*****THIS IS A CAPITAL CASE*****

*****EXECUTION SCHEDULED FOR DECEMBER 9, 2021, AT 10:00 A.M.*****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BIGLER JOBE STOUFFER,

Petitioner,

v.

SCOTT CROW, ET AL.,

Respondents.

APPENDIX TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

s/ Gregory W. Laird
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FILED
United States Court of Appeals
Tenth Circuit

December 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BIGLER JOBE STOUFFER,

Plaintiff - Appellant,

v.

SCOTT CROW; RANDY CHANDLER; BETTY R. GESELL; JOSEPH A. GRIFFIN; F. LYNN HAUETER; KATHERYN A. LAFORTUNE; STEPHAN MOORE; CALVIN PRINCE; T. HASTINGS SIEGFRIED; DARYL WOODARD; JIM FARRIS; JUSTIN FARRIS; MICHAEL CARPENTER; JUSTIN GIUDICE; PARAMEDIC Y; EXECUTIONER #1; EXECUTIONER #2; EXECUTIONER #3,

Defendants - Appellees.

No. 21-6153
(D.C. No. 5:21-CV-01000-F)
(W.D. Okla.)

ORDER

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

Bigler Jobe Stouffer is an Oklahoma inmate sentenced to death whose execution has been scheduled for December 9, 2021. He has appealed to this court from the district court's order denying his motion for a preliminary injunction. In connection with his appeal, he filed an emergency motion for stay of execution.

Our rule concerning stays pending appeal is that

> [n]o application for a stay . . . pending appeal will be considered unless the applicant addresses all of the following:
>
> (A) the basis for the district court's or agency's subject matter jurisdiction and the basis for the court of appeals' jurisdiction, including citation to statutes and a statement of facts establishing jurisdiction;
>
> (B) the likelihood of success on appeal;
>
> (C) the threat of irreparable harm if the stay or injunction is not granted;
>
> (D) the absence of harm to opposing parties if the stay or injunction is granted; and
>
> (E) any risk of harm to the public interest.

10th Cir. R. 8.1.

In exercising our discretion whether to issue a stay, we consider these factors as they apply to the circumstances of the case before us. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Mr. Stouffer "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 434.

In his motion, Mr. Stouffer has not addressed the last three stay factors. In particular, he has not identified the threat of irreparable harm he may suffer if the stay or injunction is not granted. The defendants discern his alleged irreparable harm as the potential that "the *method* of execution will cause irreparable harm, for example, by showing he will suffer a constitutionally impermissible level of pain as compared to another available and constitutional method he proposes." Resp. at 20. In his reply, Mr. Stouffer does not challenge this articulation of his alleged irreparable harm. Nor does he specify any other irreparable harm he may suffer if the stay is not granted. Accordingly, we will limit our discussion to whether, absent a stay, Mr. Stouffer has

shown he will be irreparably harmed by being subjected to an unconstitutionally painful method of execution in violation of the Eighth Amendment.

To establish such a harm, Mr. Stouffer must show both that the State's chosen method of execution presents "a substantial risk of severe pain" and that the risk is substantial in comparison to other known and available alternatives. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citing *Glossip v. Gross*, 576 U.S. 863 (2015), and *Baze v. Rees*, 553 U.S. 35 (2008)). These two factors are commonly known as "*Glossip* prongs one and two." Mr. Stouffer's entire argument on his Eighth Amendment claim is that "[t]he additional evidence regarding the [John] Grant execution satisfies the first hurdle and Stouffer's Affidavit wherein he has made the same choices [of alternative methods of execution], without reservation, as [the] *Glossip* plaintiffs, satisfies the second." Mot. at 19-20.

The district court found Mr. Stouffer had failed to establish a likelihood of success on either prong of the *Glossip* test. Concerning the first prong (substantial risk of severe pain) it cited the testimony of Dr. Ervin Yen, an anesthesiologist who witnessed John Grant's execution on October 28, 2021, that "Mr. Grant was unconscious and insensate to pain very soon after the midazolam was pushed and was dead before the second drug was pushed," and that his regurgitation and respiratory distress occurred while he was unconscious. R., Vol. 2 at 42. The district court further concluded that even if Mr. Grant had been conscious during the episode of coughing and regurgitation, "this brief episode did not subject him to a level of pain and suffering necessary to amount to severe, cruelly

superadded pain within the meaning of the Supreme Court's lethal injection cases." *Id.* at 43.

Based on our review of the cited portions of the record, including Dr. Yen's testimony and the entire transcript of the preliminary injunction hearing, Mr. Stouffer has failed to establish a threat that he will be irreparably harmed by a violation of his Eighth Amendment rights if he is executed using Oklahoma's three-drug protocol, including midazolam. As we stated in a previous appeal, the fact that the district court declined to grant summary judgment on the first element of an identical *Glossip* claim asserted in another case does not equate to a showing of a likelihood of success on the merits for purposes of appeal. *See Jones v. Crow*, No. 21-6139, 2021 WL 5277462, at *6 (10th Cir. Nov. 12, 2021) (citing *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). Nor does the favorable summary-judgment decision, even when supplemented with the additional evidence Mr. Stouffer has supplied concerning the Grant execution, equate to a showing in his case of the likelihood of irreparable harm resulting from an unconstitutionally painful execution. Because Mr. Stouffer has failed to establish the first prong of the *Glossip* test by showing a substantial risk of unconstitutionally severe pain, we need not consider whether he has made an adequate showing of the second prong of that test.

Given Mr. Stouffer's failure to establish the threat of irreparable harm if the stay he seeks is not granted, we need not discuss whether he has satisfied the other stay

factors. Mr. Stouffer has not shown that the circumstances justify an exercise of our discretion to issue a stay pending appeal. We therefore deny his motion for stay.

Entered for the Court
Per Curiam

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

BIGLER JOBE STOUFFER,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. CIV-21-1000-F
	)	
SCOTT CROW, et al.,	)	
	)	
Defendants.	)	

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

On November 22 and 23, 2021, this action came on for hearing on Plaintiff's Motion for Stay of Execution (doc. no. 6) and Plaintiff's Supplemental Motion for Stay of Execution (doc. no. 39).

For the reasons stated at length on the record on November 23, 2021, pursuant to Rule 52(a)(1), Fed.R.Civ.P., the court concludes that plaintiff has failed to establish the requisite probability of success on the merits of his claims.

The court accordingly concludes that the motion for preliminary injunction by plaintiff Bigler Jobe Stouffer is without merit. The motion is accordingly **DENIED**.

IT IS SO ORDERED this 23rd day of November, 2021.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

BIGLER JOBE STOUFFER,

Plaintiff,

vs. Case No. CIV-21-1000-F

SCOTT CROW, et al.,

Defendants.

TRANSCRIPT OF COURT'S RULING

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

NOVEMBER 23, 2021

10:00 A.M.

APPEARANCES

FOR THE PLAINTIFF: Mr. Gregory Laird, Laird Laird, PLLC, 406 S. Boulder, Suite 480, Tulsa, OK 74103
Mr. David A. Tank, Attorney at Law, 5506 Beechwood Terrace, West Des Moines, IA 50266
Mr. Stephen J. Rafferty, Attorney at Law, 291 South Euclid Ave., Ph 5, Pasadena, CA 91101

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

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

(PROCEEDINGS HAD NOVEMBER 23, 2021.)

THE COURT: Good morning. We're here once again in Civil 21-1000, the lethal injection challenge by the Plaintiff Bigler Jobe Stouffer, and we're here so that I may make my ruling on the motion and supplemental motion for preliminary injunction.

Counsel will please give their appearances.

MR. LAIRD: Greg Laird, Stephen Rafferty and David Tank for the plaintiff.

MR. CLEVELAND: And Bryan Cleveland and Andy Ferguson for the defendants.

THE COURT: Okay. Thank you.

Before I start, let me once again applaud counsel on both sides for their presentations under obviously a fairly compressed schedule, not as compressed as another similar matter that I recently had, but still a fairly compressed schedule, demanding on both sides, and so I certainly would not want to close this matter without an understanding on both sides that I certainly do respect and appreciate the effort that has been put into the matter from counsel on both sides.

I'll now make my ruling on Mr. Stouffer's motion, which is supplemented and, really, the definitive motion is at Docket Entry Number 39, the supplemental motion.

In making my rulings, I will be quoting from the controlling authorities, consisting of decisions from the

Supreme Court and the Tenth Circuit.

For the sake of brevity, when I quote those passages, I will generally not note internal quotations. I would prefer to express my rulings in a polished written order, but time is of the essence.

I have been working, in part, from the notes I made during the hearing yesterday. And as everyone concerned has a right to expect, I have made every effort to bring the materials in the record and the evidence at the hearing together into a comprehensible ruling.

Facts as to the Court I Equal Protection Claim

And the Count III Promissory Estoppel Claim

I'll now address, first, the facts as to the Count I equal protection claim and the Count III promissory estoppel claim.

Even though those claims are legally distinct, they do have some factual overlap. Consequently, I will make my factual findings relevant to those claims and then I will rule on those claims.

The case we now call the Glossip case was filed as Warner v. Gross on June 25, 2014. Mr. Stouffer was not an original plaintiff in that case and has never been a plaintiff in that case.

A motion for preliminary injunction was filed in Glossip on November 10, 2014. That motion was the subject of the Supreme Court's decision on the merits in Glossip v. Gross.

When that motion was filed in this Court on November 10, 2014, it was an urgent matter because Charles Warner was scheduled for execution on January 15, 2015, just over two months after the motion was filed.

Consequently, I put a scheduling order in place establishing a sequence of scheduled events leading to a hearing on the preliminary injunction which was scheduled for December 17 through 19, 2014, and was, in fact, held on those dates.

I ruled on that motion denying the preliminary injunction on December 22, 2014. The Court of Appeals affirmed that decision on January 12. Charles Warner was executed on January 15, and the Supreme Court handed down its decision affirming the decision of the Court of Appeals on June 29, 2015.

Meanwhile, on November 20, 2014, with preparation for the December hearing well underway, Mr. Stouffer filed a pro se motion to intervene in the Glossip case. That motion was not at issue until December 19 and was denied on December 22, the same day I denied the motion for preliminary injunction.

In my order denying intervention, I wrote that "Mr. Stouffer states no grounds for relief which indicate that he must be a named plaintiff in this action in order to receive the benefit of any ruling which might arguably benefit the named plaintiffs whether at this or a later stage."

That is Docket Entry Number 171 in the Glossip case and

that statement was factually correct.

On October 16, 2015, in the wake of the Supreme Court's decision in Glossip, and after some noteworthy difficulties were encountered with respect to implementation of Oklahoma's then-existing lethal injection protocol by the then-existing Department of Corrections' staff, all parties in Glossip filed a stipulation that provided, as pertinent here, that the Attorney General would not seek an execution date as to the Glossip plaintiffs or any other condemned prisoners until at least 150 days after the Department of Corrections provided specified items of information, together with notice that the Department will be able to comply with a new execution protocol.

The stipulation is Docket Entry Number 259 in Glossip.

I immediately entered an order confirming that stipulation. The State's inclusion of "other condemned prisoners" in that stipulation was the only commitment the State ever made in Glossip for the benefit of any prisoners who were not plaintiffs in that case.

On February 27, 2020, the plaintiffs in Glossip filed a motion to reopen that case which led to a dispute as to whether the terms of the October 2015 stipulation had been complied with.

That motion did not purport to have been filed by, or to seek relief for, any prisoners other than the plaintiffs in

Glossip.

It was clear by early 2020 that the State was laying the groundwork to proceed with executions under the new protocol.

When that motion to reopen the Glossip case was filed in late February 2020, Mr. Stouffer had been out of court for more than five years. During those five years, having been denied intervention in the Glossip case, he had a statutory right to file his own case, with counsel at public expense, to challenge any protocol Oklahoma might propose to use to execute him.

Various method-of-execution cases had been prosecuted in this Court, beginning with the Boltz case, Civil 06-587, in 2006, and the availability of appointed counsel in a Section 1983 method-of-execution challenge was explicitly recognized by the Court of Appeals in 2013 in an Order and Judgment written for the panel by Judge Tymkovich in Hooper v. Jones, which is at 536 Fed. Appx. 796. And as I say, that is a 2013 decision.

I will also note that I'm unpersuaded by the suggestion yesterday that Mr. Stouffer was, or reasonably would have been, inhibited from pursuing his own case for fear of running afoul of the three-strikes limitation.

That limitation on litigation in forma pauperis, set forth in 28 U.S.C. Section 1915(g), with a corresponding provision for dismissal, as set forth in subdivision (c) of 42 U.S.C. Section 1997(e), comes into play only where an inmate litigant has had three or more actions dismissed on the ground that the

action was frivolous, malicious or failed to state a claim. There has been no showing that Mr. Stouffer has been in jeopardy of running afoul of Section 1915(g).

As I noted in my ruling in the Glossip case just under a month ago, we had a scheduling conference in the Glossip case in March of 2020. At that conference, which was held in chambers, the Attorney General of Oklahoma acquiesced in my suggestion that none of the Glossip plaintiffs should be set for execution as long as there was anything for him to litigate in this Court.

As I said last month, as shown by the transcript at Docket Entry Number 537 in the Glossip case, given the number of years that have elapsed since the Glossip 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.

There was no discussion at that conference of the status of anyone other than the Glossip plaintiffs.

And I would note that the minute sheet for that scheduling conference, Docket Entry Number 305 in the Glossip case, does not purport to memorialize any agreement, let alone an agreement for the benefit of anyone who was not a party to the Glossip case.

As Mr. Stouffer's counsel correctly points out, at a motion hearing in May of 2020, without saying it in so many words, I effectively assured all of the plaintiffs in the Glossip case that we would be back here quickly if the Attorney General went back on the understanding that none of the Glossip plaintiffs would be set for execution as long as they had anything to litigate in this Court.

The transcript of that May 2020 hearing, Docket Entry Number 321 in the Glossip case, clearly shows that the comments by counsel and the Court were made in the context of that case and the plaintiffs in that case.

There was no mention of Mr. Stouffer or of any broader category of prisoners other than the plaintiffs in that case.

The only promise the Attorney General of Oklahoma has made to or for the benefit of Mr. Stouffer with respect to the scheduling or deferral of his execution was the written stipulation filed in the Glossip case on October 16, 2015, for the benefit of the Glossip plaintiffs and "any other condemned prisoners" not to seek an execution date before the end of the 150-day deferral period. The Attorney General has not broken that promise.

The Fourteenth Amendment Equal Protection Claim (Count I)

I will now rule on the Fourteenth Amendment Equal Protection claim in Count I.

In Count I, Mr. Stouffer asserts a "class of one" equal

protection claim. He cites the decision of the Court of Appeals in Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, with the relevant passage on page 1216, that's a Tenth Circuit decision from 2011, for the standard to be applied to this claim.

And I agree that the Kansas Penn case definitively articulated the test I am to apply.

In that case, the Court of Appeals told us that to prevail on a "class of one" theory, a plaintiff must first establish that others, similarly situated in every material respect, were treated differently. A plaintiff must then show that this difference in treatment was without rational basis, that is, the government's action was irrational and abusive and wholly unrelated to any legitimate State activity.

This standard is objective. If there is a reasonable justification for the challenged action, we do not inquire into the government actor's actual motivations.

Mr. Stouffer has not shown that he is similarly situated in every material respect to the others who were treated differently. Although it is true that, like the Glossip plaintiffs who await trial in that case, Mr. Stouffer has very recently designated an alternative method of execution.

Mr. Stouffer's situation is materially different in that he had no pending challenge when the new protocol was adopted in early 2020 and he had no pending challenge when his

execution date was set.

The issue on this equal protection claim is not whether Mr. Stouffer is guilty of laches or of unconscionable delay in seeking a stay, as was the case with the lethal injection challenge in Hill v. McDonough, 547 U.S. 573, a 2006 decision. Instead, the issue here is, first, whether in setting an execution date for a prisoner who had no litigation pending and as to whom the State had fully complied with the only deferral promise it ever made, the State was according different treatment to an individual similarly situated in every material respect to the Glossip plaintiffs.

The second issue is whether the differential treatment was so lacking in rational basis as to be irrational, abusive and wholly unrelated to any State activity.

I conclude that Mr. Stouffer cannot prevail on either prong of the "class of one" equal protection test. For the reasons I have already stated, Mr. Stouffer is not similarly situated to the Glossip plaintiffs who await trial in that case.

As for the second prong of the test, Mr. Stouffer has not shown that the State's action in scheduling his execution was without rational basis, specifically, that it was, in the words of the Court of Appeals, irrational and abusive and wholly unrelated to any legitimate State activity.

When the 150-day deferral period expired, Mr. Stouffer was

not in court on a method-of-execution challenge, he had not been in court for several years, all of his direct appeals and collateral review proceedings had long since run their course, and the State had fulfilled the only deferral promise the State had made for his benefit.

The test, as I have said, is an objective test. The shorthand version of the second prong, as articulated by the Court of Appeals in the Kansas Penn Gaming case, is whether there was a "reasonable justification" for the State's action with respect to Mr. Stouffer.

This requires the Court to put itself in the place of the decisionmakers who were tasked with making the momentous decision to seek execution dates and to identify those as to whom a date should be set.

I conclude that the decision to seek an execution date as to Mr. Stouffer was not outside the bounds of rationality established by the Court of Appeals in the Kansas Penn Gaming case.

Accordingly, I conclude that Mr. Stouffer has not demonstrated a likelihood of success on the merits of his "class of one" equal protection claim.

The Promissory Estoppel Claim (Count III)

I will now rule on the Count III promissory estoppel claim.

As Mr. Stouffer correctly points out on page 20 of his

supplemental motion, the starting point for a promissory estoppel claim is the question of whether a "clear and unambiguous promise was made."

That much is clear from the Oklahoma Supreme Court's decision in Russell v. Board of County Commissioners, 952 P.2d 492, with the relevant passage on page 503. That's an Oklahoma Supreme Court decision from 1997.

Mr. Stouffer does not suggest that I look to any federal common law definition of "promissory estoppel," and I am, likewise, content to proceed on the basis of the Oklahoma definition, both because that is the definition cited by Mr. Stouffer and because the Oklahoma definition is straight out of the Restatement, Second of Contracts, Section 90.

In support of his promissory estoppel claim, Mr. Stouffer asserts that he "reasonably relied on the conduct and unequivocal promise of defendants through the Attorney General of Oklahoma that no condemned prisoners would be executed until the Glossip action was completed." That's as set forth in the supplemental motion, Docket Entry Number 39, at page 20.

The record shows no such promise and none was made. The promise, if we can call it that, that was made by the Attorney General in the Glossip case consisted of his acquiescence, to my great relief, in my suggestion that none of those plaintiffs should be set for execution as long as there was anything for him to litigate in this Court. As I have already said today,

that was no small concession by the Attorney General.

There was no reason for the Attorney General to provide any assurance encompassing any prisoners who were not before the Court in the Glossip case. No such assurance was sought and none was given.

Mr. Stouffer has not shown that any promise, let alone a clear and unambiguous promise, was made to him. For that reason, his promissory estoppel claim fails on the first element of the Restatement test, as adopted in the Russell v. Board of County Commissioners decision.

I conclude that Mr. Stouffer has not demonstrated a likelihood of success on the merits of his promissory estoppel claim.

Ruling: The Challenge to the Midazolam Protocol (Count II)

I will now state my ruling on the challenge to the midazolam protocol in Count II.

In his supplemental motion, Mr. Stouffer advances two arguments in support of his contention that he has established a right to preliminary injunctive relief on the basis of Count II, his challenge to the Chart D midazolam protocol.

His first argument, which is expressed in the heading for this section of his supplemental motion, and reiterated on page 17, is that "Stouffer is very likely to, at a minimum, proceed past summary judgment and receive a trial on the merits on his

Eighth Amendment claim for relief alleging the State's three drug cocktail submits him to cruel and unusual punishment." That is from page 15 of the supplemental motion.

His second argument, which focuses on the first prong of the Glossip test and relies on the manner in which the execution of John Grant unfolded, is that the "serious questions" I found to exist when I denied the State's motion for summary judgment in the Glossip case were "answered in Grant's final minutes." That is on page 16 of the supplemental motion.

On this point, Mr. Stouffer contends that execution under the new protocol "would result in Stouffer's execution being carried out in a manner that is predictably cruel and/or unreliable and that will inflict excruciating pain upon him potentially including (but not limited to), as occurred with Grant, body convulsions, vomiting, and choking on his own vomit." That is at page 16 of the supplemental motion.

Returning to the first argument, the existence of fact issues precluding summary judgment in favor of the State with respect to the Chart D protocol does not mean that Mr. Stouffer has shown a likelihood of success on the merits of his challenge to that protocol.

That was made clear on page 14 of the Tenth Circuit's order and judgment in Jones v. Crow, where the Court of Appeals quoted with approval from a Sixth Circuit decision to the

effect that the proof required to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion.

The first argument relying on my denial of summary judgment in the Glossip case is rejected. Plaintiff's entitlement to a preliminary injunction depends on whether he has affirmatively satisfied both prongs of the Glossip test.

The Glossip Test

And I will now address the Glossip test.

The three Supreme Court decisions which control my analysis of plaintiff's method of execution challenge are Baze v. Rees, 553 U.S. 35, a 2008 decision; Glossip v. Gross, which is the case, of course, that I have already referred to more than once, 576 U.S. 86 3, a 2015 decision; and Bucklew v. Precythe, 139 S. Ct 1112, a 2019 decision.

In Bucklew, the Court referred to the test to be applied in a method-of-execution challenge as the Baze-Glossip test. The two overarching elements of that test were concisely described, albeit in reverse order, in Bucklew.

The question is whether the prisoner has "identified a feasible and readily implemented alternative method of execution the State has refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain?" That is in the Bucklew decision at page 1129.

Thus, the prisoner must establish that the State's proposed method of execution prevents a substantial risk of severe pain and he must show that there is a feasible and readily implemented alternative as determined in the framework established by the Baze, Glossip and Bucklew cases.

Thus, on the first prong of the Glossip test, we look at the severity of the pain to which the prisoner may be subjected and to the magnitude of the risk that he actually will be subjected to pain of that severity.

Then, on the second prong, we compare execution by the challenged method with the method the prisoner proffers as a feasible and readily implemented alternative.

The First Prong of the Glossip Test

As the Supreme Court put it in the Glossip decision, "An inmate challenging a protocol bears the burden to show, based on evidence presented to the Court, that there is a substantial risk of severe pain." That is at page 882 of the Glossip decision.

Accordingly, I am required to address whether Mr. Stouffer has shown that execution under Chart D of the Oklahoma protocol would expose him to a substantial risk of severe pain.

I will address that both in light of the evidence as to the execution of John Grant on October 28 and in light of the expert testimony which has been received in this case as to the efficacy of midazolam as the drug administered for the purpose

of rendering the prisoner insensate to pain as the execution proceeds under Chart D.

Severity of the Pain

I'll first address the severity of the pain.

When the Court in Baze discussed the concept of pain so severe that it would be cruel within the meaning of the Eighth Amendment, it noted that "some risk of pain is inherent in any method of execution." That's at page 47 of the Baze decision.

On the next page, the Court spoke of pain so severe that it amounted to a punishment "superadded" to the sentence of death.

I also note that in its order and judgment 11 days ago in Jones v. Crow, the Court of Appeals summarized this aspect of the Glossip test by stating that to "succeed on an Eighth Amendment claim, a prisoner must show that the State has crossed the line by cruelly superadding pain to the death sentence." That's at page 13 of the Order and Judgment quoting from Bucklew.

In Bucklew, the Court illustrated its decision of painfully cruel -- its discussion of painfully cruel executions by discussing execution by hanging, which the Court, on page 1125, described as a "traditionally accepted method of execution."

The Court cited the fact that "many and perhaps most hangings were evidently painful for the condemned person

because they caused death slowly." That's from page 1124 of the Bucklew decision.

Oddly enough, one thing that is not quite clear from the Baze, Glossip and Bucklew line of cases is whether the Court's reckoning of the degree of pain required to qualify as "cruel" within the meaning of the Eighth Amendment is to be reckoned exclusively on a comparative basis, the comparison being with the prisoner's proposed alternative method, or whether, as a threshold matter, the pain to be inflicted under the challenged protocol must be shown to be severe on an absolute scale before the comparison is even triggered.

A little over a year ago, in a statement respecting the denial of certiorari in a case arising from the Ohio Execution Protocol Litigation, Justice Sotomayor, citing Glossip and Bucklew, maintained that those cases make it "clear that the proper inquiry is comparative, not categorical."

At that stage, the case was styled Henness v. DeWine and that statement is at 141 S. Ct. 7, and that was on October 5th of 2020, just a little over a year ago.

Justice Sotomayor's view of the matter may be correct, because the majority in Bucklew placed considerable emphasis on the comparative aspect of the Baze-Glossip analysis.

Nevertheless, the Sixth Circuit's decision in the Ohio case may be instructive in assessing the issue of the severity of the pain to be inflicted by the State's proposed method of

execution, regardless of whether the issue is to be evaluated categorically or comparatively.

The Sixth Circuit decision with which Justice Sotomayor took issue when her colleagues denied certiorari was handed down in December of 2019, with en banc rehearing denied a few weeks after that, all of which was less than a year after the Supreme Court's decision in Bucklew.

The Sixth Circuit, with the benefit of all three of the relevant Supreme Court decisions, noted the discussion in Bucklew of the pain inflicted by hanging and commented that "Despite that risk of pain, despite indeed the near certainty of that pain, hangings have been considered constitutional for as long as the United States have been united. All of this puts Henness's claims about risks of pain in context. Yes, he points to the risks of chest tightness and chest pain. But that pales in comparison to the pain associated with hanging. And yes, he points to the risks of sensations of drowning and suffocation. But that looks a lot like the risks of pain associated with hanging, and indeed may present fewer risks in the typical lethal injection case."

That's from the Sixth Circuit's decision In re Ohio Execution Protocol Litigation, 946 F.3d 287, with the relevant discussion at page 290, and as I have noted with certiori denied in Henness v. DeWine, 141 S. Ct.7.

The Court concluded by saying that, "the fact that

midazolam may not prevent an inmate from experiencing pain is irrelevant to whether the pain the inmate might experience is unconstitutional. Without evidence showing that a person deeply sedated by a 500 milligram dose of midazolam is still sure or very likely to experience an unconstitutionally high level of pain, Henness has not met his burden on this prong, and the district court clearly erred in concluding otherwise." That also is on page 290 of 946 F.3d.

What can safely be said, because the Supreme Court has said it, is that the pain must be severe. I conclude that even if Justice Sotomayor is correct, any determination of the permissibility of the Chart D protocol under the Eighth Amendment should be informed, in part, by the Supreme Court's repeated references to methods of execution which have historically been understood to be cruel and to those which have historically not been so understood.

To be clear, there is no need for me to reach a conclusion as to whether the pain associated with hanging is an Eighth Amendment benchmark, but the Supreme Court's persistent references to historical methods of executions is not irrelevant.

Those references are part of the context, given to us by the Supreme Court, in which I evaluate the efficacy of midazolam generally and, in particular, the implications of the events that unfolded during the execution of John Grant.

Magnitude of the Risk

I'll now address the issue of the magnitude of the risk.

Chief Justice Roberts' opinion for the Court in Baze made it plain that "the Constitution does not demand the avoidance of all risk of pain in carrying out executions." That's from page 47 of the Baze decision.

To the contrary, to establish an Eighth Amendment violation, the risk must be such that it is "sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers." That is from page 50 of the Baze decision.

On that score, the Court noted, by way of example, that "the risks of maladministration" consisting, for instance, of "improper mixing of chemicals and improper setting of IVs by trained and experienced personnel cannot remotely be characterized as objectively intolerable." That's from page 62 of the Baze decision.

Consequently, there is no room for doubt that one of the critical inquiries in a method-of-execution challenge is the assessment of the degree of risk that the prisoner will, in fact, be subjected to the level of pain that he argues is violative of the Eighth Amendment prohibition of cruelty.

I would also note that the Court in Glossip discussed the possibility that midazolam might not have the effect that it ordinarily does have.

The Court's guidance on that point was that "the mere fact that a method of execution might result in some unintended side effects does not amount to an Eighth Amendment violation." That's from page 882 of the Glossip decision at footnote 3.

Glossip First Prong:

Findings With Respect to the Efficacy of Midazolam

Now, on the first Glossip prong, I will make my findings with respect to the efficacy of midazolam.

The record in this case now includes, by way of hard copy exhibits or by way of judicial notice of documents in the record in the Glossip case, the primary documents relied upon by the parties to that case to support and oppose the defendants' motion for summary judgment in that case.

Plaintiff's Exhibit 18 is the response of the Glossip plaintiffs to the motion for summary judgment. Whether it is in the record as a hard copy as Plaintiff's Exhibit 15 or by way of judicial notice, the defendants' motion and the exhibits thereto, Docket Entry Number 388 in the Glossip case, are also in the record in this case.

The materials from the Glossip case, which have been received in evidence in this case by way of hard copies or judicial notice, were sufficient in Glossip to present a fact issue as to the efficacy of midazolam, as used in Chart D.

Those materials advance Mr. Stouffer's cause in this case no farther than they advanced the cause of the plaintiffs in

the Glossip case.

As to the efficacy of midazolam, the live testimony received in the hearing in this case augmented the showing made by the defendants at the summary judgment stage of the Glossip case.

The preponderance of the evidence before me on this motion establishes that a 500-milligram dose of midazolam will reliably render a person unconscious and insensate to pain.

As for the duration of that effect, a clinical dose of midazolam will take effect in 30 to 60 seconds and will wear off in 10 to 15 minutes. A clinical dose will reach its peak effect in 1 to 3 minutes. A massive dose, such as a 500-milligram dose, would take much longer than 10 or 15 minutes to wear off, if the recipient of that dose survives it at all.

Midazolam has been used clinically, including by Dr. Ervin Yen, for general anesthesia. Although Dr. Yen has not recently used midazolam for that purpose, because a patient who has received a dose of midazolam sufficient for general anesthesia will require an exceptionally long time to regain consciousness.

Midazolam is not now considered to be an optimal drug for purposes of general anesthesia, but as we are all well aware, the Baze-Glossip analysis is not a search for an optimal drug.

The first prong of the Glossip test, as applied in this

case, requires the prisoner to demonstrate that the use of midazolam, as specified in Chart D, presents a substantial risk of severe pain. The risk must be shown to be "sure or very likely" to materialize in the form of needless suffering if the drug is used for execution as provided in the new protocol.

Glossip First Prong:

Findings With Respect to the

John Grant Execution on October 28, 2021

I will now address the question of whether the John Grant execution calls into question these general findings as to the efficacy of midazolam.

John Grant was executed on October 28, 2021, less than a month ago. According to Plaintiff's Exhibit 26, at 7:10 that morning, Mr. Grant had eggs for breakfast. He did not eat lunch but had snacks that were in his cell throughout the day. The execution began at or soon after 4:00 p.m., as scheduled.

As to the events that transpired during the execution, I have evidence from three persons, each of whom witnessed the Grant execution.

I have the benefit of sworn declarations from Julie Gardner and Meghan LeFrancois, both of whom are employees of our Federal Public Defender's Office. Those declarations are in the Glossip case as Docket Entries 551-1 and 551-2, and are before the Court in this case, as included in Plaintiff's Exhibit 41.

And I have the benefit of the live testimony of Dr. Ervin Yen who also witnessed the execution of John Grant.

Ms. Gardner and Ms. LeFrancois were apparently seated in the first room behind the window into the execution room. Dr. Yen was seated in a viewing room behind that room, viewing the execution from a vantage point somewhat higher than the vantage point in the first room.

Dr. Yen estimated that he was seated about 15 feet from the window into the execution chamber. Dr. Yen's observations were understandably more clinical and were informed by his background as a board-certified anesthesiologist who has practiced his profession for several decades.

The accounts of these three witnesses as to what they actually saw during the execution are remarkably consistent, at least in terms of those aspects of the execution that are most relevant for present purposes.

For instance, all three witnesses observed Mr. Grant struggling to breathe. Ms. Gardner saw Mr. Grant's chest heaving, which was also described by Dr. Yen.

All three witnesses saw Mr. Grant vomiting, although Dr. Yen characterized that more as regurgitation, as distinguished from vomiting, which I'll touch on here in a moment.

Ms. LeFrancois saw Mr. Grant coughing, as did Dr. Yen, who estimated that Mr. Grant may have coughed as many as 20 times

in 20 or 30 seconds.

Ms. LeFrancois saw Mr. Grant raise his head and open his eyes "maybe right after the drugs started flowing." After a few seconds, she saw Mr. Grant put his head back down and close his eyes.

It is discernible from all three accounts that it is probable that the midazolam was pushed within a minute, and perhaps well under a minute, after the curtain was raised and the death warrant was read.

Aside from any issue as to whether Mr. Grant was or was not insensate to pain by the time he started coughing and vomiting, aside from any issue as to whether the pain, if he felt it, rose to a level amounting to cruelty within the meaning of the Eighth Amendment as applied by the Supreme Court in its three lethal injection cases, and aside from any issue as to whether the Grant execution tells us that midazolam had or has a negative effect that is "sure or very likely to cause serious illness and needless suffering" in Mr. Stouffer's execution, we have the physiological question of the cause of the vomiting and related coughing.

The persuasive testimony, based on Dr. Yen's extensive clinical experience and his personal observation of the Grant execution, is that Mr. Grant lost consciousness soon after the midazolam was pushed. Mr. Grant had difficulty breathing and then stopped breathing.

As the midazolam took effect, he did not have the benefit of interventions which would be normal in a clinical setting, such as an endotracheal tube or a mask to maintain respiration.

As Dr. Yen put it, Mr. Grant was "attempting to breathe." Mr. Grant's stomach would rise as his chest went down, which Dr. Yen said is commonly called a "rocking boat" motion caused by his effort to breathe.

The rocking boat motion, which is likely what Ms. Gardner called "heaving," was not a convulsion or seizure. I repeat, not a convulsion or seizure. Dr. Yen is unaware of any instance in which midazolam has caused convulsions.

Mr. Grant's respiratory distress, vomiting and coughing occurred while he was unconscious and, at least in substantial part, because he was unconscious with stomach contents obviously flowing to his mouth.

As Dr. Yen put it, if Mr. Grant had been conscious, he "would just open his airway and breathe."

As described by Dr. Antognini, responses such as vomiting, snoring and coughing can occur in an anesthetized person. Anesthesia causes the relaxing of control of the gastroesophageal junction which permits stomach contents, if they are present in an appreciable quantity, to move toward the head of a person lying supine, with the resultant potential for aspiration into the airway.

After the coughing stopped, Dr. Yen saw what he described

as "clearish" secretions come from Mr. Grant's mouth, followed by vomitus, which was amber in color. This was relatively passive regurgitation, as distinguished from the stronger reflex of vomiting.

Due to Mr. Grant's unconsciousness, he had limited ability to clear fluids from his throat. Regurgitation can and does happen in anesthetized persons lying supine with substances in their stomach.

At approximately 4:15, Mr. Grant turned his head slightly and his left shoulder raised up slightly. These did not appear to Dr. Yen to be voluntary movements and were consistent with movement commonly seen in anesthetized patients.

On the basis of his observations, informed by his education and professional experience, Dr. Yen is of the opinion that Mr. Grant was unconscious and insensate to pain very soon after the midazolam was pushed and was dead before the second drug was pushed.

I find that Mr. Stouffer has not established that midazolam cannot be relied upon to perform as intended as the first drug pushed under Chart D.

The John Grant execution does not call into question the efficacy of midazolam as the first drug in the three-drug sequence.

Moreover, assuming that, contrary to the findings I have made, Mr. Grant was conscious during the episode of coughing

and regurgitation, I find that this brief episode did not subject him to a level of pain and suffering necessary to amount to severe, cruelly superadded pain within the meaning of the Supreme Court's lethal injection cases.

There is, likewise, no basis in this record for the Court to conclude that the physical responses observed in Mr. Grant during his execution are "sure or very likely" to be experienced by Mr. Stouffer when he is executed.

I conclude that Mr. Stouffer has not demonstrated a likelihood of success on the first prong of the Glossip test.

Glossip Second Prong:

Feasible and Readily Implemented

Alternative Method of Execution

I will now address the second prong of the Glossip test.

As to the second prong of the Glossip test, Mr. Stouffer argues, once again, that because "the Court found that serious questions of fact precluded granting summary judgment as to each of the four alternative methods of execution in Glossip," he should "be allowed to proceed to trial or adopt the ultimate results of the Glossip action as to all overlapping claims." That's on page 17 of the supplemental motion.

As I have already noted, this argument misconceives the standard to be applied to a motion for a preliminary injunction.

Mr. Stouffer's burden in this hearing was to establish a

likelihood of success on the merits on the question of the availability of a feasible and readily implemented alternative method of execution which the State has refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain.

As for the comparison of the risk of pain, the Court in Bucklew told us that a "minor reduction in risk is insufficient; the difference must be clear and considerable." That's from page 1130 of the Bucklew decision.

The Glossip summary judgment materials that are in this record, as relevant to the second prong of the Glossip test, do not, in this case, go farther than to remind the Court that there is a fact issue in the Glossip case as to the second prong.

As the Court of Appeals made plain in the Jones v. Crow decision, there is a vast difference between a showing that there is an issue of fact and a showing that there is a likelihood of success on the merits.

At the hearing, Mr. Stouffer presented no evidence in support of his proposed alternative methods of execution. In the words of the Supreme Court, the proposed alternative must be shown to be "feasible and readily implemented."

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." That's

from page 1129 of the Bucklew decision.

As I have already found, the evidence on the first prong of the Glossip test is insufficient to trigger the comparison called for by the second prong. But there is, in any event, an absence of evidence to enable Mr. Stouffer to clear the bar on the second prong.

Mr. Stouffer has not demonstrated a likelihood of success on the merits with respect to either the first prong or the second prong of the Glossip test.

Consequently, I conclude that Mr. Stouffer has not demonstrated a likelihood of success on the merits of the Count II challenge to the Chart D midazolam protocol.

Ruling: The Human Experimentation Claim (Count X)

I will now rule on the Count X, the human experimentation claim.

The human experimentation theory was rejected by the Court of Appeals at an earlier stage of the Glossip case in Warner v. Gross, 776 F.3d 721, with the relevant discussion at page 736. And as we're all well aware, that was the Tenth Circuit's decision in early 2015.

That theory was revived, somewhat, after I entered my August 11th order in Glossip, because of my comments in that order about the potential evidentiary value of executions which might occur before the February 2022 trial in that case.

But the human experimentation theory was laid to rest,

again, by the Court of Appeals at pages 21 through 24 of its order and judgment 11 days ago in Jones v. Crow.

I conclude that Mr. Stouffer has not demonstrated a likelihood of success on the merits of his Count X human experimentation claim.

Ruling: The Remaining Preliminary Injunction Factors

I will now address the remaining preliminary injunction factors.

It was made explicit in the Tenth Circuit's decisions in January 2015 in Warner v. Gross, and 11 days ago in Jones v. Crow that, in a case like this, the gateway to consideration of the issues of irreparable harm, the balancing of the equities and the public interest, is a showing that the party seeking the preliminary injunction is likely to succeed on the merits of his claim.

Even though the issue for Mr. Stouffer in this case is not whether, but how, he will be executed, a finding in his favor on the remaining three factors would flow virtually as a matter of course from a finding in his favor on the likelihood of success on the merits. But because Mr. Stouffer has not demonstrated that he is likely to succeed on the merits, I conclude, using the words of the Court of Appeals on page 24 of the order and judgment in Jones v. Crow, that "it is unnecessary to address the remaining requirements for a preliminary injunction."

Conclusion

In conclusion, for the reasons I have stated, the motion of Plaintiff Bigler Jobe Stouffer for a preliminary injunction is denied.

Counsel, you may expect a transcript of this hearing to be available as soon as reasonably possible.

As I mentioned at the close of the hearing yesterday, for the benefit of counsel and a reviewing court, I am going to give the reporter some headings to insert into the transcript of my ruling.

If you'll please stand by for just a moment.

That does conclude my ruling on the motion and supplemental motion for preliminary injunction.

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 24th day of November 2021.

/S/ Tracy Thompson

Tracy Thompson, RDR, CRR
Federal Official Court Reporter