require, does not require.

And so, you know, our plea, Your Honor -- and, again, it can be enforced in part, I think, upon the expectations that this would be -- the claim would be litigated.

You could tell from, you know, the cross-examination, the examination of Dr. Antognini, the Court will benefit from that with all the witnesses.

And I think it's one thing to say something -- you know, somebody can generally say something on paper, but if they're put to the test, you can make more -- you make better factual findings.

And I think that the plaintiffs who are now out of the case, and they're out of the case because of this construction of Baze, Glossip and Bucklew, can be put back in the case and a stay granted until trial because their claims -- claims are still to be resolved at trial.

And I think that's absolutely true of Claim 2, the Eighth Amendment claim, as well as the religious liberty claim, Your Honor.

I wanted to also, in addition to -- because our -- the way we -- to the extent we moved expeditiously or not is important in weighing the hardships. And I think we have, you know. I think we've worked hard and we've raised claims. And there was a claim --

THE COURT: Well -- and I'm certainly not going to foreclose argument from the State on this, but you take the Hill v. McDonough case, and other cases like that, on one hand, we could have been having this hearing about a month ago because the executions were scheduled a month ago. But -- so I'm sure I'll hear from Mr. Mansinghani on that.

On the other hand, this -- this is not an egregious 11th-hour-59th-minute, at least in most respects, new theory of the

sort that really riles up the Supreme Court.

So in terms of the temporal aspect of it, unless Mr. Mansinghani persuades me otherwise, you're not going to hear a lot more about that from me.

Could it be better? Yes, it could be better, but I'm not terribly inclined to second-guess that.

And this is not like the situation in some of the other cases that are -- that has really turned the whole process out of something out of a dime novel. That's not really where we are.

MR. STRONSKI: Thank you, Your Honor.

I wanted to make the point that -- I think that something was said that we could have objected to execution dates earlier.

We did file the day after execution dates were sought, we filed an objection because the Rule 59 motion, I think, was still pending, and that they not be set, which the State opposed.

And, you know, interestingly, Your Honor, just so you know, you put Coddington back in the case and the next business day we filed a motion to strike his execution day, which to this date is vigorously opposed, because his execution date is in early March. I think it's March 10th, I think. And so he still has an execution date. But it's after -- it's probably going to happen during the trial. But that's something to deal

with another day, but we have acted quickly.

I wanted to make one point, Your Honor, on the merits. And I think -- I think in terms of the cross-examination of Dr. Antognini, and in terms of his very general opinions, he -- he did say with respect to -- he relies on the Miyake reference a lot, and he said -- if you look at his expert report on paragraph 19, he says that -- he talks about a Glass reference and that it achieved unconsciousness with a BIS rating in the 60s, levels in the 60s.

And he -- I think he did say that Miyake was getting low 60s on BIS. He did admit that BIS has its limitations.

But if you look at the page which is Bates-Numbered 41 at the beginning of the discussion, there it talks about, again, despite these differences in both plasma it affects high concentration of midazolam, there were no differences in the BIS relative beta ratio or SEF 95 between patients receiving midazolam and .2 and .3 milligrams per kilogram, and we did talk -- I did talk to him about that. And so there's increasing it 50 percent and you're not seeing clinically any real difference.

But he said the BIS levels were in the low 60s, I think he said. But then if you read on, he said these results are consistent with those reported earlier showing that BIS decreased only to 70, but the end of continued infusion of midazolam by 0.03 milligrams per kilogram for 10 minutes, and

that the maximum effect of midazolam on BIS is approximately 70.

So the maximum effect on BIS of midazolam, the maximum, again, suggesting a ceiling, is below that for which even Mr. Antognini, Dr. Antognini, is citing for unconsciousness.

And I would also add that the overdose studies show that a benzodiazepine is present in the blood of somebody who is still awake that is potentially, according to Dr. Antognini's evaluation of the relative potency of diazepam, which was the drug in the study in patients 7 and 8, the Divoll study, and the midazolam in Mr. Warner's autopsy, that the awake person had more benzodiazepine in their system than Mr. Warner did.

And so that, again, goes to the strength of our case, that using midazolam in lieu of a drug that is a real anesthetic is just bad clinically and it's bad state policy, because it creates a great risk of severe pain.

This is not a drug that's used this way. It's not a drug that's designed this way. It's not a drug that's studied in this way. And it's a drug that's understood to have ceiling effects and limitations on its effect based on its well-accepted and known method of action in the brain, which is different than the short-acting -- the benzodiazepines, the pentobarbital or thiopental or other drugs, propofol, so there are many drugs that are more appropriate and this drug just isn't --

THE COURT: You understand we could only wish that this was -- that the -- or from your perspective, you could only wish that the issue was which is better. It's -- you know that the issue of what's the optimal drug is not before the Court. The Supreme Court has pretty well excluded that inquiry.

MR. STRONSKI: Right. No, I appreciate that and that was probably a bad choice of words.

But there are drugs that are -- that would be constitutionally appropriate and midazolam is not. And that is our point.

And I think the testimony of Dr. Antognini, where he has no experience with it at these levels, and he's really, really largely speculating, and some of his speculations has been inconsistent with what he cites, is evidence of that.

And I think you'll hear more of that at trial, which is why in this case it's so important not to allow any of the five to be executed prematurely when there's going to be a trial in February and they would be in the trial but for the construction of Baze, Glossip and Bucklew, which respectfully we think is legal error.

And I've explained my opinion and we would love to resolve it before Your Honor and not another court.

And I think, with that, I'm probably done. I'm happy to answer questions.

THE COURT: I've asked all the questions I have at the moment, and I realize there's probably not going to be another moment, but I do appreciate the time and the attention and the care and the concern you have obviously devoted to the matter.

MR. STRONSKI: Thank you.

THE COURT: I'll hear from the defendants.

MR. MANSINGHANI: Thank you, Your Honor.

Starting with likelihood of success on the merits, you know, their motion raised several other counts beyond Count II, VII and VIII -- sorry, VI and VII and VIII and IX, and I'm not going to argue those things. I think those were well-briefed and well-addressed in your prior rulings.

With respect to Count II, you know, their motion did not present any argument that they were likely to succeed on the merits of Glossip Prong 1.

The evidence today that you heard mainly, I believe, dealt with Glossip Prong 1. And, you know, Dr. Antognini's evidence we think is persuasive and certainly is, for the purposes of this hearing, not rebutted by any expert.

With respect to Mr. Hahn's testimony, the Court, of course, can evaluate it, but I would like to point out that other courts have evaluated Mr. Hahn's testimony with respect to Glossip Prong 1.

The Sixth Circuit carefully analyzed Mr. Hahn's testimony

regarding Ronald Smith's execution and compared it to Dr. Antognini's testimony and found it not sufficient to prove out a case in Glossip Prong 1. And can I give you the cite for that. It's 860 F.3d 881, and they discuss it primarily on pages 889 to '90.

Similarly, the Eleventh Circuit evaluated Mr. Hahn's testimony with respect to Mr. Ronald Smith's execution and found it wanting at 695 Fed.Appx. 418, page 428, and similar rulings out of --

THE COURT: I'm assuming -- I haven't looked at that, I'm assuming that all went to, if you will, medical inferences to be drawn from it, as opposed to anything that just turned his credibility, as such, upside down.

MR. MANSINGHANI: That is true to a mostly -- mostly, but not necessarily completely.

So with respect to the Eleventh Circuit ruling I spoke to you about, they did note his -- the inconsistency, I think, between his testimony and what media reports of the executions were.

THE COURT: Okay. You may proceed.

MR. MANSINGHANI: Okay. And again, of course, in -- Arkansas and Tennessee found also this wanting, although they didn't discuss his testimony in particular, it was just part of the record in those cases.

We think that, given the testimony before this Court,

there's just no way they're likely to proceed on Prong 1 of Glossip, and so no way likely to succeed on Count II, and, therefore, that the injunction can be denied on those grounds.

I do want to address this Court's -- or the Prong 2 of Count II. And as we explained in our brief at pages 9 to 10, the Glossip-Baze-Bucklew standard of an alternative is not just for purposes of comparison but also for ensuring that there is not a never-ending cycle of litigation, that there is not an attempt to challenge the death penalty itself, but an actual challenge to a method of execution with a constitutional alternative that is proposed.

There's been a lot of shifting positions here and so I can't necessarily quite characterize the plaintiffs' position at this point, but I will say that these sort of last-minute changes days before an execution come at severe prejudice to both the State and, perhaps more importantly, to the victims of the -- the families of the victims of these inmates. And they really do deserve better than that sort of yanking around.

And I think this Court's ruling on Rule 59 demonstrates the impropriety of these changes. But even with these changes, I take Mr. Stronski to have said that they have not revoked anything they said in their complaint, but it's precisely that complaint that reserves the right to object to these alternative methods of execution.

And I think that takes me to my last point, aside from any

questions this Court has, which is with respect to irreparable harm to the State and the interests against a stay of execution.

I don't think we should minimize the State's interest in expeditiously enforcing its sentences. The Supreme Court recognized that in both Hill v. McDonough and Bucklew, but also the victims who are expecting the closure that comes with an execution in the next coming days, who put themselves through a clemency hearing, again, with respect to Mr. Grant, Mr. John Grant.

And I think that's -- it does sort of serious harm to them to continue to yo-yo them back and forth to having an execution and not.

And it's not like the State sought these execution dates in bad faith; we did so, we believe, in good faith and that has engendered very serious and important reliance interests that also justified denying the injunction and denying the stay here.

THE COURT: Thank you.

MR. MANSINGHANI: Thank you.

THE COURT: Anything -- I'm going to obviously -- going to go back into chambers and take a look at my notes, take a look at the briefs, take a look at the exhibits.

I am not just keenly aware, but painfully aware of the need to rule without delay.

It's now just a little before 2:00. I'd like to recess -- I'd like to say we'll recess until a specified time and then I will return and rule.

Am I going to rule this afternoon? Yes, I'm going to rule this afternoon. I think that's essential, for reasons that it's not necessary to elaborate on. So, yes, I'm going to rule this afternoon.

I devoutly hope that my ruling will be correct, legally and factually, but I'm keenly aware also that there is a reviewing court whose role we must all respect.

And one way to respect the role of that reviewing court is for me not to delay, other than as is absolutely necessary, in making my ruling so that the unsuccessful party today can promptly seek review. And that's my intent.

So, again, I'd like to say I'll be back in an hour, it might not be an hour or it might be a little over an hour, I don't know, so I'm not going to recess until a specified time.

We will stand in recess subject to call. And so you all need to stay where Lori can let you know that we will be resuming, because I don't want there to even be ten minutes of delay between when I rule and when I could have ruled. Because I think we're in a situation in which, to put it mildly, time is of the essence.

So anything further before we recess for that purpose?

What say the plaintiffs?

MR. STRONSKI: Nothing, Your Honor, thank you.

THE COURT: What say the defendants?

MR. MANSINGHANI: Nothing, Your Honor.

THE COURT: Very well.

Court will be in recess.

Lori, please, when we recess, please bring me these exhibits, and then if you would please bring me the papers in the row closest to me on the table here.

Court will be in recess.

(RECESS HAD.)

THE COURT: Good afternoon. We're resuming in Civil 14-665, Richard Glossip and others v. Randy Chandler and others.

And at this point, I will make my ruling on the motion for preliminary injunction.

And preliminary to that, let me commend counsel on both sides, once again, for the timely effort -- it's hard work -- the timely effort and the professionalism that is apparent from your activities on both sides of these issues, which obviously are of surpassing importance to both sides.

The motion for preliminary injunction, Docket Entry Number 506, will be denied.

I'll first address the issue of the agreement that has been referred to both in the motion, and to some lesser degree, here in court.

The argument of these five plaintiffs for a preliminary injunction on the basis of an agreement with the Attorney General of the State of Oklahoma is rejected.

First, all of the claims that these five plaintiffs have asserted in this district court have been dismissed under Rule 12 or adjudicated by way of summary judgment under Rule 56.

Then the Rule 59 motion for reconsideration was filed, briefed and denied. The case is complete in this Court as to these five plaintiffs.

To my great relief, in March of 2020, the Attorney General of Oklahoma acquiesced in my suggestion that none of the plaintiffs should be set for execution, as long as there was anything for him to litigate in this Court.

Given the number of years that have elapsed since these plaintiffs stood trial and were convicted, that was no small concession by the Attorney General, taking into account the interest of the State in carrying out these sentences, after decades of litigation, as well as the interest of the surviving families and other victims.

As to these five plaintiffs, there is nothing more to litigate in this Court.

In May of 2020, I effectively assured all of the plaintiffs that we would be back here quickly if the Attorney General went back on that understanding.

Because there is nothing more for these five plaintiffs to

litigate in this Court, the State of Oklahoma has not gone back on that understanding.

Aside from that, in March and May of 2020, neither the Court nor the Attorney General had any indication that there would be a subset of the 32 plaintiffs who would, after being given more than one chance to designate an alternative method, would expressly decline to do so.

The plaintiffs in that subset effectively carved themselves out of Count II, which is the only count remaining to be tried as to the other 27 plaintiffs.

As to Counts VI, VII, VIII and IX, I see no need to elaborate very much on the reasoning set forth in my orders of August 11, 2021, Docket Entry Number 449, and August -- I'm sorry -- and October 12 of 2021, Docket Entry Number 493, as well as my previous order on the Rule 12 motion at Docket Entry Number 349 that was filed on September 15th of 2020, a little over a year ago.

Plaintiffs have not shown a substantial likelihood of prevailing on the merits as to Counts VI, VII, VIII and IX.

And as I've said, I'm not going to elaborate a great deal on those counts. I think it is appropriate, though, to make one additional observation as to the religious freedom argument, both constitutional and statutory under the two statutes that plaintiffs cite.

The requirement to designate an alternative method of

execution is inherent in the Eighth Amendment, as the Supreme Court reads it.

Nothing in the decisions in Baze, Glossip or Bucklew suggests that this conclusion as to the demands of the Eighth Amendment is trumped by the First Amendment or by any statutory provisions.

And I would add that all one would have to do is read the concurring opinion of Judge Gorsuch, as he was then known -- he was a circuit judge -- in the Tenth Circuit's Hobby Lobby decision before that case got to the Supreme Court, to understand quite clearly that when Justice Gorsuch wrote the Bucklew opinion for the Supreme Court, he was as attuned as any justice could possibly be to any possible religious freedom issues that might have been lurking in the background in Baze, Glossip or Bucklew. Then Judge Gorsuch's opinion in Hobby Lobby is at 723 F.3d 1114, beginning at 1152.

I'll now turn to my analysis of where the matter stands as to these five plaintiffs on this motion under Glossip Step 1.

Mr. Hahn testified about the two Alabama executions, predominantly two of them, he made some reference to a third one.

One of the two that he predominantly testified about was a very recent one involving Willie Smith, and the other one was in 2016 involving Ron Smith.

Mr. Hahn testified, and I have no reason to gainsay this,

that as to Mr. Willie Smith, his left arm jerked, he tried to move his arm once, he -- as Mr. Hahn put it, he bucked up twice, his breathing became labored, and gasping continued until the administration of the paralytic and through the consciousness check.

But as testified to by Mr. Hahn, Mr. Willie Smith did not react to the three-step conscious -- the three-step consciousness check, even though labored breathing continued, which, of course, is indicative that he was not conscious and was not paralyzed.

And that, I think, is significant, that the three-step consciousness check occurred, he did not react to it, again, which is indicative that he was not conscious and was not paralyzed.

Mr. Hahn also described his observations during the execution of Ron Smith. He saw physical reactions from Ron Smith after the administration of 500 milligrams of midazolam. And his description of those physical reactions after administration of 500 milligrams was much the same as with Willie Smith.

One noteworthy difference is, even after the administration of 1,000 milligrams of midazolam, Ron Smith reacted to the pinch on the consciousness check.

The paralytic was administered and the curtain was closed 3 to 5 minutes later, indicating that Mr. Ron Smith had died.

The testimony of Dr. Antognini casts substantial doubt on the medical significance of Mr. Hahn's observations. At this point in the analysis, it is important to remember that the question is whether these five plaintiffs have, for the purpose of this hearing, shown a "significant possibility of success on the merits," as Judge Briscoe put it when this case was at the Court of Appeals in 2015, or that they are "likely to succeed on the merits," as it was put in the Diné case in 2016.

On the issue of whether, in the words of the Supreme Court, the use of midazolam in Chart D presents a substantial risk of severe pain that is sure or very likely to cause serious illness and needless suffering, I find from Dr. Antognini's unrebutted testimony that it is common for an individual to move during the induction of anesthesia and while anesthetized, even at fairly deep levels of anesthesia.

That movement can include reflexive responses to stimuli originating from the spinal cord and not from the brain. The movement also can result from the injection itself, especially when the anesthetic agent is pushed rapidly by way of IV injection.

Dr. Antognini testified that some individuals have described midazolam itself as being mildly painful. Under anesthesia, and this is apparently more likely toward the beginning of the administration of the anesthetic agent, it is not uncommon to encounter changes in the individual's breathing

pattern, which can include both deep breathing and shallow breathing.

Dr. Antognini opined that Willie Smith's movements, as described by Mr. Hahn, would not indicate that Mr. Smith was not under general anesthesia.

The evidence is speculative, at best, as to reasons for the movements described by Mr. Hahn and as to how those reactions would have compared to the movements that could result from the use of an alternative drug as the first drug.

The Ron Smith execution was arguably the more problematic of the two Alabama executions, in that Ron Smith reacted to the pinch in both of the consciousness checks.

But at least for today's purposes, the unrebutted testimony of Dr. Antognini leaves the Court with speculation, at best, as to whether the movements and responses of Ron Smith were the result of any failure of midazolam to perform as intended in the execution process.

Now, there was some testimony about pulmonary edema, but none of it went into any detail and I draw no inferences favorable to the plaintiffs from what little testimony there was about pulmonary edema.

Dr. Antognini opined that 500 milligrams of midazolam would render an individual unconscious and insensate to pain. As we are well aware, midazolam is not the drug of choose for inducing deep anesthesia. And that is true for a variety of

reasons.

But the Glossip Step 1 analysis does not ask what is the optimal drug. The question is whether these five plaintiffs have established, for today's purposes, that there is a substantial likelihood that the use of midazolam in Chart D presents a substantial risk of severe pain that is sure or very likely to cause serious illness and needless suffering. Those are the words of the Supreme Court. I find that these five plaintiffs have not carried that burden.

Now I'll move to Glossip Step 2.

The defendants make a good point when they point out that the Glossip Step 2 requirement of designation of an alternative serves two purposes which have been expressly recognized by the Supreme Court.

One purpose is to provide a comparator, as the Court explicitly discussed in the Bucklew decision at page 1126.

The other purpose is to foreclose additional rounds of litigation, a point that the Supreme Court emphasized in Baze when it rejected an approach in which each ruling would be "supplanted by another round of litigation touting a new and improved methodology." That's from page 51 of the Baze decision.

In the third-amended complaint, and this is -- you'll have to forgive the repetition, but this, I think, bears repetition for this purpose.

In the third-amended complaint, all of the plaintiffs "reserve the right following consultation with counsel to object to any proffered alternative." That's the third-amended complaint, Docket Entry Number 325, at page 47.

At the summary judgment stage, these plaintiffs had expressly declined to designate alternative methods of execution and had asserted that the question of whether an "alternative might be considered constitutional when assessed against a proffered alternative to that alternative is a question for another day and not at issue here." That's page 42 of plaintiffs' brief and response to the motion for summary judgment, Docket Entry Number 425.

In their brief in support of the motion before the Court today, plaintiffs say they "do not argue that they cannot or should not be subject to execution by these alternative methods proposed by their co-plaintiffs; instead, they argue only that they should not be required individually to elect any specific alternative for their own respective executions." That's from page 16 of the motion for preliminary injunction.

In response to my questioning, counsel for plaintiffs at one point ruled out a method-of-execution challenge to any of the pleaded alternatives, but then reverted to the position taken in the third-amended complaint and at the summary judgment stage that they have not revoked anything they have said in the third-amended complaint.

The plaintiffs' shifts of position as to designation of an alternative and as to the significance of the designation of an alternative is telling.

The only common thread in this case with respect to Glossip Step 2 is that the positions of these five plaintiffs have been uniformly responsive to the exigencies of the moment.

In the Bucklew decision, at page 1125, Justice Gorsuch wrote, citing the decisions in Baze and Glossip, that "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."

It is simply not possible to read this decision, let alone Baze and Glossip, as indicating that the prisoner is entitled to propose, through counsel, what might be a better method, while reserving the right to contest the use of that method in his case.

The requirement to designate an alternative method is meaningless, unless in addition to providing a comparator, the designation, in fact, serves the purpose of precluding another iteration of method-of-execution litigation in the case of the prisoner making the designation.

Of course, the designation is Step 2 of the Glossip analysis, not Step 1, and the prisoner still has to carry his burden under Step 1.

But I can think of no other reason for which the Court would have found Step 2 to be, as a matter of constitutional law, a component of an Eighth Amendment method-of-execution challenge.

For the reasons stated here and as addressed repeatedly in the courtroom today, the Court is far from satisfied that these five plaintiffs have met their obligation and, hence, carried their burden under Glossip Step 2.

Aside from the comparative aspect of the requirement to designate an alternative, the Supreme Court's treatment of what we call Glossip Step 2 is, at base, a search for certainty that any given round of method-of-execution litigation will, for the prisoners directly involved, be the last round.

For the reasons explained at length in my order on summary judgment and in my order denying the Rule 59 motion, all of which was made more apparent today in the courtroom, plaintiffs have fallen far short of providing that certainty.

These five plaintiffs have not shown a substantial likelihood of prevailing on the merits with respect to Glossip Step 2. That, of course, is a standalone issue, separate from plaintiffs' failure to carry the day on Glossip Step 1.

I will now briefly address the other factors that are apparent from the decision in the Diné case and the Winter case.

Taking my cue from the decision of the Court of Appeals in

Warner v. Gross, as this case was styled in 2015, I conclude that, in light of my resolution of the issues as to the first prong of the preliminary injunction standard, the other three prongs are decidedly less significant.

As for irreparable harm, plaintiffs are correct that they would be irreparably harmed by implementation of an unconstitutional lethal injection protocol.

But the factual aspect of that contention is speculative on this record, and in any event, as Mr. Stronski acknowledged this afternoon, it just circles us back to the merits on the first prong.

As for whether the threatened injury outweighs the harm that a preliminary injunction may cause to the defendants, there will be substantial harm either way.

The Supreme Court has made it clear that the State's interest in timely enforcements of its judgments cannot be ignored. For the same reason, I conclude that the preliminary injunction, if granted, would adversely affect the public's undeniable interest, as has been pointedly emphasized by the Supreme Court, in timely enforcement of the judgments of the state courts after decades of direct and collateral review of the conviction and sentence of death.

Returning to the first factor, as to Count II, the motion of these five plaintiffs for a preliminary injunction fails under both Step 1 and Step 2 of the Glossip analysis.

The motion is, likewise, without merit to the extent that relief is sought on the basis of Counts VI, VII, VIII and IX. For that reason, the motion is denied.

A brief order to that effect incorporating these findings and conclusions will promptly be entered.

Now, that brings us to the motion to preserve evidence. I'm going to give you some preliminary thoughts and then I'll solicit your views as to how we ought to proceed. I've got a notion as to how we ought to proceed.

Now, that motion is divided into three segments: Number 1, it seeks an order to preserve documents and things; Number 2, it seeks an order providing a limited execution and autopsy access to preserve evidence; and Number 3, it seeks an order omitting the paralytic from execution to preserve evidence.

That third element of the motion, seeking an order omitting a paralytic from execution to preserve evidence, is one that I am, to put it mildly, very skeptical of. I'll -- I want to hear from both parties, but I am very skeptical that this Court should or perhaps even can direct the State of Oklahoma to modify 2021 protocol, which is the subject of this very litigation.

But that brings me back to Part 1 of the motion. There's one or two things in it, such as subparagraph D on page 5, that I'm skeptical of, but I'd have to say there's quite a bit in Part 1 that sounds fairly reasonable to me. And I'm not

reaching a conclusion on that score, but there's quite a bit in Part 1 of the motion that sounds fairly reasonable to me, all things considered.

Turning to Part 2, the first request in Part 2 is an order directing the defendants to permit a representative of the plaintiffs to view the preparation and establishment of the IV lines and so forth; I'm skeptical of that, but I think perhaps the defendants ought to sit down and talk to the plaintiffs about the second aspect of Part 2, where they talk about participation in or at least observing the autopsy.

So I've given you some very preliminary thoughts -- and I emphasize this is preliminary. I've given you some very preliminary thoughts as to this emergency motion to preserve evidence.

It's now about quarter till 4:00. I'm going to direct counsel to proceed to my chambers conference room to discuss that motion, perhaps with the benefit of the comments that I have just made.

If there's anything I need to rule on, obviously, I will rule promptly, but I hope I have given counsel something to work with in arriving promptly at an agreement as to what is appropriate to be done and will be done under this motion to preserve evidence.

If an agreement cannot be reached or if there are some lingering issues after agreement is reached on other issues,

then -- Lori, what's my schedule like tomorrow?

COURTROOM DEPUTY: Our morning is full of plea hearings and a sentencing, and the afternoon is wide open.

THE COURT: Okay. Then I'll be able to address the matter in open court tomorrow afternoon.

Anything further before we recess for the purposes I've just described?

MR. STRONSKI: No, Your Honor.

MR. MANSINGHANI: No, Your Honor.

THE COURT: Very well.

Court will be in recess.

(COURT ADJOURNED.)

CERTIFICATE OF OFFICIAL REPORTER

I, Tracy Thompson, Federal Official Realtime Court Reporter, in and for the United States District Court for the Western District of Oklahoma, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 25th day of October 2021.

/S/ Tracy Thompson

Tracy Thompson, RDR, CRR
Federal Official Court Reporter

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RICHARD GLOSSIP, et al.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	Case No. CIV-14-0665-F
	)	
RANDY CHANDLER, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the court is defendants' motion for summary judgment, doc. no. 388. By this order, the motion is granted in part and denied in part.

This action challenges Oklahoma's execution protocol under the United States Constitution, the Oklahoma Constitution and other laws. It is brought by inmates who have been sentenced to death by the State of Oklahoma. Defendants are state actors, sued in their official capacities only, who are charged with carrying out the death sentences. The case has already been before the Supreme Court, but that was at the preliminary injunction stage and involved an earlier version of Oklahoma's lethal injection protocol. On October 16, 2015, a few months after the Supreme Court's ruling on June 29, 2015 affirming denial of plaintiffs' motion to preliminarily enjoin executions, this action was administratively closed, by agreement, for an indefinite period. The purpose of the closure was to permit the state to investigate and amend its execution procedures. This action was reopened on March 19, 2020. On July 6, 2020, a Third Amended Complaint was filed, challenging the state's new protocol. Certain counts of the Third Amended Complaint were dismissed by the court on a motion to dismiss. The remaining

counts are challenged by the motion for summary judgment which is now before the court.

A. Procedural History

Including doc. no. 392, which was stricken, and doc. no. 397, which is moot because it replied to doc. no. 392, the motion for summary judgment resulted in the following filings:

Date filed	Doc. No.	Filed by	Name of Document
2-19-21	388	Defendants	Defendants' Motion for Summary Judgment and Brief in Support
3-19-21	392	Plaintiffs	Opposition of plaintiffs (other than Wade Lay) to Defendants' Summary Judgment Motion (stricken,[1] along with doc. nos. 393 and 394)
3-26-21	397	Defendants	Reply in Support of Defendants' Motion for Summary Judgment (superseded by doc. no. 433)
5-7-21	422	Defendants	Defendants' Supplemental Brief in Support of Their Motion for Summary Judgment
5-14-21	425	Plaintiffs	Opposition of Plaintiffs (other than Wade Lay) to Defendants' Summary Judgment Motion
5-27-21	433	Defendants	Reply in Support of Defendants' Motion for Summary Judgment

B. Plaintiffs' Claims

In their Third Amended Complaint, doc. no. 325, filed on July 6, 2020, plaintiffs asserted the following claims:

Count I	Fifth[2] Amendment Due Process claim based on asserted failure to disclose sufficient information re: development of the protocol and execution procedures. **Dismissed** per order at doc. no. 349.
Count II	Eighth Amendment claim asserting that constitutionally impermissible pain and suffering will result from the use of the three-drug lethal injection protocol (midazolam, vecuronium bromide and potassium chloride).

[1] Doc. no. 392 was stricken as a result of plaintiffs' failure to comply with LCvR56.1. The court chose to strike that response rather than taking as true the defendants' statement of uncontroverted facts. *See*, Order, doc. no. 401.

[2] As was noted at an earlier stage of this action, the Fifth Amendment does not apply to the defendants in this case. Doc. no. 349, at 4 (Count I construed as asserted under the Fourteenth Amendment).

Count III	Eighth and Fifth[3] Amendment claim asserting "deliberate indifference" to the serious medical needs of the plaintiffs. **Dismissed** per order at doc. no. 349.
Count IV	First, Fifth[4] and Sixth Amendment claim asserting unconstitutional denial of access to counsel and the courts.
Count V	18 U.S.C. § 3599 claim asserting intentional deprivation of right to counsel.
Count VI	*Ex Post Facto* claim under U.S. and Oklahoma Constitutions, based on substitution of midazolam.
Count VII	Fourteenth Amendment Due Process claim based on use of midazolam instead of barbiturate.
Count VIII	Religious freedom claim asserting violation of plaintiffs' sincerely-held religious beliefs resulting from necessity of proposing a feasible alternative method of execution. **Dismissed** per order at doc. no. 349.
Count IX	Eighth and Fourteenth Amendment claim asserting that plaintiffs will be subjected to constitutionally impermissible human experimentation.
Count X	First and Fourteenth Amendment claim asserting denial of right of access to governmental information.

C. Summary Judgment Standard

Under Rule 56, Fed. R. Civ. P., summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). All reasonable inferences to be drawn from the undisputed facts are to be determined in a light most favorable to the non-movant. United States v. Agri Services, Inc., 81 F.3d 1002, 1005 (10th Cir. 1996). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials, demonstrating that there is a genuine issue for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

[3] See note 2. Plaintiffs elected not to persist with their Fifth Amendment Due Process claim. Doc. no. 349, at 8.
[4] See note 2.

D. The Motion Will Be Granted in Part and Denied in Part as to Count II

The heart of plaintiffs' case is Count II, their direct Eighth Amendment challenge to the lethal injection protocol adopted by the State of Oklahoma on February 20, 2020.[5] The protocol includes three alternatives for execution by lethal injection, as set forth in Chart A, Chart B and Chart D (Chart C is reserved). Chart A contemplates completion of the execution with a single dose of pentobarbital. Similarly, Chart B specifies a single dose of sodium pentothal. Those two drugs have been used successfully in numerous executions, 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." Glossip v. Gross, 576 U.S. 863, 869-70 (2015) (this case at earlier stage). Consequently, Chart D of the Oklahoma protocol provides for sequential use of three readily-available drugs, midazolam, vecuronium bromide (a paralytic) and potassium chloride (to induce cardiac arrest). The actual effect of midazolam is hotly contested in this action, as it has been in other cases in other courts.

Plaintiffs' principal claim is that midazolam cannot be relied upon to render the prisoner undergoing execution by lethal injection insensate to pain, with the result that execution using Chart D of the protocol will subject the prisoner to a constitutionally unacceptable risk of severe pain and suffering as the lethal injection process proceeds. Plaintiffs also challenge other features of the protocol, including, prominently, the adequacy of the provision for a consciousness check to be performed after the midazolam is injected but before the second two drugs are

[5] All references to the February 20, 2020 protocol (entitled: Execution of Inmates Sentenced to Death) are to that document as it appears in the record as Exhibit 1 to defendants' motion, doc. no. 388-1. For brevity, the document (including attachments) will simply be referred to in this order as "the protocol," and references to pages will be to the relevant page of the document at doc. no. 388-1, without further citation to the subsection of the protocol or to the ECF docket entry.

pushed. Defendants, for their part, maintain that lethal injection using the Chart D combination of drugs, implemented with the benefit of other safeguards written into the protocol, clears the Eighth Amendment bar. The court has concluded, on Count II, that defendants are entitled to judgment as a matter of law under Rule 56 as to six of the thirty-two plaintiffs but that summary judgment should be denied as to the others.

As Justice Gorsuch wrote two years ago, "the Eighth Amendment does not guarantee a prisoner a painless death–something that, of course, isn't guaranteed to many people, including most victims of capital crimes." Bucklew v. Precythe, 139 S.Ct. 1112, 1124 (2019). Also worthy of note is the fact that the Supreme Court "has yet to hold that a State's method of execution qualifies as cruel and unusual," *id.*, and that the deference that is due a state's choice of execution procedures means that courts, in method-of-execution challenges, do not sit as "boards of inquiry charged with determining 'best practices' for executions." Bucklew, 1125, quoting from Baze v. Rees, 553 U.S. 35 (2008). The case at bar has already been to the Supreme Court and back, all on the issue of the constitutionality of a midazolam lethal injection protocol, but that was at the preliminary injunction stage. The matter is now before the court for final adjudication, by way of summary judgment or trial, based on a new protocol.

1. The substantive standards applicable to Count II

The Eighth Amendment standards applicable in this case were articulated by the Supreme Court in Baze, in this case (Glossip, 576 U.S. 863), and in Bucklew. Those decisions will be discussed here only to the extent necessary (i) to explain why summary judgment on the Eighth Amendment claim will be granted as to some plaintiffs but denied as to others, and (ii) to define the issues remaining for trial.

Defendants argue, in substance, that a successful lethal injection challenge must satisfy both prongs of a two-prong test, as first articulated in Baze and emphatically confirmed (over equally emphatic dissents) in Glossip. That is correct as far as it goes, but, importantly, the two prongs are not wholly independent of each other; there is some overlap. Specifically, if there is a fact issue precluding summary judgment for defendants on one of the two prongs, that fact issue may well (and apart from other obstacles to summary judgment) preclude summary judgment on the other. This is because, as discussed below, the question of whether the prisoner has made his case under the first prong (which hinges on whether the state's method presents a substantial risk of severe pain) is to be determined, at least in part, by looking at how attractive the prisoner's proffered alternative is when compared to the state's chosen method (the second prong). Thus, where the prisoner, as the non-moving party, enjoys the benefit of all factual inferences reasonably supported by the record, the prisoner is in an advantageous position–again, for summary judgment purposes–if he can raise a triable fact issue as to a proffered method that *might* be more than "slightly or marginally safer," Glossip at 877, than the state's proposed method.[6]

First Prong. In Bucklew, the court, summarizing its decisions in Baze and Glossip, held that the prisoner who challenges the state's method of execution must show that the state's method presents "a substantial risk of severe pain." Bucklew, at 1125. A method of execution that presents a "substantial risk" is one that "is *sure or very likely* to cause serious illness and needless suffering." Glossip, 877 (quoting from Baze, emphasis in original).

[6] It goes without saying, but is nonetheless worth mentioning, that, at trial, the prisoner, having the burden of proof, does not have that advantage.

The risk presented by the state's method is not assessed in the abstract or on an absolute scale. To the contrary, the court's task "is a *necessarily* comparative exercise." Bucklew, 1126 (emphasis in original). Thus, the prisoner must show that "the risk is substantial when compared to the known and available alternatives." Glossip, 878 (internal quotation omitted). This is where the second prong comes in.

Second Prong. It is clear from Bucklew (again summarizing Baze and Glossip) that the alternative method of execution the prisoner is obliged to propose must be "feasible and readily implemented," and it must be one that "the State has refused to adopt without a legitimate penological reason." To be considered at all, the prisoner's proposal must be "sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'" Bucklew, at 1125, 1129. And the "mere fact that a method of execution might result in some unintended side effects does not amount to an Eighth Amendment violation." Glossip, 882, n. 3. Although states, of necessity, are free to use previously untried methods, it is quite unlikely that an untried method will pass muster as *the prisoner's* proposed alternative: "[C]hoosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it." Bucklew, 1130.

The proposed alternative need not be one "presently authorized by" state law. Bucklew, 1128. Thus, the prisoner "may point to a well-established protocol in another State as a potentially viable option." *Id.* But it is not enough to argue for "a slightly or marginally safer alternative." Glossip, 877 (quoting from Baze). The "difference [in risk] must be clear and considerable." Bucklew, 1130. That said, in a passage that has a natural tendency to accentuate the importance of the first prong (degree of risk and severity of pain), the Court, in Bucklew, observed that "we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative—assuming, of course, that the inmate is more interested in avoiding unnecessary pain than in delaying his execution." *Id.* at 1128-29. (As is

discussed below in Part 3, this passage also drives home the point that the "available alternative" that the prisoner must "identify" is to be proffered by the prisoner for use in *carrying out his death sentence*, and not for the purpose of setting up another round of Eighth Amendment litigation.)

As has been seen, the court's reckoning of whether the state's proposed method presents a constitutionally unacceptable risk of severe pain is, in large part, the product of a comparison of the risk and pain inherent in the state's method with the risk and pain inherent in the defendant's proffered alternative method of execution. When the state moves for judgment as a matter of law, any of the proffered alternatives (Glossip second prong) that cannot be eliminated as a matter of law become players in the competition against the state's chosen method. The court then determines (bearing in mind this is under Rule 56) whether the state has demonstrated as a matter of law that the prisoner cannot prevail on the first prong–the key question being whether "the risk of pain associated with the State's method is 'substantial when compared to a known and available alternative.'" Bucklew, 1125 (quoting from Glossip at 878).

2. Summary judgment denied – first prong

Some basic facts–such as what Oklahoma's new execution protocol actually says–are not in dispute. And, as is made plain elsewhere in this order, the facts that compel summary judgment on all of plaintiffs' remaining claims other than Count II are not in dispute. But, as to Count II, plaintiffs' direct Eighth Amendment challenge to the new protocol, fact issues preclude summary judgment in favor of the defendants as to those plaintiffs who have, as they must, designated at least one alternative means of carrying out their own sentence of death. The factual disputes arise mostly, if not entirely, from conflicts in the expert testimony and the inferences to be drawn from that testimony. That aspect of the matter–the battle of the experts–is addressed below. It suffices to say at this point that defendants' motion is

essentially an invitation to the court to try this case on the papers before it. For the reasons set forth below, the court declines to do so.

A survey of defendants' basic contentions and of plaintiffs' responses thereto will show why the court declines to enter summary judgment on Count II. Defendants' arguments for summary judgment on Count II are advanced on pp. 23-32 of defendants' summary judgment brief, doc. no. 388. Those arguments and plaintiffs' responses will be summarized here.[7]

Defendants first argue, correctly, that the Supreme Court has already spoken positively–in this case, no less–of the use of midazolam in a lethal injection protocol and that, post-Glossip, other states have used a 500 milligram midazolam protocol without incident. As will be seen, this argument provides the backdrop for defendants' more specific contentions as to the efficacy of midazolam when used as they propose to use it. The Supreme Court's observation about the successful use of midazolam for execution purposes should not (and will not) be taken lightly, but that comment was made at the preliminary injunction stage of this case. The Court of Appeals has made it clear (as is plain from the text of Rule 65) that a preliminary injunction hearing is just that–preliminary–and that any resulting adjudications are equally preliminary. Sec. & Exch. Comm'n v. Pearson, 426 F.2d 1339, 1344 (10th Cir. 1970). As for the present state of the record with respect to midazolam, plaintiffs cite and quote from the report of one of their experts[8] to the effect that

[7] To avoid encumbering this order with excessive (and needless) citations to the record, it suffices to say that all of the defendants' arguments relating to the Glossip first prong are to be found at pp. 23-32 of their brief and all of plaintiffs' arguments in response are at pp. 28-37 of their brief in opposition, doc. no. 425. This order will cite specific pages in those sections of the briefs only as necessary for clarity.

[8] The papers before the court on summary judgment do not, in terms, challenge the qualifications of any of the parties' experts. The deadline for Daubert motions was February 26, 2021. Doc. no. 350. None were filed. (At an earlier stage of this case, the court urged counsel on both sides to

midazolam "cannot reliably render the prisoner insensate to the terror of chemical suffocation from the second drug (vecuronium bromide) or the pain of being burned alive from the inside from the third drug (potassium chloride)." (Quoting from doc. no. 388-4, at 31.) There is a fact issue as to whether midazolam performs as well, for execution purposes, as defendants claim it does.

Next, defendants advance more specific arguments as to the effect of midazolam. These arguments go to the actual effect of midazolam on the prisoner's ability to feel pain during the lethal injection process. On this point, the court notes, preliminarily, that defendants use some loose terminology, leaving the court uncertain as to what, exactly, they contend midazolam will actually accomplish when used as specified in the protocol. Defendants first argue that a 500 milligram dose of midazolam will induce "general anesthesia." Doc. no. 388, at 24. Defendants next address the matter in terms of "deep sedation." *Id.* at 26. Still later, they talk about "midazolam's ability to produce unconsciousness." *Id.* at 27. But when discussing the effect of injection of the second drug (vecuronium bromide), they revert to the "deeply sedated" frame of reference for midazolam. *Id.* at 30.

In response, plaintiffs take a slightly different tack. They argue, with backing from one of their experts, that the *duration* of midazolam's effect is the problem, because it is not enough for midazolam simply to *induce* anesthesia, the point being that (per plaintiffs' theory of the case) the prisoner is subjected to the possibility of a sequence of painful episodes as the execution unfolds (first, the sense of suffocation resulting from immediate onset of pulmonary edema, next the sense of chemical suffocation resulting from the injection of vecuronium bromide, and finally the burning sensation resulting from the injection of the potassium chloride). Thus, plaintiffs say, simply inducing anesthesia will not suffice. Anesthesia must be

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carefully consider whether, under all the circumstances in this nonjury case, Daubert motions are really necessary.)

maintained, which one of their experts says midazolam will not do: "[E]ven if anesthesia is successfully induced using only midazolam, a subject will not remain in an insensate and anesthetic state after they are subjected to even mild pain stimuli." Report at doc. no. 388-5, p. 38, ¶ 93 (citing an article in a professional publication). There is a fact issue as to whether midazolam will reliably render the prisoner insensate to pain–however the required level of suppression of consciousness might be expressed–for the length of time necessary to avoid a constitutionally unacceptable risk that the prisoner will be subjected to a constitutionally unacceptable level of pain.

Defendants next argue that the existence of midazolam's purported "ceiling effect" (broadly speaking, a tendency of the drug's potency to level off even as the dosage increases) has not been supported by scientific data supporting a contention that the ceiling effect kicks in before the midazolam can serve its purpose.[9] The significance of this contention is that if the ceiling effect does keep midazolam from reliably performing as intended during the lethal injection process, that raises a serious question as to whether the protocol can pass constitutional muster (or, at a minimum, significantly complicates the matter). The ceiling effect has been litigated in a dozen or more courtrooms around the country, but it has not been litigated with finality in this case. On that score, the plaintiffs have proffered the expert report of a board-certified anesthesiologist attesting to the ceiling effect (with support from several published sources in the field). To be sure, the up or down question of the existence of the ceiling effect is the beginning, not the end, of the analysis, but the

[9] Not necessary to address in this order is the question of whether the ceiling effect, if it exists, is likely to come into play at a dosage of 500 milligrams or less, or otherwise at a level that would call into question the efficacy of midazolam when used for the purpose of completing an execution per the protocol.

materials in the record get the plaintiffs far enough down that road to avoid a definitive determination on that issue at this stage.

Defendants also engage directly with plaintiffs on a range of issues relating to plaintiffs' contention that midazolam induces pulmonary edema and does so in a way that causes the prisoner to experience what plaintiffs characterize as an intolerable sensation of asphyxiation, equivalent to a botched hanging. Defendants' overarching argument is that "[p]laintiffs have failed to prove that any 'flash pulmonary edema' after injection of midazolam will cause unconstitutional levels of pain." Doc. no. 388, at 27. Elaborating on this point, defendants argue that "[p]laintiffs cannot on the record evidence prove a sure or very likely risk of severe pain [resulting from pulmonary edema]." *Id*. at 28. The problem is that, at this stage, plaintiffs do not have to "prove" anything. Although courts sometimes, on summary judgment, speak in terms of what the non-movant has proven or failed to "prove" or "show" or "establish," the lower bar at this stage is the question of whether plaintiffs have demonstrated the existence of a genuine issue of material fact. *E.g.*, Goodwin v. General Motors Corporation, 275 F.3d 1005, 1011 at n.7 (10th Cir. 2002), *cert. denied*, 537 U.S. 941 (2002). As for pulmonary edema, the parties are at odds, backed by experts, on a range of issues, such as (i) its prevalence as a consequence of administration of midazolam, (ii) how soon it sets in after the midazolam is pushed, (iii) how long it lasts, (iv) whether it is likely to occur while the prisoner remains conscious, (v) what the prisoner feels if pulmonary edema actually does occur in any given instance, and (vi) whether pulmonary edema, if experienced by a

sensate prisoner, would be more painful than hanging (which defendants appear to posit as a benchmark for determination of constitutionally permissible pain).[10]

Moving to the second and third drugs specified in the protocol, defendants argue that plaintiffs have "failed to prove" that injection of vecuronium bromide or potassium chloride "will cause unconstitutional pain." Doc. no. 388, at 30, 31. This issue is distinct from the question of whether the midazolam injection causes the *immediate* onset of pulmonary edema, with a resultant sense of suffocation, before the second two drugs are pushed. On the question of the effect of the administration of the second two drugs, and despite defendants' inapt framing of the issue (plaintiffs have "failed to prove"), it is tempting to rule for defendants as a matter of law under Rule 56 (g). Defendants' main argument as to the pain that may result from administration of these drugs is that the prisoner will have been rendered unconscious by the time these last two drugs are pushed. Plaintiffs' response, as to both drugs, is that they will cause a constitutionally intolerable level of pain in a *sensate* person. But, under the protocol, authorization to administer the second two drugs is expressly made conditional; they are be administered only if it is "confirmed the inmate is unconscious." Protocol, p. 44.

In the protocol that passed muster in Baze, the consciousness check required after the administration of the first drug (in that case, sodium thiopental) and before administration of the second two drugs (pancuronium bromide and potassium chloride) was performed "by the warden and deputy warden through visual inspection." Baze, 553 U.S. at 45. In Baze, as here, it was uncontested that administration of the second two drugs would present "a substantial, constitutionally

[10] In In re Ohio Execution Protocol Litig., 946 F.3d 287, 290 (6th Cir. 2019), *cert. denied sub nom.* Henness v. DeWine, 141 S. Ct. 7 (2020), the Sixth Circuit appears to have adopted (much to the consternation of Justice Sotomayor, 141 S. Ct. at 9) the pain associated with hanging as a benchmark. This court makes no determination, at this stage, as to the merits of that approach.

unacceptable risk of suffocation" if the first drug failed to perform as intended. *Id.* at 53. In Baze, as here, the consciousness check after administration of the first drug was important to the Court. But the Court's assessment of the Kentucky protocol led it to the conclusion that the prisoners "have not shown that the risk of an inadequate dose of the first drug is substantial." *Id.* at 54. Analytically, the Court's focus, in Baze, on the risk presented by an inadequate dose of thiopental is equivalent to the risk, under the Oklahoma protocol, that midazolam will not render the prisoner insensate before the second two drugs are pushed, with the result that the prisoner is subjected to a constitutionally unacceptable level of pain and suffering.

In Baze, the Court concluded that the Kentucky protocol (including, as relevant here, the consciousness check accomplished via visual inspection by the warden and deputy warden) mitigated that risk to the extent required by the Eighth Amendment. It is tempting to conclude that Oklahoma's protocol does the same. But in the case at bar, the prisoners squarely attack the warden's unfettered discretion to deviate from the protocol, as well as–among other things–the adequacy of the consciousness check specified in the protocol. The consciousness check is unmistakably a central consideration in the Supreme Court's lethal injection jurisprudence. Thus, even acknowledging the necessity of discretion to deviate from the protocol in ways that would not materially increase the risk that has been the focus of no less than three Supreme Court decisions in the last thirteen years, it is passing strange that Oklahoma would write a protocol (knowing it would be looked at under a microscope) which, read literally, gives the director discretion to water down the consciousness check or wink at its results.[11] On that score, the Supreme

[11] In that same vein, the court notes that defendants assert, as an undisputed fact, that "IV Team members must be either physicians, physician assistants, nurses, EMTs, paramedics, or militarily trained medical personnel, and they must be certified or licensed in the United States." Doc. no.

Court recently reminded us, albeit in a different constitutional context, that a provision for "entirely discretionary exceptions" to the operation of an otherwise constitutional administrative scheme may be fatal to the constitutionality of that scheme. Fulton v. City of Philadelphia, __ U.S. __, 141 S.Ct. 1868, 1878 (2021). For these reasons, and because plaintiffs back up their attack on the protocol's safeguards with credible expert criticism,[12] the court declines to rule, as a matter of law, that plaintiffs' case fails on the issue of whether, under the protocol taken as a whole, the injection of the second two drugs presents a constitutionally unacceptable risk of severe pain.[13]

388, at 1 (citing protocol p. 6). Since the consciousness check is to be performed by the IV Team Leader, Protocol, p. 43, "using all necessary and medically-appropriate methods," *id.*, that very reassuring specification of professional credentials would likely be a noteworthy upgrade from the consciousness check performed "by the warden and deputy warden through visual inspection," which cleared the bar in in Baze, 553 U.S. at 45. The problem, again (as plaintiffs point out, doc. no. 425, at 1), is that, under the protocol, the director retains unfettered discretion to eliminate the requirement of professional medical credentials. Protocol, at 1. Although the evidence at trial may (or may not) firm up the court's confidence level as to the integrity with which the reserved power to modify the protocol will work in practice, the reservation of unfettered power in the director or his designee to modify the protocol, especially as to those provisions so strongly touted by defendants, erodes the confidence the court ordinarily needs in order to adjudicate an issue favorably to the movant as a matter of law.

[12] *See*, doc. no. 388-5, at 56-77, which provides a detailed (and documented) critique of defendants' protocol and related plans relating to the consciousness check. To be sure, the Supreme Court has made it clear that this case cannot be about "best practices." Bucklew, 1125. Thus, "an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner." Baze, 60-61. The question at trial will be whether the defendants' planned approach to ascertaining the prisoner's state of consciousness is at least minimally adequate to satisfy the Supreme Court's requirements with respect to risk mitigation (*e.g.*, avoidance of "a substantial risk of suffering," *id.* at 60) in the comparative context the Court has prescribed.

[13] As a word to the wise, the parties would be well advised to be prepared, at trial, to present evidence as to the actual track record of midazolam as used in executions over the last few years. That evidence may go far to eliminate speculation as to whether midazolam does or does not perform as intended when used as specified in the protocol. (Because, as will be discussed, six of

Summary judgment will be denied on the issue of whether the protocol satisfies the first prong of the Glossip test.

3. Summary judgment granted in part and denied in part – second prong

As to defendants' attack on plaintiffs' case under Glossip's second prong, three issues rise to the surface:

a. Are defendants entitled to judgment as a matter of law because of plaintiffs' purported reservation of the right to challenge the use of their proffered alternative methods of execution?

b. Should defendants' motion be granted as to those plaintiffs who have declined to propose an alternative method? If so, should a Rule 54 (b) final judgment be entered as to those plaintiffs?

c. As to the remaining plaintiffs, have defendants demonstrated as a matter of law that none of the proffered alternatives are eligible to be in the running for comparison with Oklahoma's midazolam protocol?

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a. Plaintiffs' purported reservation of the right to challenge the use of their proffered alternative methods of execution is of no legal effect but will not result in summary judgment against them.

In the Third Amended Complaint (p. 47, ¶¶ 113, 114) and other documents, plaintiffs have explicitly purported to reserve the right to challenge their proffered alternative methods of execution. Defendants object to this, arguing in their motion that, because of this reservation, Count II must fail as a matter of law. Doc. no. 388, at 35. In response, plaintiffs contend that "whether the alternative might be considered constitutional when assessed against a proffered *alternative to that alternative* . . . is a question for another day and not at issue here." Doc. no. 425, at 42 (emphasis added).

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the plaintiffs in the case at bar have declined to proffer an alternative method of execution, there may well be a track record under Chart D of the new Oklahoma protocol by the time this case is called for trial as to the other twenty-six plaintiffs.)

This reservation is, as a legal matter, wholly untenable. The Supreme Court has made it unmistakably clear that method-of-execution litigation is not an iterative process. The Court was careful to note, in Bucklew, that "Glossip expressly held that identifying an available alternative is 'a requirement of *all* Eighth Amendment method-of-execution claims' alleging cruel pain." Bucklew, 1126 (emphasis in original). Thus, it is unsurprising that, in Bucklew, the Court described the prisoner's failure to identify an alternative as a "dispositive shortcoming." Bucklew, 1121. This was foreshadowed in Baze, where the Court quite understandably expressed its distaste for an approach in which "each ruling [is] supplanted by another round of litigation touting a new and improved methodology." Baze, 51. (And in Bucklew, aside from stating that the prisoner's failure to identify an alternative was a "dispositive shortcoming," the Court noted that "[o]nly when the district court warned that his continued refusal to abide this Court's precedents would result in immediate dismissal did Mr. Bucklew finally point to [his proposed alternative]. Bucklew, 1129.) *See also*, Brooks v. Warden, 810 F.3d 812, 822 (11th Cir. 2016), *cert. denied*, 577 U.S. 1116 (2016) (prisoner not entitled to challenge the constitutionality of his proposed alternative). Consequently, plaintiffs' lame assertion that the constitutional permissibility of their proffered alternatives presents "a question for another day," is of no legal effect. The short of the matter is that the Supreme Court, in requiring that the prisoner propose a "feasible and readily implemented" alternative method of implementing the sentence of death (as laid down in no less than three cases since 2008), was not doing so for the purpose of giving license to additional rounds of litigation.

Plaintiffs' reservation of the right to challenge their proposed alternatives puts the court to a choice of either ignoring the reservation or entering judgment against plaintiffs as a matter of law. The court chooses to ignore the purported reservation. At least pending trial, the court will give plaintiffs the benefit of the literal import of

their supplemental responses to defendants' interrogatories. Those supplemental responses intimate no reservation of a right to challenge a proffered alternative. That said, if it should appear at trial that any of the plaintiffs actually do reserve the right to challenge their proposed alternatives, that will be fatal.

b. The motion will be granted as to those plaintiffs who have declined to propose an alternative method of carrying out their sentence of death.

The following table shows the array of responses (and some nonresponses) to Interrogatory No. 15, which required (as enforced by the court) each plaintiff to identify which of the pled alternative methods of execution he proposes for use in his case:

Plaintiffs' Proposed Alternative Methods of Execution[14]

Plaintiff	FDA-approved pentobarbital or sodium thiopental	Compounded pentobarbital or sodium thiopental	Midazolam plus pre-dose of anesthetic	Firing squad	Declined
Andrew	X				
Bush				X	
Cannon	X				
Coddington					X
Cole	X	X	X	X	
Cuesta-Rodriguez	X	X	X	X	
Eizember	X	X	X	X	
Fairchild	X	X	X	X	
Glossip	X	X			
Goode	X	X	X	X	
Grant, D.					X
Grant, J.*					X
Grissom	X	X		X	
Hancock	X	X	X	X	

[14] The third amended complaint was brought by the thirty-five plaintiffs, listed in the first paragraph of that pleading. Doc. no. 325, ¶ 1. Of those thirty-five, three have been terminated as plaintiffs in this action, leaving, as of the date of this order, the thirty-two plaintiffs identified in the chart. Nicholas A. Davis died on April 7, 2021 and was termed on April 13, 2021. *See*, doc. no. 406 (suggestion of death). On May 10, 2021, Patrick Murphy was dismissed for lack of subject matter jurisdiction, and termed, after his conviction was vacated. *See,* Doc. no. 424 (order granting defendants' unopposed motion to dismiss claims of Patrick Murphy). Jimmy Dean Harris died on June 29, 2021 and was termed on June 30, 2021. *See*, doc. no. 440 (suggestion of death).

Hanson**	X				
Harmon	X			X	
Johnson	X		X		
Jones					X
Lay***					X
Littlejohn	X			X	
Malone	X	X	X	X	
Martinez	X			X	
Mitchell	X	X	X	X	
Pavatt			X	X	
Postelle					X
Rojem	X	X	X	X	
Ryder	X	X	X	X	
Sanchez	X	X	X	X	
Simpson	X	X	X	X	
Smith	X	X			
Underwood	X	X			
Wood				X	

* Plaintiff John M. Grant was unwilling to respond to Interrogatory No. 15. See doc. no. 441.

** Plaintiff George Hanson signed two versions of a response to Interrogatory No. 15 (both dated the same date). One version opted for execution with FDA-approved pentobarbital or sodium thiopental; the other version expressly declined to identify an alternative. The court considers it appropriate–viewing the record in the light most favorable to the nonmovant–to give plaintiff Hanson the benefit of the response that does not result in summary judgment against him.

*** Plaintiff Wade Lay expressly declined to proffer an alternative. Doc. no. 447-1.

As shown in the table, six of the plaintiffs—Coddington, D. Grant, J. Grant, Jones, Lay and Postelle—have declined to proffer an alternative for carrying out their sentence of death.[15] As is set forth above in Part D(3)(a), that refusal is fatal to these plaintiffs' Eighth Amendment claims which, as will be seen, are the only claims which would, in any event, remain for trial. Accordingly, defendants are entitled to summary judgment as to these six plaintiffs. That raises the question of whether final judgment should be entered against these plaintiffs under Rule 54 (b).

[15] Plaintiff Wade Lay elaborated on his express refusal to proffer an alternative (doc. no. 447-1) in a twelve-page pro se pleading, doc. no. 448. In that pleading, Mr. Lay emphatically repeats his refusal to designate an alternative. *Id.* at 10-11. He also states, incorrectly, that his operative pleading in this case is "his amended complaint (Doc. No. 326)." *Id.* at 10. That amended complaint was stricken on October 1, 2020, by the order at doc. no. 357 (mailed to Mr. Lay on the same day).

Under Rule 54 (b), Fed. R. Civ. P., "[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

"Certification under Rule 54(b) is a two-step process. Initially, the district court must determine that the judgment is final. . . . . The judgment must be 'final' in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action. Second, the district court must determine that there is no just cause for delay." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988) (citations and internal quotes omitted). "No precise test has been developed for determining whether just cause exists for delay, but generally courts have weighed Rule 54(b)'s policy of preventing piecemeal appeals against the hardship or injustice that might be inflicted on a litigant because of the delay." United Bank of Pueblo v. Hartford Acc. & Indem. Co., 529 F.2d 490, 492 (10th Cir. 1976).

The language of the rule, the collective import of the Tenth Circuit decisions, and the guidance to be gleaned from Professor Wright and his colleagues[16] suggest, at least as relevant to the present procedural posture of this case, that the court's Rule 54 (b) determination should be guided by the following considerations:

- Are multiple parties involved, including one or more parties whose claims have been fully adjudicated?

Yes. We have thirty-two plaintiffs and multiple defendants. The claims of these six plaintiffs will be fully and finally adjudicated by this order, in combination

[16] 10 Wright and Miller, *Fed. Prac. & Proc. Civ.* § § 2656, 2657 and 2659 (4th ed.).

with the order entered on September 15, 2020, doc. no. 349, dismissing with prejudice Counts I, III and VIII. Under the most commonly applied test, "whenever more than one claimant requests relief or one or more plaintiffs seek relief against more than one defendant, regardless of the factual similarity of the claims, a final judgment may be rendered under Rule 54(b) on one or more but fewer than all of the claims since each plaintiff's claim or rights as to each defendant could have been enforced separately." *Wright & Miller*, *id.*, § 2657. Each of these six plaintiffs could have enforced his rights separately. The court expressly determines that its judgment against the six plaintiffs who have not proffered an alternative for carrying out their sentence of death is a final judgment.

- Is there any just reason for delaying finality as to these six plaintiffs?

No. The court expressly so determines. There are two main considerations in play here.

First, there is clear cleavage between the basis upon which this case now ends (in this court) as to these six plaintiffs and the basis upon which this case will go to judgment as to the other twenty-six plaintiffs. Regardless of what the final outcome may be as to the plaintiffs who *have* proffered at least one alternative method of execution, none of those plaintiffs will arrive at the Court of Appeals in anything resembling the same posture as these six plaintiffs. Thus, on appeal from the Rule 54 (b) judgments entered today, the Tenth circuit will not find itself "hear[ing] appeals that will require it to determine questions that remain before the trial court with regard to other claims." *Wright & Miller*, *id.*, § 2659.

Second, as the Supreme Court has repeatedly and emphatically recognized, after decades of appeals and collateral review as to these six plaintiffs, both "the State and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew, 1133 (quoting from Hill v. McDonough, 547 U.S. 573,

584 (2006)). "The people of [Oklahoma], the surviving victims of [these plaintiffs'] crimes, and others like them deserve better." *Id*. at 1134.

- Rule 54(b) certification as to six plaintiffs.

Having made the necessary determinations, the court concludes and certifies that final judgment should be entered under Rule 54(b) against the six plaintiffs who have not proffered an alternative method for carrying out their sentence of death. These six plaintiffs are Coddington, D. Grant, J. Grant, Jones, Lay and Postelle. A separate judgment will be entered for that purpose with respect to each of these plaintiffs.[17]

c. As to the remaining plaintiffs, the defendants have not established, as a matter of law, that the proffered alternative methods of execution should be excluded as comparators with execution per Chart D of the protocol.[18]

To prevail as a matter of law as to all plaintiffs on the Glossip second prong, it is necessary for defendants to exclude all four of the plaintiffs' proffered alternative methods of execution as viable comparators to execution per Chart D. (As shown in the table in Part (b), above, some of the plaintiffs have selected fewer than all four of the alternatives pled in the Third Amended Complaint. That is of no moment for present purposes because, as will be seen, the court has concluded that fact issues preclude elimination of any of the four proffered alternatives.)

The Supreme Court has made it clear that if a prisoner makes an adequate showing on the first Glossip prong, the bar is fairly low (from the prisoner's perspective) on the second prong. As noted above, the Court, in Bucklew, observed

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[17] Entry of final judgment against Lay moots his motions at doc. nos. 408, 409, 429 and 430.

[18] For purposes of this discussion of whether defendants have made a case for rejection of plaintiffs' proposed alternatives as a matter of law, the court will disregard the fact that the existence of fact issues as to the Glossip first prong (degree of risk and severity of pain under Chart D of the protocol) makes it very hard to undertake and adjudicate as a matter of law the *comparison* mandated by the Court in Glossip and Bucklew.

that "we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1128-29. This, again, illustrates the interrelationship between the two prongs.

1. Fact issues preclude rejection, on summary judgment, of plaintiffs' first and second alternatives.

Plaintiffs' first alternative method of execution proposes use of a single dose of FDA-approved pentobarbital or sodium thiopental (barbiturates),[19] augmented by a "pre-dose" of a large clinical dose of an anesthetic drug such as fentanyl. The second alternative differs from the first only in that the pentobarbital or sodium thiopental would be compounded rather than FDA-approved. In support of these alternatives, plaintiffs point out that Charts A and B of the protocol already provide road maps for use of pentobarbital and sodium thiopental in Oklahoma executions. The difference, essentially, would be the addition of fentanyl.

In urging the court to reject these first two alternatives as a matter of law, defendants argue that (i) the defendants are unable to procure the barbiturates, (ii) the fentanyl-barbiturate proposal lacks sufficient detail, and (iii) in any event, it is untried and untested in any state. Of these three arguments for rejection of the fentanyl-barbiturate proposal as a matter of law, the one that comes closest to being supported by undisputed facts is the third–that this is an untried and untested combination. But the problem is that this proposal basically adopts the Oklahoma protocol (Charts A and B) for using the barbiturates (a method that *was* successfully used by Oklahoma when those barbiturates were available for execution), adding only the pre-dose of fentanyl. It is difficult to conceive, at least with the clarity

[19] Examples abound of prisoners arguing against the constitutionality of a method in one case while other prisoners argue, in other courts, that the same method is a satisfactory alternative. *Compare,* Sigmon v. Stirling, 2021 WL 2402279 (D.S.C. June 11, 2021), at *4 (proposing lethal injection of a single dose of pentobarbital), with Barr v. Lee, 140 S.Ct. 2590 (2020), where single-dose pentobarbital was challenged as violative of the Eighth Amendment).

required under Rule 56, that starting out with a big dose of fentanyl in an otherwise tried and tested protocol would really render the barbiturate options (Charts A and B) "untried and untested" in the sense that that concept was discussed in Baze and Bucklew. As for availability of the barbiturates, it appears that the defendants may have the upper hand on that issue at trial, but plaintiffs have succeeded in raising a fact issue as to whether, with reasonable effort, the defendants could procure one or the other of the barbiturates.[20] As for the suggested lack of detail of the fentanyl plus barbiturates proposal, the court is unimpressed. This proposal, as noted, essentially takes the Oklahoma protocol (Charts A and B) on its own terms and adds the fentanyl.

2. Fact issues preclude rejection, on summary judgment, of plaintiffs' third alternative (pre-dose of fentanyl, 40 milligrams of midazolam; remove the paralytic).

Plaintiffs' third alternative method of execution proposes starting with fentanyl, followed by 40 milligrams of midazolam, then the potassium chloride (to induce cardiac arrest), without the paralytic (vecuronium bromide). Defendants argue that this proposal should be rejected as a matter of law because (i) it is not sufficiently specific, and (ii) it is an untried method.

As for specificity, defendants point out that plaintiffs' proposal calls for injection of 40 milligrams of midazolam, but their expert's report does not address that dosage. In fact, the only dosage of midazolam addressed in the relevant report is 500 milligrams (which is unsurprising, since that is what Chart D requires), and the section of the report that directly addresses this third alternative (doc. no. 388-4, ¶¶ 108-110) makes no reference to any particular dosage of midazolam. At least for

[20] It should go without saying, but the court will say anyway, that there would appear to be no significant obstacle to accommodating plaintiffs on their fentanyl plus barbiturates proposal with no further ado if defendants should, at long last, find a supply of one or the other of the tried and tested barbiturates.

now, the call for exactly 40 milligrams of midazolam is sufficiently specific, and the court takes the call for a pre-dose of fentanyl to be identical to the same component of plaintiffs' first and second proposals. Specificity is not the real problem.

The defendants' argument that the opiate-plus-midazolam alternative is an untried method is a bit more complicated than either side admits. Such a combination *has* been used. Plaintiffs point out two such instances. *See*, doc. no. 388-5, at ¶¶ 174-177. But there were problems with those executions. *Id.* The record is thoroughly ambiguous as to *why* there were problems with those executions. Viewing the record in the light most favorable to the plaintiffs, as is required at this stage, it appears that an opiate plus midazolam combination *might* work, and, at a minimum, that it is not "untried and untested," at least if the court were, for this purpose, to equate fentanyl with hydromorphone as the anesthetic pre-dose proposed in plaintiffs' third alternative.

Summary judgment is a very near miss as to this third alternative. The support it gets in plaintiffs' briefing (less than one page in a sixty-eight-page brief) and from their experts is noticeably feeble. This proposal smacks of being half-baked at best. But the court declines to reject it at this juncture.

3. Fact issues preclude rejection, on summary judgment, of plaintiffs' fourth alternative (firing squad).

Plaintiffs' fourth, and last, proposed alternative is execution by firing squad, which is the fourth in order of preference among the statutorily mandated methods of execution in Oklahoma, 22 O.S. 2020 Supp. § 1014. Plaintiffs proffer an expert report from an emergency physician who has treated numerous gunshot wounds and has himself been shot. The report provides details from two established protocols for execution by firing squad (from the U.S. Army and the State of Utah) and then proceeds to elaborate on those protocols, which are quite similar in many respects. The court, consequently, rejects out of hand defendants' contention that the proposed

firing squad alternative is not advanced with sufficient detail to survive summary judgment. All that is necessary is that the firing squad proposal be "sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'" Bucklew, 1129. That leaves the contention that execution by firing squad would not significantly reduce a substantial risk of severe pain. On that score, defendants argue–yet again–that "[p]laintiffs have failed to prove their case." Doc. no. 388, at 38. Aside from the fact that plaintiffs are required to prove nothing at this stage, we have the fact that the merits of the firing squad proposal–degree of risk and severity of pain–are the subject of pointed disagreement among three experts, one for the plaintiffs and two for the defendants. Summary judgment will be denied as to the firing squad proposal.

In sum, to the extent that defendants' motion is denied as to Count II, it is not denied on narrow legal grounds but rather because fact issues preclude adjudication under Rule 56. As to Count II, defendants' motion would, on some issues, have the court use the analysis and conclusions of defendants' experts to pick apart the opinions of plaintiffs' experts. On other issues, defendants invite the court, more simply, to weigh the persuasive value of an expert's conclusion and find it wanting. But, on summary judgment, the "approach of weighing the credibility of the competing expert reports amounts to improper fact-finding. Indeed, competing expert opinions present the classic battle of the experts and it is up to [the trier of fact] to evaluate what weight and credibility each expert opinion deserves." Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005) (citations and internal quotations omitted). That said, it is also true that neither the plaintiffs nor the defendants will have to prevail on every one of the fact issues raised by Count II in order to prevail in this case. But a trial of the fact issues is necessary. The trial will enable the court to resolve those fact issues and judgment will be entered accordingly.

E. The Motion Will Be Granted as to Count IV

Plaintiffs assert, under the First, Fifth and Sixth Amendments, a violation of their right of access to counsel and the courts. Specifically, they allege that:

> The Execution Protocol does not provide Plaintiffs with access to counsel during an execution. Therefore, under the Execution Protocol, Plaintiffs will not be able to communicate with their counsel prior to and during the execution and will not be able to communicate with counsel regarding any problems, including constitutional violations.
>
> In addition, the Execution Protocol does not permit witnesses (including Plaintiffs' attorneys or medical consultants) to view the setting of IVs and/or the syringes being pushed, so there is no way to identify, object to, challenge, or correct, any issues with the IV-setting or drug administration process, including constitutional violations.

Third Amended Complaint, doc. no. 325, ¶¶ 139, 140.

Plaintiffs elaborate on this claim in their opposition brief. The object of this claim is to enable plaintiffs' counsel "to communicate with the Plaintiffs, during the process of preparing for and implementing the execution, starting with the setting of IVs, and continuing through the pushing of the syringes to administer the drugs and observing the prisoner's reactions, through the time the prisoner is declared dead." Doc. no. 425, at 57. This is so that counsel may proctor the process, looking for "potential or extant problems and issues that will result in an inhumane execution." *Id*. at 55. As can be seen, this claim focuses on counsel's access to, and ability to communicate with, the inmate.

Several provisions of the protocol are relevant to this claim:

- *Except for calls from the inmate's attorney of record*, the inmate's telephone privileges are terminated at 9:00 p.m. on the day before the execution. Protocol, p. 20.
- The inmate may meet with two attorneys of record on the day of the execution, the meeting to conclude "two hours prior to the scheduled execution or earlier if necessary to begin preparing the inmate for the execution." *Id.*, p. 21.
- After the inmate is moved to the execution room and placed on the execution

table, the IV Team inserts the primary and back up IV catheters. *Id.*, p. 25. (By statute, the identities of the IV Team members, and all others "who participate in or administer the execution process," must be kept confidential. 22 Okla. Stat. 2011 supp. § 1015 (B).)

- The execution may be witnessed by five persons selected by the inmate. *Id.*, p. 11.
- After IV access has been established by the IV team, and the Attorney General and the Governor (or their designees) have confirmed the absence of legal impediments to execution, "the agency director shall order the H Unit Section chief to proceed with the execution." *Id.*, p. 27. The inmate is given the opportunity to make his last statement. After that, the microphone is turned off. *Id.*
- The protocol includes detailed provisions with respect to checking the effectiveness of IV access (*Id.* pp. 26, 43), electrocardiographic monitoring of the inmate (41), confirming the administration of the correct chemicals (43, 44), monitoring the inmate's "level of consciousness" (41), "physically confirm[ing] the inmate is unconscious" (43, 44), halting the execution in the event of problems with the IVs or with administration of the chemicals (42), and confirming death (43).

The last item listed above–the safeguards written into the protocol–deserves brief mention here. The safeguards in the protocol are, in some respects, more demanding than those in the protocol which was before the court at the preliminary injunction stage. The Supreme Court, in reviewing this court's denial of a preliminary injunction (and the Tenth Circuit's decision affirming that denial), observed that this court "did not commit clear error in concluding that these safeguards help to minimize any risk that might occur in the event that midazolam does not operate at intended." Glossip, 886. That comment by the Court is significant not so much for its faint praise (no clear error) as for the fact that the Court acknowledged the practical reality that, once the multi-step lethal injection process is under way, the implementation of safeguards, per a carefully-developed protocol, is at least as important as anything a lawyer, standing there with a cell phone, might be able to accomplish.

In ruling from the bench at the preliminary injunction stage of this case, the court addressed plaintiffs' access to counsel claim as follows:

> This conjures up an untenable scene in which the prisoner's counsel is standing at the gurney, cell phone in hand, ready to dictate the information necessary to fill in the blanks on an emergency ex parte motion for stay if he or she takes issue with any part of the process as it unfolds.
>
> The reality is that as execution by lethal injection is actually carried out, the prisoner's erstwhile right of access to the courts must, of necessity, give way to the execution team's discharge of its duties as long as those who are carrying out the process are operating within the confines of a constitutionally sound lethal injection protocol. And I hasten to add that it would appear from plaintiffs' contention as to the very closeness of the scrutiny that they say is constitutionally required that protection of the identities of the execution team members would likely be impossible.
>
> . . .
>
> No court has found a constitutional right for the prisoner to have counsel present to supervise the IV insertion process and I decline to be the first judge to so hold.

Transcript of Ruling, December 22, 2014, at 77-78 (doc. no. 179, entered Dec. 23, 2014).

The court's view of the matter has not changed. Practical and legal problems, entwined, are fatal to Count IV.

Because any constitutional claim which might be asserted during an execution would, by definition, be a last-minute (or later) plea for emergency relief to halt an execution in progress, it is appropriate to note at the outset that the Supreme Court has unmistakably set the tone for late-stage capital litigation. Specifically, "[t]he federal courts can and should protect States from dilatory or speculative suits." Hill v. McDonough, 547 U.S. 573, 585 (2006) (lethal injection challenge). Lest anyone miss the point, the Court returned to this theme in Bucklew: "Courts should police carefully against attempts to use such [method of execution] challenges as tools to interpose unjustified delay." Bucklew, 1134.

The Court's admonitions do not, of course, mean that the Constitution can be suspended at some predetermined hour before the execution begins, nor does it mean that an attempt to halt an execution on the basis of allegations relating to events during the execution is to be considered "dilatory" in the usual pejorative sense. But, given the practical realities attendant to litigation and emergency adjudication of any claim lodged while an execution is in progress, the Court's caution about speculative suits fits. And closely related to this admonition from the Court is the fact that "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." Hill, at 583-84. Of the four familiar factors governing the grant or denial of a stay, perhaps the most prominent in this context is the question of "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." Hilton v. Braunskill, 481 U.S. 770, 776 (1987). There is no "execution in progress" exception to this unyielding requirement. Finally, it is worth noting that, in the context of a lethal injection challenge, the Supreme Court has observed that "an isolated mishap alone does not give rise to an Eighth Amendment violation." Baze, 552 U.S. at 50.

Against this backdrop, the court's analysis of plaintiffs' access-to-counsel claim begins with a Tenth Circuit decision, Est. of Clayton Lockett v. Fallin, 841 F.3d 1098 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 2298 (2017). Ordinarily, an on-point Tenth Circuit decision would be the beginning and end of the story for this court, but Lockett turned on issues of qualified immunity, so the circuit court's legal analysis consisted of a search for "clearly established law," a task which differs somewhat from looking for what the law actually is, whether clearly established or not.

As described by the district court (Heaton, J.), the Lockett estate's claim was that:

> Mr. Lockett had a right to communicate with his counsel as he lay on the gurney in the execution chamber, so that he could potentially commence litigation about whatever aspect of the execution process arguably violated his rights. Plaintiff cites no authority which gets remotely close to supporting that remarkable assertion, and the court has considerable doubt whether any constitutional violation of that sort even arguably exists.

Est. of Clayton Lockett v. Fallin, 2015 WL 3874883, at *9 (W.D. Okla. June 23, 2015).

The Tenth Circuit panel, which included then-Judge Neil Gorsuch, agreed with the district court:

> Lockett's Estate attempts to assert a constitutional right to counsel throughout an execution. It asks this court to recognize a constitutional right to counsel "when an execution procedure is producing unexpected and painful results." [record citation omitted] Lockett's Estate points to no law that would support a right to counsel throughout an execution, and we struggle to envision what such a right would look like in practice. Thus, Appellees have violated no clearly established law.

Lockett, 841 F.3d at 1117.

The Supreme Court has not addressed the issue of a constitutional right to counsel (or the courts) while an execution is in progress. The asserted right at issue here is not the abstract right to have an attorney-client relationship as an execution unfolds. Plaintiffs have made it plain that the right asserted here is a right to communicate with counsel at all stages of the execution process, beginning with the setting of the IVs, continuing through the pushing of the chemicals, and ending at "the time the prisoner is declared dead." Doc. no. 425, at 57. Addressing access to counsel in this context, the Courts of Appeals for the Fifth and Eleventh Circuits have reached conclusions consistent with that of the Tenth Circuit in Lockett. One district court has gone the other way to a limited extent, in a decision, Coe v. Bell, 89 F.Supp. 2d 962 (M.D. Tenn. 2000), *vacated as moot*, 230 F.3d 1357 (6th Cir. 2000), with which this court disagrees.

In Arthur v. Dunn, 2017 WL 1362861 (M.D. Ala. April 12, 2017), the issue took the form of a dispute as to the constitutionality of Alabama's prohibition on possession of a cell phone by counsel during the execution. As will be seen, the district court focused mainly on the practicalities of the prisoner's claim; the circuit court closely examined the legal aspects.

The district court in Arthur v. Dunn posited a "hypothetical telephonic colloquy," *id.* at *6, occurring during an execution:

> Counsel: "His eye just opened."
> Judge: "What exactly does that mean?"
> Counsel: "I don't know."
> Judge: "What are you asking me to do?"
> Counsel: "Stop the execution."
> Judge: "What drugs have they given?"
> Counsel: "I don't know."
> Judge: "What volume of unknown drugs have they given?"
> Counsel: "I don't know."
> Judge: "At what rate over time were the unknown drugs in unknown amounts given?"
> Counsel: "I don't know."
> Judge: "What would be the effect on your client if I ordered the execution stopped?"
> Counsel: "I don't know."
> Judge: "Can you tell me with any degree of medical certainty that stopping the execution at this point would not harm your client, cause him pain and suffering, or leave him permanently comatose?"
> Counsel: "No, honestly I can't."
> The same colloquy would ensue if the inmate tried to sit up and speak, groaned and thrashed, called for help, or had any other physical reaction that might occur during an execution.

Id. at *6.

After extensive discussion of the reasons for which it agreed with the Tenth Circuit in Lockett and disagreed with the Tennessee district court in Coe, the district

court, in Arthur, focused on an issue that was dispositive when the case got to the Eleventh Circuit: "To state a valid claim, Arthur would have to establish an actual injury. *See* Lewis [v. Casey], 518 U. S. at 349, 351–52. Arthur's request for his counsel to take a cellular device into a prison while an execution is taking place is based on speculation that something might go wrong during the procedure. This theoretical basis for relief falls outside of the injury requirement stated in Lewis." *Id.* at *7. The Eleventh Circuit agreed: "To state a valid right-of-access claim, Arthur must show both that denying his witness access to a phone actually prevents him from accessing the courts and that he will specifically be prevented from bringing a colorable or viable underlying Eighth Amendment claim." Arthur v. Comm'r, Alabama Dep't of Corr., 680 F. App'x 894, 909 (11th Cir. 2017).

For the Eleventh Circuit, the predominant issue in Arthur was that of standing. There was no "'actual injury' sufficient to state a claim under Bounds [v. Smith, 430 U.S. 817 (1977)] and Lewis because, absent an underlying violation of a fundamental right, no 'injury in fact'–and thus no standing–has been shown." Arthur at 909. In other words, the right of access to counsel (and, *a fortiorari*, to the courts), applies only to *extant* claims. But in the case at bar, plaintiffs assert a right, under the First, Fifth and Sixth Amendments, to have their counsel proctor the execution process, from beginning to end, with a view to initiating litigation *if* they see something they deem constitutionally objectionable. That, as a matter of law, is not sufficient. *See also*, to the same effect as Arthur, Whitaker v. Collier, 862 F.3d 490, at 501 (5th Cir. 2017) (right to counsel during execution: possibility of a "botched execution" is an "isolated mishap" that is not cognizable via a method-of-execution claim, citing Baze]); Grayson v. Warden, 672 Fed. Appx. 956, 966-67 (11th Cir. 2016) (possibility that "something might go wrong" is not an "actual injury" entitling prisoner to counsel with cell phone); McGehee v. Hutchinson, 463 F.Supp.3d 870,

931-32 (E.D. Ark. 2020) (access during entire process, including setting IVs)[21], *appeal pending*, 8th Cir. No. 21-1965); Bible v. Davis, 2018 WL 3068804 (S.D. Tex. June 21, 2018) (no right to have attorney present, with or without a cell phone, while IV is inserted), *aff'd* (on statute of limitations), 739 Fed. Appx. 766 (5th Cir. 2018); Towery v. Brewer, 2012 WL 592749, *18 (D. Ariz. Feb. 23, 2012) (no "actual injury"), *aff'd* 672 F.3d 650 (9th Cir. 2012) (not reaching merits of access to counsel claim), *cert. denied*, 565 U.S. 1243 (2012).

Finally, the court will note that, even in Coe, the district court went no further than to hold that the prisoner had a right of access to counsel up to an hour *before* the execution and that counsel could have access to a telephone while witnessing the execution, Coe, 89 F.Supp.2d at 966, all of which, it should be noted, caused that court to observe that it was "skeptical about a prisoner's realistic ability to assert and get redress for a violation of his right to be free from cruel and unusual punishment during the execution itself." *Id.*

The court concludes that defendants are entitled to judgment as a matter of law on Count IV.

F. The Motion Will Be Granted as to Count V

Under 18 U.S.C. § 3599, an indigent defendant in a capital case is entitled to appointed counsel at public expense. 18 U.S.C. § 3599 (a)(1). That right includes representation in "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." 18 U.S.C. § 3599 (e). In Count V, plaintiffs assert that by "denying Plaintiffs meaningful access to counsel and to the courts during the preparation for, and carrying out of,

[21] Although clearly holding that plaintiffs had no right to have "their attorneys to see and hear the full execution, including the insertion of the intravenous lines and information about when each drug in the Arkansas Midazolam Protocol is pushed," *id.* at 932-33, the court did grant relief on an access-to-cell phone claim. *Id.* at 931. But this result appears, as much as anything else, to have been reached by way of enforcement of an agreed viewing policy. *Id.*

their executions, Defendants intentionally will violate Plaintiffs' rights under 18 U.S.C. § 3599." Doc. no. 325, at 56.

Defendants argue that plaintiffs' claims of denial of access to counsel and the courts fail under § 3599 for essentially the same reasons for which the constitutional access to counsel (and courts) claim must fail. Doc. no. 388, at 39-41. The court agrees. Plaintiffs cite no authority (and the court has found none) suggesting that, aside from the question of who pays for counsel's services, the right to counsel at the time of execution of a sentence of death is more extensive under § 3599 than it is under the controlling constitutional provisions (as discussed in Part E, above). The court accordingly concludes that defendants are entitled to judgment as a matter of law on Count V.

G. The Motion Will Be Granted as to Count VI

Count VI alleges violations of the Ex Post Facto Clause of the United States Constitution (Article I, Section 10, clause 1) and Article V, section 54 of the Oklahoma Constitution. These arguments are different but related.[22]

A change in the execution method does not increase a condemned inmate's punishment and thus does not implicate the Ex Post Facto Clause. *See*, *e.g.*, Malloy v. South Carolina, 237 U.S. 180, 185 (1915) (law which changed method of execution from hanging to electrocution "did not change the penalty—death—for murder, but only the mode of producing this" and did not otherwise increase the punishment); Zink v. Lombardi, 783 F.3d 1089, 1108 (8th Cir. 2015) (prisoners failed to state an ex post facto claim because the punishment—death—has remained the same, and only the mode of producing death has changed); Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997) ("[t]he change in method does not make the

[22] Count VI does not challenge the protocol under the Ex Post Facto Clause of the Oklahoma Constitution (Article 2, section 15).

sentence [of death] more burdensome and so does not violate the Ex Post Facto Clause"); United States v. Tipton, 90 F.3d 861, 903 (4th Cir. 1996) (fact that regulation providing for death by lethal injection was promulgated after condemned inmate had been sentenced did not violate Ex Post Facto Clause); United States v. Chandler, 996 F.2d 1073, 1096 (11th Cir. 1993) (reasoning that a new capital statute specifying a method of execution would only provide for the method by which the punishment would be carried out and would not alter a death sentence, thus it would not violate Ex Post Facto Clause); Matter of Federal Bureau of Prisons' Execution Protocol Cases, 2021 WL 127602, *3 (D.D.C. Jan. 13, 2021) (rejecting ex post facto claim at preliminary injunction stage; "The court finds no reason to depart from precedent squarely addressing the question at hand. The substitution of the drugs used in lethal injection does not alter Higgs' sentence of death—it changes only the way his sentence will be implemented.").[23]

Moving on to the state constitutional provision in question—Article V, section 54 of the Oklahoma Constitution—that section provides as follows: "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute." (Emphasis added.) Plaintiffs allege that, other than Mica Martinez, they were sentenced to death under an earlier version of the first sentence

[23] As part of their ex post facto argument, plaintiffs contend that permitting a more painful execution, could, taken to its logical conclusion, permit death by a lethal dose of any substance, such as gasoline, battery acid, etc. The court disagrees. The fact that plaintiffs' ex post facto argument has been rejected implies nothing at all–either as a matter of law or logic–about how these types of purely hypothetical injections would fare under the Eighth Amendment if a court were called upon to make such a determination.

of 22 O.S. Supp. 2020 § 1014(A), which was in effect until November 1, 2011.[24] Count VI alleges the protocol (which is consistent with the amended version of the first sentence of § 1014(A) but not the earlier version), violates Article V, section 54. Plaintiffs argue the amended version of the statute creates a significant risk of increased punishment as compared to the pre-November 1, 2011 version of the statute. The court rejects this argument. Article V, section 54 is not violated by the protocol or by the complained-of amendment to § 1014(A), neither of which impact the way in which the penalty (death) will be carried out. In the language of Article V, section 54, neither the protocol nor the amendment "affect any accrued right, or penalty incurred…."

The court concludes that defendants are entitled to judgment as a matter of law on Count VI.

H. The Motion Will Be Granted as to Count VII

Count VII alleges a Fourteenth Amendment procedural due process claim. In this count, plaintiffs allege they have a protected life and liberty interest in being executed with the use of "an ultrashort-acting barbiturate" as required by the first sentence in the version of § 1014(A) in effect before November 1, 2011. Plaintiffs argue that "[a]llowing Defendants to execute Plaintiffs using a method that state law did not permit when Plaintiffs were sentenced and which would disadvantage

[24] Prior to the amendment which became effective on November 1, 2011, the first sentence of § 1014(A) provided: "The punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced…." Effective November 1, 2011, the first sentence of § 1014(A) was amended to provide as follows: "The punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs until death is pronounced…." (Oklahoma's highest courts have held that for purposes of Article V, section 54, there is no material difference between a statutory repeal and an amendment, because an amendment, to a certain degree, operates as a repeal of prior law. Witherow v. State, 400 P.3d 902, 904, n. 2 (Okla. Crim. App. 2017), citing One Chicago Coin's Play Boy Marble Board v. State ex rel. Adams, 212 P.3d 129, 133 (Okla. 1949).)

Plaintiffs and create a significant risk of increased punishment would, by definition, violate their due process rights under the United States Constitution." Doc. no. 425, p. 53, n. 14.

At the motion to dismiss stage, the court held that Count I, construed as a claim brought under the Due Process Clause of the Fourteenth Amendment, failed on its merits. Doc. no. 349, pp. 3-7. At that time, the court addressed Whitaker v. Livingston, 732 F.3d 465 (5th Cir. 2013), indicating its agreement with Whitaker's statement that: "The lack of a cognizable liberty interest is fatal to the due process claim." Whitaker, 500, citing Sepulvado v. Jindal, 729 F.3d 413, 420 (5th Cir. 2013). As Whitaker stated, "Even if the Fourteenth Amendment sometimes protects liberty interests not explicitly enumerated in the Constitution, we know of no case, in the context of executions, in which the Supreme Court has found a liberty interest to exist, based on the contours of the Eighth Amendment, that goes beyond what that Amendment itself protects." Whitaker, 467.

Count VII, like Count I (as construed), rests on the Fourteenth Amendment. Whereas Count I alleges defendants' failure to disclose sufficient information regarding the protocol violates plaintiffs' due process rights, Count VII alleges plaintiffs have a protected interest in being executed in the manner specified in the earlier version of § 1014(A), that is, with the use of "an ultrashort-acting barbiturate." Count VII, like Count I, fails as a matter of law; both counts rest on the incorrect premise that the Fourteenth Amendment provides a cognizable due process interest in the manner of execution. The court concludes that defendants are entitled to judgment as a matter of law on Count VII.

I. The Motion Will Be Granted as to Count IX

Count IX is a human experimentation claim. It is brought under the Eighth and Fourteenth Amendments. Count IX alleges the execution drugs called for by

the protocol have not been tested on non-human animals. Count IX alleges the use of these drugs on unconsenting human subjects constitutes high-risk experimentation with lethal drugs, violating a prisoner's Eighth Amendment right to be free from cruel and unusual punishment, and violating a prisoner's substantive due process right to liberty as protected by the Fourteenth Amendment.

To the extent Count IX is brought under the Eighth Amendment, it is the equivalent of the human experimentation claim which was previously alleged in Count 7 of the original complaint. This court denied relief on that claim at the preliminary injunction stage. The court of appeals affirmed that ruling, rejecting plaintiffs' argument that this court erred when it applied the risk-analysis test of Baze instead of an "evolving standards of decency" analysis. Warner v. Gross, 776 F.3d 721, 736 (10th Cir. 2015).

For the same reasons that Count 7 of the original complaint failed when it was before the court at an earlier stage, Count IX, to the extent it is based on the Eighth Amendment, fails today. The Eighth Amendment does not require that, absent consent, a prisoner may only be executed in a manner that has been tested on non-human animals. Count IX also fails to the extent it is premised on the Fourteenth Amendment. The Fourteenth Amendment does not provide plaintiffs with a substantive due process right to be executed in a manner which has been tested on non-human animals. *See*, Whitaker, 500 ("The lack of a cognizable liberty interest is fatal to the due process claim"). The court concludes that defendants are entitled to judgment as a matter of law on Count IX.

J. The Motion Will Be Granted as to Count X

Count X relates to plaintiffs' right of access to governmental information under the First and Fourteenth Amendments.

To the extent Count X is brought under the Fourteenth Amendment, it is similar to Count I, previously dismissed. Count I, construed as alleged under the Fourteenth Amendment, alleges that plaintiffs have not been provided with sufficient governmental information regarding the development and drafting of the protocol or the procedures that will be used to carry it out. Similarly, Count X also addresses plaintiffs' alleged right to governmental information. However, Count X focuses on a subset of that information, specifically, information regarding the source of the drugs to be used. As already noted several times in this order, this court dismissed Count I because it agrees with Whitaker that the protocol, which goes to the manner of causing death rather than the penalty of death, does not implicate rights protected by due process. This principle also controls the result with respect to plaintiffs' narrower set of claims, alleged in Count X, asserting that failure to provide plaintiffs with information about the source of the execution drugs deprives plaintiffs of notice and an opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment.

Other courts have found that neither the Fourteenth Amendment nor the First Amendment grant a prisoner the right to know where, how or by whom lethal injection drugs will be manufactured. For example, Wellons v. Comm'r, Georgia Dep't of Corrections, 754 F.3d 1260, 1267 (11th Cir. 2014), which considered similar issues at the preliminary injunction stage, states as follows.

> We agree with the judgment of the district court. Neither the Fifth, Fourteenth, or First Amendments afford Wellons the broad right "to know where, how, and by whom the lethal injection drugs will be manufactured," as well as "the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters." *See Lewis v. Casey*, 518 U.S. 343, 354, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[S]tatements [in *Bounds*] appear to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court....These elaborations upon the right of access

> to the courts have no antecedent in our pre *Bounds* cases, and we now disclaim them.") (citing *Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)); *Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir. 2013) ("There is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol."); *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011) (holding that the prisoners, who argued that the Arkansas Method of Execution Act violated the due process clause because its secrecy denied them "an opportunity to litigate" their claim that the execution protocol violated the Eighth Amendment, failed to state a plausible due process access-to-the-courts claim). Wellons has not established a substantial likelihood of success on the merits of his claim that the dearth of information regarding the nature of the pentobarbital that will be used in his execution and the expertise of those who will carry it out violates the First Amendment or his right to due process.

Wellons, 754 F.3d at 1267 (emphasis added).

The Eighth Circuit Court of Appeals has concluded that the First Amendment does not support a claim for failure to disclose the name and source of drugs to be used in an execution. Zink v. Lombardi, 783 F.3d 1089, 1112 (8th Cir. 2015). In addition to citing Wellons, Zink notes that after a divided panel of the Ninth Circuit enjoined the execution of an Arizona inmate until the state provided him with the name and provenance of drugs to be used in his execution, "The Supreme Court promptly vacated the injunction without dissent." Zink, 1112, referencing Wood v. Ryan, 759 F.3d 1076, 1088 (9th Cir. 2014), *vacated*, Ryan v. Wood, 573 U.S. 976 (2014). Zink affirmed the district court's dismissal of this and other claims. Zink, 1114.

Neither the Fourteenth nor the First Amendment requires the state to provide information to plaintiffs regarding the source of the execution drugs or the nature of

the company which manufactures those drugs.[25] The court concludes that defendants are entitled to judgment as a matter of law on Count X.

K. Conclusion as to Motion for Summary Judgment[26]

For the reasons stated in this order, defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART, as follows.

Count II. The gist of Count II, which is alleged under the Eighth Amendment, is that lethal injection under Chart D will subject the prisoner to a constitutionally unacceptable risk of a constitutionally unacceptable level of pain and suffering. Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART with respect to this count. The motion is GRANTED with respect to the claims alleged in Count II by plaintiffs Coddington, D. Grant, J. Grant, Jones, Lay and Postelle. To the extent defendants move for summary judgment on the claims alleged in Count II by the other twenty-six plaintiffs, the motion is DENIED.

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[25] Title 22 O.S. 2011 § 1015(B) has not been cited by any party. Nevertheless, the court notes it. Section 1015(B) provides that "The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings." To the extent this statute addresses those who supply execution drugs, the Oklahoma Supreme Court has construed it to make only the identity of the persons who supply the drugs confidential. Lockett v. Evans, 330 P.3d 488, 491 (Okla. 2014). The complaint does not allege that plaintiffs have a right to know the identity of the persons who supply the drugs, rendering § 1015(B) only marginally relevant.

[26] Embedded in plaintiff Wade Lay's pro se pleading filed on August 9, 2021, is a motion to "suspend the proceeding," in which he also seeks discovery and an evidentiary hearing. Doc. no. 448, at 11-12. That motion is **STRICKEN** as moot, in light of the rulings set forth in this order. If that motion were not moot, it would be denied because (i) the proceedings Mr. Lay contemplates (described at doc. no. 448, p. 12) have no connection with the issues before the court in this case, and (ii) granting the relief sought would, with no semblance of a showing of good cause, Husky Ventures, Inc. v. B55 Invs., Ltd., 911 F.3d 1000, 1019 (10th Cir. 2018), upend the schedule in this case.

Counts IV, V, VI, VII, IX and X. Summary judgment is GRANTED in favor of defendants and against plaintiffs on Counts IV, V, VI, VII, IX and X.

Plaintiffs Against Whom Summary Judgment is Entered. Summary judgment on Counts II, IV, V, VI, VII, IX and X is GRANTED in favor of defendants and against plaintiffs Coddington, D. Grant, J. Grant, Jones, Lay and Postelle. As Counts I, III and VIII were dismissed with prejudice at an earlier stage, no claims alleged by these six plaintiffs remain for trial. The court has certified that final judgment should be entered under Rule 54(b), Fed. R. Civ. P., against these six plaintiffs. Separate judgments will be entered for that purpose.

Counts Remaining to be Determined at Trial. These rulings, along with the court's rulings at the motion to dismiss stage, mean that the only claims which remain for trial are those alleged in Count II by the twenty-six plaintiffs other than Coddington, D. Grant, J. Grant, Jones, Lay and Postelle.

L. Scheduling, Trial Setting and Related Matters

By separate order, which will provide guidance as to the course of proceedings through the trial of this case, this matter will be set for a scheduling conference.

IT IS SO ORDERED this 11th day of August, 2021.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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