IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN, *et al.*	)	
	)	
Plaintiffs-Appellants,	)	No. M2018-01385-SC-RDO-CV
	)	Davidson County Chancery Court
v.	)	No. 18-183-III
	)	
TONY PARKER, *et al.*	)	**Execution date:**
	)	**David Miller - December 6, 2018**
Defendants-Appellees.	)	
	)	
This document relates to:	)	
David Earl Miller, Larry McKay,	)	
Nicholas Sutton, Stephen M. West	)	

ON APPEAL PURSUANT TO TENN. CODE ANN. § 16-3-201(d)(3)
FROM THE JUDGMENT OF THE CHANCERY COURT

BRIEF OF PLAINTIFFS-APPELLANTS

DANA C. HANSEN CHAVIS
Asst. Federal Community Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
Telephone: (865) 637-7979
Facsimile: (865) 637-7999
BPR No. 019098

Counsel for Plaintiffs Miller, McKay, Sutton and West

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JURISDICTIONAL STATEMENT

Thirty-three death row inmates, including Plaintiffs herein, filed a declaratory judgment action in the Davidson County Chancery Court, challenging the constitutionality of Tennessee's new January 8, 2018 execution protocol. (R. I, 1).[1]

On July 26, 2018, the Chancery Court entered a final order (R. XVI, 2229) dismissing Plaintiffs' Second Amended Complaint for Declaratory Judgment (July 3, 2018) (R. XI, 1416). On July 30, 2018, 29 of the 33 Plaintiffs (not the Plaintiffs herein) filed a notice of appeal in the Tennessee Court of Appeals. (R. XVI, 2280).

On August 13, 2018, this Court entered an order assuming jurisdiction over the case pursuant to Tenn. Code Ann. §16-3-201(d)(3).

On August 23, 2018, Plaintiffs herein, the Miller Plaintiffs, timely filed a notice of appeal, and on August 27, 2018, the Court designated Plaintiffs as "Appellants."

STATEMENT OF THE ISSUES

I. The Chancery Court relied on fact-based findings from other cases—not the facts developed below—when it addressed *Glossip*'s first prong, and thereby violated Plaintiffs' right to due process of law.

II. Plaintiffs were denied notice and an opportunity to be heard on *Glossip*'s second prong: an alternative method of execution that significantly reduces the risk of pain and suffering.

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[1] Citations to the record herein are indicated by "R." for the technical record; "Tr." for the transcript of the proceedings followed by the volume and page number. Trial Exhibits are indicated by a description if necessary, followed by "Exh. Vol." and page number.

INCORPORATION OF ISSUES

Counsel for the 28 Other Plaintiffs are, on this same date, separately filing a brief that undersigned counsel anticipates will raise issues different from those asserted here. Due to the "compressed super-expedited"[2] briefing schedule, the Miller Plaintiffs primarily raise in this brief due process violations because those errors undermine the integrity of the entire proceeding below. Undersigned counsel acknowledges the rule on waiver that usually applies when an issue is not fully briefed on appeal, however, counsel does not have the time or resources to brief all significant errors which occurred in the proceedings below and are reflected in the Chancery Court's final order. The Miller Plaintiffs assert that any application of a waiver rule—given the unique circumstances of this case—would constitute a separate violation of due process and/or equal protection. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands[,]" *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)), and the Miller Plaintiffs do not waive any right to relief contained in the Other Plaintiffs' brief.

STATEMENT OF THE CASE

This appellate brief arrives at the Court ten days after the record on appeal was filed and eight days after Plaintiffs were designated as "Appellants" in

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[2] *Abdur'Rahman, et. al. v. Parker, et.al*, No. M2018-01385-SC-RDO-CV, dissent from order dated August 27, 2018, p.1. Undersigned counsel has had, at most, ten days to review the record that includes ten days of trial during which 23 witnesses testified and 139 exhibits were filed, and to research, prepare and file this brief.

compliance with the ten-day deadline issued on August 13, 2018. Undersigned counsel can confidently predict that this document contains typographical and grammatical errors and it may not contain all relevant facts, legal authority, record cites, nor exhaustive analysis. In addition, there has not been time to address and correct errors in transcriptions of the record below.[3]

On January 8, 2018, Defendant Tony Parker, the Commissioner of the Tennessee Department of Correction, issued a new execution protocol. (R. I, 95). Among other changes, this new protocol (hereinafter "the January 8th Protocol") contained two options for carrying out a lethal injection. The first, Protocol A, was materially identical to the one-drug pentobarbital protocol contained in Tennessee's prior protocol. The second, Protocol B, was a new three-drug protocol utilizing midazolam, vecuronium bromide, and potassium chloride. (R. II, 151). Three days later, Tennessee's Attorney General filed "Notices" in this Court in the cases of a number of Tennessee death row inmates, including Plaintiffs Miller, Sutton and West.

This Court scheduled Plaintiff David Earl Miller's execution date for December 6, 2018.

On February 20, 2018, after exhausting available administrative remedies, Plaintiffs Miller, Sutton, West, and McKay, with 29 other Tennessee death row

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[3] Errors include and are not limited to the following: the word "anxiolytic" is transcribed as "amnestic;" the word "amnestic" is transcribed as "anesthetic." Other transcription errors change the substance of testimony. *See, e.g.*, Tr. XLII, 1795 ("It was a very firm decision that because there was no memory created does [sic- doesn't] mean that the suffering was not occurring.").

inmates (hereinafter "Other Plaintiffs") filed a Complaint for Declaratory Judgment in the Davidson County Chancery Court, Case No. 18-183-III. (R. I, 1). The complaint alleged, *inter alia*, new Protocol B (three-drug midazolam protocol) violates the Eighth and Fourteenth Amendments to the United States Constitution and Tenn. Const. art. I, § 6, 8. To satisfy the requirements of *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017) and *Glossip v. Gross*, 135 S. Ct. 2726 (2015), Plaintiffs pled that Protocol A (one-drug pentobarbital protocol) had been upheld as constitutional by this Court and was a "known and available alternative method of execution." (R. I, 51-52). Plaintiffs also alleged the paralytic drug vecuronium bromide was unnecessary to cause their death and that its use inflicted severe and unnecessary pain. (R. I, 37-40). Defendants neither admitted nor denied these allegations, but rather, on March 29, 2018 filed a Motion to Dismiss. (R. II, 209).

On April 11, 2018, the Chancery Court held a scheduling conference. At that hearing, the court observed that the availability of pentobarbital was information uniquely possessed by Defendants. The court remarked that Plaintiffs needed to know that information in order to meet their burden under *Glossip*'s second prong. The court asked Defendants whether Protocol A (i.e., pentobarbital) would be available to carry out the August 9th execution of former Plaintiff Billy Ray Irick. Defendants repeatedly refused to answer. (Tr. XX, 20-21, 25).

On April 13, 2018, Plaintiffs filed an Amended Complaint alleging in greater detail the factual basis for the allegation that Protocol A constitutes a known and available method of execution that significantly reduces the substantial risk of

serious pain and suffering posed by Protocol B. (R. III, 293, 343-47).

On May 7, 2018, the Chancery Court ordered Defendants to produce documents related to "[Defendants'] knowledge of the availability as of August 2018, of the drugs needed to implement Protocol A for the execution scheduled for that time[.]" (R. V, 628).

On May 21, 2018, Defendants moved for a protective order to prevent the depositions of Defendants Parker and Mays. The motion argued Defendants were unavailable, their testimony was irrelevant to a facial challenge, and they are government officials not subject to deposition. (R. V, 661). Affidavits from both Defendants set out their unavailability. (R. V, 668, 671). Defendant Parker's affidavit also stated he approved the new January 8th Protocol because "the drug in TDOC's previous procedures, are unavailable to TDOC for the purpose of carrying out executions by lethal injection." (R. V, 670). Parker did not explain why the new protocol retained the one-drug pentobarbital protocol as the primary option. He did not address the court's inquiry about availability for the upcoming executions.

At a hearing that same day, the court inquired about Parker's affidavit. (R. V, 704j-704k). When the court asked Defendants which drugs would be used in the upcoming August execution, Defendants refused to answer. (Tr. XXII, 22; R. V, 704bb). The court observed Plaintiffs were unable to know whether they should plead additional alternatives.

> THE COURT: [W]e have about five different logics going here depending on which drug is available. If both are available, that takes us to certain legal claims. If one is available, that takes us another route. So we need to get some clarity on that.

. . .

> THE COURT: It's your position, if I get clarity, that Protocol 1 is no longer an alternative that you would seek to amend. So summary judgment would be futile or should be delayed, because you would seek to amend.

(Tr. XXII, 20-21).

On May 24, 2018, the court ordered order that the depositions take place.

On June 13, 2018, the Chancery Court entered an order eliminating summary judgment procedures in the case. The court reasoned:

> The record establishes, however, that the facts and events in this case are not set or static; they are ongoing and developing, making it difficult to discern whether there are genuine issues of material fact. That is because (1) the availability of drugs for the State's lethal injection protocol is constantly in flux and (2) the available quantities also vary such that the facts are not static for the different dates of execution of the various Plaintiffs.

(R. VI, 743-44).

On the same day, the Chancery Court denied Plaintiffs' motion to compel the deposition testimony of the only person with personal knowledge of the availability of pentobarbital. (R. VI, 739; *see also* R. XIII, 1752-53; motion at Sealed R. Vol. 1, 107).

On June 28, 2018, Plaintiffs sought to file a second amended complaint (R. X, 1275) that raised: claims based upon newly disclosed information that any lethal injection drug used for Plaintiffs' executions would be compounded (R. X, 1284-90, 1297-1319);[4] the disparate impact of Protocol B on Plaintiffs with execution dates

[4] The only compounded drug in the January 8th Protocol, on its face, is pentobarbital.

based on their individual characteristics (R. X, 1290-97); and, a lack of due process based on Defendants' ongoing refusal to state whether they would possess pentobarbital at the time of the scheduled executions, and which lethal injection option—Protocol A or Protocol B—would be used to carry-out the executions (R. X, 1336-39). The motion was granted in part and denied it in part (R. X, 1353) and Plaintiffs then filed their second amended complaint on July 3, 2018 (R. XI, 1416).

On July 5, 2018, at 1:06 p.m.—the day Plaintiffs' trial brief was due and four calendar days before trial—Defendants filed notice of a new execution protocol (hereinafter "July 5th Protocol"). The July 5th Protocol deleted Protocol A (one-drug pentobarbital protocol), retained as the sole method of execution Protocol B (three-drug midazolam protocol), and made other changes. (*See* R. XII, 1589). Seven hours later, Plaintiffs filed their trial brief. The brief informed the court and Defendants of Plaintiffs' intent to present evidence of other alternative methods of execution, including the removal of vecuronium bromide from the three-drug midazolam protocol. (R. XIII, 1712, 1747).

The trial began on July 9, 2018. The Miller Plaintiffs gave oral notice to the court and all parties that issuance of the new July 5, 2018 Protocol gave rise to new causes of action upon which they were entitled to due process. Because the issue was capable of repetition but evading review, the Miller Plaintiffs agreed the court could go forward and determine whether Protocol B (three-drug midazolam protocol) inflicts unnecessary pain and suffering. (Tr. XXIV, 32-39).

The Chancery Court received testimony from 23 witnesses and 139 exhibits

on July 9-13, 16-18, July 23-24.

At the conclusion of Plaintiffs' direct case, they orally moved to amend their second amended complaint to conform to the evidence. In particular, to expressly designate a two-drug protocol (the three-drug protocol minus vecuronium bromide) as a feasible, readily available alternative method of execution that significantly reduces the substantial risk of severe pain caused by the three-drug midazolam protocol. (Tr. XLIII, 1929). The court denied the oral motion on the record and entered a written order on July 19, 2018.

The written order also *sua sponte*—and without the Miller Plaintiffs' consent—held that Defendants' issuance and filing of a new execution protocol on July 5th had amended Plaintiffs' complaint. (R. XIII, 1736 & n.13; Tr. XXIV, 32-39; R. XV, 2141). The order declared: "the proof at trial that the protocol in issue and on which declaratory judgment is sought is the [new July 5th Protocol]." (R. XV, 2139).

The next day, the Miller Plaintiffs sought reconsideration of that order. (R. XV, 2141). They argued, like at the start of trial, they were entitled to due process to challenge the July 5th Protocol, including the opportunity to allege additional alternatives. (R. XV, 2145, 2148-49 n.7). Their motion was denied. (R. XVI, 2216).

On July 26, 2018, the court dismissed the complaint (R. XVI, 2229). On the core Eighth Amendment cause of action (Count I), the court held:

> The Inmates who filed this lawsuit have failed to prove the essential element required that there exists an available alternative. On this basis alone, by United States law, this lawsuit must be dismissed.[5]

[5] Counts V and VIII were dismissed for the same reasons. (R. XVI, 2264, 2274).

(R. XVI, 2232; *see also* R. XVI, 2239, 2250, 2264).

On July 30, 2018, the 29 Other Plaintiffs filed their notice of appeal.

On August 13, 2018, this Court, over one dissent, assumed jurisdiction of the case and set forth an expedited schedule for the appeal.

On August 23, 2018, the Miller Plaintiffs filed their notice of appeal, and motions to designate them as "Appellants" and to bifurcate their appeal from the Other Plaintiffs and allow the Miller Plaintiffs time for a meaningful appeal.

On August 27, 2018, the Court, over one dissent, denied the bifurcation request and directed the Miller Plaintiffs to follow the existing briefing schedule.

STATEMENT OF THE FACTS

Plaintiffs proposed the one-drug pentobarbital option in Tennessee's execution protocol as the alternative to the three-drug option and Defendants indicated they may possess pentobarbital for the scheduled executions.

At a hearing two months after the Plaintiffs alleged Protocol A (one-drug pentobarbital protocol) as an alternative method of execution, the Chancery Court asked Defendants to state their position on whether Protocol A was available. (Tr. XX, 20). Rather than answer the question, Defendants replied:

> Well, I think what we have told the Tennessee Supreme Court in the motions to set execution dates that there has been difficulty obtaining the drugs for Protocol A.

(Tr. XX, 20).

The court noted the inadequacy of Defendants' answer. It explained that Defendants' answer put the trial court and Plaintiffs in an untenable position. (Tr. XX, 20). Defendants claimed it was "somewhat premature" to answer the court's

question. (Tr. XX, 20). The court disagreed:

> It's not premature because we have an August execution date. We need to know whether it will be available for that execution for the plaintiffs to be able to fulfill the condition of *Glossip* and for you to be able to argue to me they have not fulfilled their position under *Glossip*. So we need to know that. That is essential for the case . . . or these proceedings are just futile and useless if we don't know that.

(Tr. XX, 20-21).

Again Defendants evaded the court's question. The court directly asked:

> That wasn't my question. August 9th, or even before that, so we have notice what's going to be used. What will be used for the August 9th--will it be available for the August 9th execution? That's the question.
>
> MR. SUTHERLAND: I can't answer that question, Your Honor. I mean-
>
> THE COURT: Well, if you can't answer it then our proceedings here are really meaningless. We've got to have the answer to that because then they can't allege--know what alternative to allege.

(Tr. XX, 21).

The court warned Defendants their recalcitrance would require extensive and time-consuming discovery so Plaintiffs could get that answer from other sources.

(Tr. XX, 24). When it attempted to infer notice from the hedged answers, Defendants rebuffed the court:

> MR. SUTHERLAND: I think that what we can say is what we told the Tennessee Supreme Court and that is because we did not have--we don't have--did not have and don't have and have had no reasonable--there's been no reasonable expectation of obtaining anything to perform Protocol A, that that's why Protocol B was added to the procedures.
>
> THE COURT: And the Court would characterize that as constituting a statement that A is unavailable. So okay. That's--that informs me about your position and whether this is pleading or substantive will help me to plan.

> MR. SUTHERLAND: I guess what I would say just to follow up is I hate to sound evasive but the Department certainly has a duty to carry out its statutory mandate and has been attempting to do that. Because for all the reasons stated in the *Glossip* decision, because anti-death penalty opponents have made it very difficult for states to obtain lethal injection chemicals, we've had to amend, adopt another protocol.
>
> Certainly, if Protocol A were--the Department has not been able to identify a source to accomplish Protocol A and that was the reason why Protocol B was adopted. Now, that doesn't mean at some day in the future. I'm just saying at this point there's no reasonable expectation that --
>
> THE COURT: You used the word "evasive". I'll use, I guess, something from literature, a Catch 22. It makes it almost impossible to have a meaningful determination of what's before the Court --
>
> MR. SUTHERLAND: I understand, Your Honor.
>
> THE COURT: --with the answer that you've given. And this Court is going to find a way that we can address that because this process needs to be meaningful.
>
> MR. SUTHERLAND: Yes, ma'am.
>
> THE COURT: And it needs to be done correctly.
>
> MR. SUTHERLAND: Yes, ma'am.
>
> THE COURT: And we know what *Glossip* tells us and the answer that I have been given does not enable you, me, or the other side to do what we need to do in this case. And so I'm going to study that and I'm going to figure out a way to handle that. There is no way that we can proceed in this matter without grappling with that and determining what to do.

(Tr. XX, 25-27) (emphasis added).

Six weeks later, on May 21, 2018, Defendants continued to imply they might obtain pentobarbital for the scheduled executions. The court asked hearing whether Defendants would use Protocol A (Plaintiffs' proposed alternative) or Protocol B (the three-drug midazolam protocol challenged here) to carry out former Plaintiff Irick's

execution. Defendants refused to state which option would be used.

> THE COURT: Let me ask you. What is the State's position on the drug that's going to be used on August 9th? That's what I need to know.
>
> MR. SUTHERLAND: We continue to look for a source of both drugs. And we anticipate having some drug on August the 9th.
>
> THE COURT: So if that's the position that you're going to continue--if you're going to continue to pursue the alternative, then that keeps in all of our claims here due process *et cetera*. So that answers my question. The State is still proceeding under its protocol that it can use one or the other.

(Tr. XX, 22) (emphasis added). The court observed Plaintiffs were unable to know whether they should plead additional alternatives.

> THE COURT: [W]e have about five different logics going here depending on which drug is available. If both are available, that takes us to certain legal claims. If one is available, that takes us another route. So we need to get some clarity on that.
>
> . . .
>
> COURT: It's your position, if I get clarity, that Protocol 1 is no longer an alternative that you would seek to amend. So summary judgment would be futile or should be delayed, because you would seek to amend.

(Tr. XXII, 20-21).

On June 13, 2018, the court explained why it eliminated summary judgment procedures:

> The record establishes, however, that the facts and events in this case are not set or static; they are ongoing and developing, making it difficult to discern whether there are genuine issues of material fact. That is because (1) the availability of drugs for the State's lethal injection protocol is constantly in flux and (2) the available quantities also vary such that the facts are not static for the different dates of execution of the various Plaintiffs.

(R. VI, 743-744).

Plaintiffs were unaware of Defendants' decision on whether they would

possess pentobarbital for the scheduled executions until four calendar days before trial. On July 5th, Defendants issued a new execution protocol (hereinafter July 5th Protocol) which removed the pentobarbital protocol, Protocol A. The three-drug midazolam protocol (former Protocol B) is the sole method.

Defendant's documents and other facts show the availability of pentobarbital.

Defendants' records demonstrate the availability of pentobarbital and/or that Defendants' could have obtained pentobarbital for Plaintiff Miller's execution. It begins with page 36 of Plaintiffs' Exhibit 105, part of the handwritten notes of the person—designated by Defendants and the court as Defendants' "drug procurer" or "staffer" for confidentiality purposes. (Exh. Vol. 11, 1503). The drug procurer searched for pentobarbital after this Court issued its decision upholding Tennessee's one-drug protocol in March of 2017. The note states the exact amount of pentobarbital required for one Tennessee execution, ten grams. An arrow is drawn to the cost for that amount, the sum of $24,000. Below that, the amount charged by the unknown compounding pharmacist to compound pentobarbital is $3,500. Next in the note is a redaction where the amount of pentobarbital which could be purchased at one time should have appeared. Further on, the time until the pentobarbital was available is also redacted. Finally, discrediting the self-serving portions of the PowerPoint presentation that was created several months later, is the statement that pentobarbital is available at bulk pricing.

The Chancery Court did not accept the plain language of the notes.[6] On page 38 of Exhibit 105, the drug procurer lists a (redacted) source of pentobarbital. (Exh. Vol. 11, 1505). On Page 39, the drug procurer indicates a source of pentobarbital could ship the drug on March 1st. After April 5, 2017, the date on which the drug procurer set out to "show [pentobarbital was] unavailable" (Exh. Vol. 10, 1486), he learned of ways to obtain pentobarbital. It could be obtained from veterinarians because the drug is widely used for animal euthanasia. The drug procurer received instructions how to accomplish this (the instructions are redacted).

The PowerPoint created by the drug procurer for presentation to higher-ranked officials also reveals the availability of pentobarbital. Not all pharmacies contacted to sell pentobarbital. (Tr. XXXVII, 1346-47). One-third of drug suppliers contacted were willing to supply it. (Tr. XXXVII, 1349) (witness without personal knowledge agrees the information is accurate but offers a contrary interpretation). Pentobarbital could be obtained if Defendants applied for licensing. (Tr. XXXVII, 1350-51). The documents were accepted for the truth. (Tr. XXXVII, 1334-35).

Plaintiffs presented other evidence establishing: (1) Defendants have a physician willing to write a prescription for pentobarbital; (2) Defendants have a pharmacy and pharmacist at the DeBerry Special Needs (adjacent to Riverbend) with the proper licensing to obtain pentobarbital; (3) Defendants have two contracts

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[6] The court gave weight to testimony from two witnesses without personal knowledge of the availability of pentobarbital that they would use the execution option of Protocol A if they possessed pentobarbital. This testimony, however, can be credited along with the drug procurer's documents. They are not mutually exclusive.

with two different compounding pharmacists to compound pentobarbital for executions; (4) other States have sources of pentobarbital and conduct executions using pentobarbital; and (5) Defendants retained the one-drug pentobarbital method in Tennessee's January 8, 2018 protocol.[7]

Scientific evidence of pain and suffering under Protocol B credited by the Chancery Court.

About four months before Defendants issued the new three-drug midazolam protocol they were warned by their drug supplier of her concern about midazolam:

> Here is my concern with Midazolam. Being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium chloride especially. It may not be a huge concern but can open the door to some scrutiny on your end. Consider the sue of an alternative like Ketamine or use in conjunction with an opioid.

(Exh. 114, Exh. Vol. 11, 1628).

The email was written to a person whom Plaintiffs were prevented from deposing. (R. V, 629). The email was read by, and its contents are imputed to, the Defendants. (Tr. XL, 1625-26). Defendants did not act with reasonable care on the drug suppliers' warning. Defendant Parker consulted with a corrections official from another sate that uses a three-drug execution protocol and learned it worked well, "for the most part[.]" (Tr. XXXVI, 1232). Defendants ignored their drug supplier's recommendation to consider an alternative drug, rather than midazolam, or to use midazolam in conjunction with an opioid that will prevent feeling pain.

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[7] Until the eve of trial, Defendants refused to state whether or not they would possess pentobarbital for the upcoming executions. They did not provide formal notice until July 23, 2018, the final day of proof at the hearing below, and then only Plaintiff Irick received notice.

The Chancery Court credited the testimony of Plaintiffs' expert witnesses over those presented by Defendants. *Compare* R. XVI, 2251 ("The Inmates presented the testimony of four well-qualified and [e]minent experts"); *with id.* at n.7 ("The Defendants' two experts, while qualified, did not have the research knowledge and [e]minent publications that Plaintiffs' experts did.")

The first drug in Protocol B, midazolam, is incapable of inducing anesthesia, regardless of dose. Midazolam is an anxiolytic benzodiazepine that produces sedation by assisting GABA in activating what are known as GABA receptors. The most relaxed state midazolam is capable of producing in a person is deep sedation (or deep sleep). People in a state of deep sedation still feel pain. (Tr. XXIV, 84-86). Midazolam has no analgesic or pain-relieving properties. (Tr. XLVI, 2148-54).

When activated, GABA receptors have an inhibitory effect on neurons. At the same time, other receptors have an excitatory effect on the same neurons. How the neuron summates these conflicting impulses determines whether the neuron will be in an excited or an inhibited state. (Tr. XXIV, 92-93). At a molecular level, midazolam, if combined with GABA, causes chloride channels in the GABA receptor to open and close more rapidly. When open, chloride ions flow through the channels, inhibiting the activity of neurons. When closed, chloride ions do not flow and no inhibition of neural activity occurs. In this regard, midazolam differs from barbiturate drugs, which also affect GABA receptors. Barbiturates hold the chloride channel open, allowing chloride ions to flow through freely. Because of the different mechanisms of action, midazolam can never inhibit neural activity as completely as

barbiturates.[8] (Tr. XXIV, 106-07).

Midazolam for injection must have a pH of 3 to stay in solution. In comparison, the normal pH of blood is approximately 7.4; the pH of hydrochloric acid is 1. Injectable midazolam, therefore, is acidic. Protocol B requires the injection of a large volume—500 ml—of midazolam which cannot be immediately buffered by blood. The solution will be acidic when it reaches an inmates' lungs, scouring the lung tissue and causing small amounts of fluid to enter with every heartbeat. As an inmate lays strapped to the gurney with a system of restraints preventing all but the slightest movements, fluid will accumulate in his lungs, producing a sensation similar to drowning or suffocation. The more fluid accumulates the harder the lungs have to work and breathing becomes difficult and labored.

The three-drug protocol directs the warden to wait two minutes after the second syringe of midazolam is injected. (R. XII, 1657). The warden then performs what is described as an assessment of consciousness. The gesture will be meaningless for two reasons. First, midazolam will not prevent an inmate from feeling serious pain. Midazolam can only produce a state of deep sedation (or deep sleep) and persons in this state can feel pain. Second, the check for consciousness does not assess whether an inmate will be able to feel the pain of vecuronium bromide and potassium chloride. Both drugs produce pain in excess of the stimulus applied by the Warden.

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[8] Tennessee's previous three-drug protocol used a barbiturate, sodium thiopental. The return to a three-drug protocol without an anesthetic drug marks a devolution of standards.

Accumulation of fluid in the lungs will cause an inmate to fight harder to breathe. He may hack and cough to try to clear the fluid. He may move. He may try to rise up against the restraints. He may express tears.[9] After the "consciousness check," executioners will administer vecuronium bromide, a paralytic drug. As it reaches their lungs, inmates will eventually be unable to breath, unable to cry out, unable to move. They will feel as though they have been buried alive. Under the protocol, this pain and suffering continues for minutes, not seconds.

After two syringes of vecuronium bromide and one syringe of saline are administered the executioners will push a massive volume of highly concentrated solution of potassium chloride into the inmate's veins. The inmate will feel as if he is being burnt alive. The pain will continue as the potassium chloride courses through the veins, reaches the heart, and induces cardiac arrest. The inmate will feel the pain of a heart attack as the potassium chloride depolarizes the muscles of the heart. The Chancery Court found that after an average of almost 14 minutes and as long as 18 minutes, the inmate will be declared dead. (R. XVI, 2255).[10]

Plaintiffs' proposed two-drug alternative significantly reduces the substantial risk of serious pain from the three-drug midazolam protocol.

Removing vecuronium from the three-drug protocol will significantly reduce the substantial risk of serious pain inherent in three-drug protocol. Dr. Stevens, testified about two ways vecuronium bromide increases pain and suffering.

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[9] Plaintiffs also introduced eyewitness testimony about the physical responses of inmates executed under a midazolam protocol.

[10] Plaintiffs introduced timeliness of midazolam executions carried out in other states.

First, he described how people administered a paralytic reported feeling like they were dead; a feeling he described as "horrific." (Tr. XXV, 156). This horror will increase excitation of neurons in the brain, making the already ineffective midazolam even more ineffective. (Tr. XXV, 156-57, 161) ("[W]hen the vecuronium is then given, ... the paralysis, the fear, suffocation ... will cause increased excitation ... causing less sedation as midazolam could provide."). Vecuronium bromide does not cause death under the protocol; potassium chloride does. (Tr. XXV, 159-60 ("[P]otassium chloride that is the final and critical drug that causes death.").

> Q: From a pharmacological perspective and to a reasonable degree of scientific certainty, will vecuronium bromide do anything to expedite the inmate's death or make it less painful?
>
> A: No, it wouldn't.
>
> Q: From a pharmacological perspective and to a reasonable degree of scientific certainty, would a two-drug protocol involving just midazolam and potassium chloride, but removing the three-minute interlude with vecuronium, be less painful and cause less suffering than the present three-drug protocol?
>
> A: It would in the sense of death comes sooner.

(Tr. XXV, 163).

Dr. Greenblatt, testified vecuronium bromide is a "neuromuscular junction blocking agent" and described the pain caused by its use as "basically, you're suffocating and you want to breathe, but you can't because you can't work you muscles." (Tr. XXVIII, 507, 510-11). The use of vecuronium does not hasten death and he does not "see any benefit" in its use. (Tr. XXVIII, 542-43).

Likewise, Dr. Lubarsky, testified vecuronium bromide does nothing to protect

an inmate from pain and actually increases the risk the inmate will feel pain. (Tr. XLII, 1821). He confirmed Dr. Stevens' opinion that the pain and suffering caused by vecuronium bromide will stimulate excitatory neurons. It will initiate the fight or flight response and a surge of adrenaline and overcome the already inadequate effects of midazolam. (Tr. XLII, 1775). He described the pain:

> A: Basically, it's like burying someone alive. They lose the ability to communicate their distress. They lose the ability to breath. They still have the air hunger. It's as if you're basically locked in a box and someone now has basically covered your mouth and you can't take a breath and your lungs and your brain are screaming.
>
> I try to think of how to describe this, but I can only harken back to what I most remember, the first time I remember being dunked under water for too long and how terrifying and how desperate we were to reach the surface. I'm sure everybody remembers that. I remember that. And that's two seconds, not minutes.

(Tr. XLII, 1774).

Defendant Parker admitted vecuronium bromide is unnecessary to carry out executions and he can easily remove it from Tennessee's lethal injection protocol.[11] (Tr. XXXVII, 1315-16).

The Defendants' case.

Defendants presented testimony from Dr. Evans and Dr. Li. The Chancery Court found they were qualified but without "the research knowledge and [e]minent publications that Plaintiffs experts did." (R. XVI, 2251 n.7). Defendants attempted to overcome the testimony of Plaintiffs' experts by reading court opinions from other

[11] When Plaintiffs proposed the two-drug alternative method, counsel for Defendants responded, "It sounds like to me it's certainly something we'd do." (Tr. XLII, 1937-38).

lethal injection cases which summarize expert testimony. On several occasions, the court sustained Plaintiffs' objections. The court recognized its decision could not rest on evidence presented by other parties in other proceedings or upon another court's evaluation of different evidence. A few examples follow:

> THE COURT: Let me clarify that. What the Court was mainly concerned about is what I think is vernacularly called as the phantom witness where we have testimony from a witness that is not going to testify in our case and it's referred to in the testimony of another witness and thereby the testimony comes in to the record. And it's not appropriate nor is it fair because that witness is not going to testify can't be examined we don't know the scope can't be probed by direct or cross examination. So that was also part of it. So with that in place tell me what you have for the Court.

(Tr. XXXIX, 1375-76).

. . .

> MR. SUTHERLAND: I would refer to the *Howell* decision from where the court indicated that Dr. Lubarsky testified that a 500 milligram dose would be no different than a 20 milligram dose.
>
> MS. HENRY: Same objection.
>
> THE COURT: The Court sustains the objection. In impeaching a witness or using something to impeach there's this rule of completeness. And the Court must have similar conditions or circumstances for it to be an appropriate impeachment. And I have not had that with what you're attempting to do with these decisions. That's the basis for the ruling. So I guess continue to ask the questions I will sustain the objections.

(Tr. XLIII, 1893-94).

. . .

> [MS. HENRY]:[12] It's the same one. I move that that testimony be stricken, because there was no question. It was improper. If he wants to question Dr. Lubarsky about testimony that he has given that would be relevant to this hearing, that's one thing. But really what counsel is doing is he's reading in the opinion into the record. I ask that be stricken.

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[12] The transcript erroneously refers to a "Mr. Johnson" instead of Ms. Henry.

THE COURT: I'm going to preserve your objection and hear the question What's the question about what you read?

MR. SUTHERLAND: The question I asked is, is Dr. Lubarsky aware of the criticism of the court as to his testimony in the *Chavez* case. And it goes to weight and it goes to bias.

THE COURT: The Court sustains the objection and concludes it's not relevant.

[MS. HENRY]: May we have it stricken, Your Honor, as well?

THE COURT: Yes. Okay. Next question.

MR. SUTHERLAND: So is Your Honor concluding that no questions regarding what a court in another hearing has --

THE COURT: You're asking him to comment on findings that a court made. The findings speak for themselves. If you want to put that into evidence I guess you could but asking him to comment upon it. That's what the nature of the question was. And the Court concludes that that is not relevant for him to comment upon findings that were made about his testimony.

MR. SUTHERLAND: Your Honor I would move to admit the *Chavez* decision by the District Court in the 11th Circuit.

THE COURT: Any objection to that?

[MS. HENRY]: Yes, Your Honor, for all the reasons that I've given. Absolutely no relevance.

THE COURT: The Court sustains the objection. We're going to mark it for identification. I'm going to do it as a collective exhibit. Both the trial court and the decision on appeal will be 134 for identification only. Okay.

(Tr. XLIII, 1860-1861).

STANDARD OF REVIEW

"The resolution of a constitutional claim after an evidentiary hearing 'generally presents a mixed question of law and fact.'" *West*, 519 S.W.3d at 563 (quoting *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 305 (Tenn. 2005)). On appeal,

this Court reviews the Chancery Court's decision "de novo with a presumption of correctness extended only to the lower court's findings of fact." *Id.*

ARGUMENT

I. The Chancery Court relied on fact-based findings from other cases—not the facts developed below—when it addressed *Glossip*'s first prong, and thereby violated Plaintiffs' right to due process of law.

It is well-settled that due process requires a court to rely upon the evidence placed before it, not evidence presented to and evaluated by another tribunal. *Ohio Bell Tel. Co. v. Pub. Utils. Com.*, 301 U.S. 292, 300 (1937).[13] This Court specifically recognizes that method-of-execution cases, like this one, involve "profoundly important and sensitive issues," *West v. Ray*, No. M2010-02275-SC-R11-CV, Order p.2 (Tenn. Nov. 6, 2010), and warrant strict adherence to due process principles. The issues are to be decided "on evidence that has been presented, tested, and weighed in an adversarial hearing[.]" *Id.* The Court in *West*, *supra*, therefore, enforced basic due process requirements by remanding the case for the Chancery Court's factual determinations and legal analysis based on those facts.

The first of two questions for the Chancery Court to decide was whether Plaintiffs proved there is "a substantial risk of severe pain" under Tennessee's

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[13] In *Ohio Bell*, *supra*, the Supreme Court reversed the Ohio Supreme Court, 131 Ohio St. 539 (1936), where the Public Utility Commission decided that the utility company should refund rates after reviewing "evidential facts not spread upon the record" and not the evidence presented. The utility company was surprised by the Commission's determination as there was no "warning or even the hint of a warning" that the outcome would be based on outside facts. The Court referred to the lower court's adjudication as a denial of "[t]he fundamentals of a trial[;]" "not the fair hearing essential to due process[,]" and a "condemnation without trial."

three-drug protocol (*Glossip*'s first prong). *Glossip*, 135 S. Ct. at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 52 (2008)); *West*, 519 S.W.3d at 563-64. This is a question of mixed fact and law, and, on appeal, the issue receives de novo review. *West*, 519 S.W.3d at 563.

The Chancery Court's decision disregarded the evidence presented. Instead, the court deferred to statements made by other courts about the three drugs in Tennessee's execution protocol, or related drugs. Plaintiffs were surprised by the grounds for court's decision, i.e., the court's reliance upon evidence presented to different triers of fact under different circumstances, and by different parties. Because the court failed to analyze *Glossip*'s first prong in light of the evidence before it, its decision on the issue is erroneous. The Chancery Court's decision should be vacated, reversed and remanded for a proper determination of the issue.

A. Plaintiffs' unrebutted proof establishes a substantial risk of serious pain.

An email from the Defendants' drug supplier warns: midazolam "does not elicit strong analgesic [pain-blocking] effects," and, as a result, "[t]he subjects may be able to feel pain from the administration of the second and third drugs."[14] (Ex. 114, Exh. Vol. 11, 1628). Because midazolam can't render a person insensate to the pain caused by vecuronium bromide or potassium chloride, the drug supplier suggested Defendants "use of an alternative [drug]," such as a barbiturate, or

[14] The email was written to a person whom Plaintiffs were prevented from deposing. (R. V, 629). The email was read by, and its contents are imputed to, the Defendants. (Tr. XL, 1625-26).

include an opioid (a pain-killer) in the protocol. *Id.* The court did not consider this information in its discussion of *Glossip's* first prong. It referenced the email for the deliberate indifference claim but dispensed with it because "midazolam's propensity was known to the United States Supreme Court in *Glossip*." (R. XVI, 2259).

Unrebutted evidence from Plaintiffs' four expert witnesses about the effects of each drug used in the protocol on the human body. In particular, the evidence established the inability of the first drug (midazolam) to prevent conscious pain and suffering caused by the second and third drugs (vecuronium bromide and potassium chloride), and the severity of the pain that very likely will be felt by a person subjected to that execution method. The Chancery Court recognized Plaintiffs' experts were "well qualified and [eminent] experts," and found that Plaintiffs "the inmate being executed may be able to feel pain[.]" (R. XVI, 2251).[15] The court, however, did not analyze the substantial risk of unnecessary, serious pain established by the evidence. Instead, the court reviewed other courts' evaluations of different evidence and determined that the Supreme Court would not find that Tennessee's protocol constitutes torture nor that the protocol constitutes the deliberate infliction of pain. (R. XVI, 2252).

Testimony from eleven eyewitnesses to executions using midazolam in a lethal injection protocol. During these executions, the witnesses observed

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[15] Although the court used the word "may," the experts unequivocally stated that midazolam cannot render a person insensate to the pain of vecuronium bromide and potassium chloride. (Tr. XXIV, 84-86, 122; Tr. XXV, 160-62, 219-20; Tr. XXVIII, 498-99; Tr. XL, 1531-32, 1538; Tr. XLII, 1755-56).

movements and reactions by the condemned person consistent with feeling pain. The court recounted: "there were signs such as grimaces, clenched fists, furrowed brows, and moans indicative that the inmates were feeling pain after the midazolam had been injected[.]" (R. XVI, 2258). The court did not factor this evidence into a risk of harm analysis. Its determination rested on the fact that other courts have denied challenges to similar three-drug protocols.

B. Plaintiffs lacked notice that the Chancery Court would rely upon evidence presented to other courts.

The basis of the court's ruling is surprising because throughout the proceedings below, the court rejected Defendants' attempts to rely on content in other court opinions. During the hearing, the court recognized that its decision could not rest upon evidence presented by other parties in other proceedings or on different courts' evaluations of different evidence presented by different parties.

For example, the Chancery Court sustained Plaintiffs' objections when counsel for Defendants attempted to read into the record the description of an expert's testimony that was contained in a court opinion addressing a lethal injection protocol in a different case. The court explained its ruling:

> Let me clarify that. What the Court was mainly concerned about is what I think is vernacularly called as the phantom witness where we have testimony from a witness that is not going to testify in our case and it's referred to in the testimony of another witness, and thereby the testimony comes into the record. And it's not appropriate, nor is it fair, because that witness is not going to testify, can't be examined, we don't know the scope, can't be probed by direct or cross examination.

(Tr. XXXIX, 1375-76).

When Defendants' counsel again attempted to read part of a court opinion

into the record, the court sustained the objection. At that time, the court rejected the facts from that different case because it was unable to determine the circumstances surrounding that different court's findings. (Tr. XLIII, 1893-94 ("the Court must have similar conditions or circumstances for it to be an appropriate impeachment.")). At that time, the court held that comments contained in other court opinions were not relevant and struck the questions asked by Defendants' counsel. (Tr. XLIII, 1860-61; R. XVII, 2346-47).

C. The Chancery Court did not compare the evidence establishing the risk of harm from the three-drug protocol with the evidence regarding Plaintiffs' proposed alternative protocol.

The Chancery Court cast Plaintiffs' evidence, particularly expert testimony, against fact-based results of other cases where some other court concluded that a lethal injection protocol did not create a substantial risk of pain. For example, the lower court cited extensively and deferred to fact-based findings in the *Glossip* opinion. (R. XVI, 2252-54 (*citing Glossip*, 135 S. Ct. at 2731-33, 2742, 2745-46, 2737)). That case, however, arose from circumstances different than Plaintiffs' case.

In *Glossip*, the trial court denied four prisoners' applications for preliminary injunctions. It found based on different evidence that the prisoners "failed to prove that midazolam is ineffective." *Id.* at 2731. The Chancery Court's reliance on fact-bound findings from *Glossip*—instead of the facts presented below—denied Plaintiffs an opportunity to be heard on the unique facts of this case. The circumstances in *Glossip* are not the same as those here.[16] The burden of proof for a

[16] The Defendants' expert in *Glossip*, Dr. Evans, was the expert for Defendants in this case.

preliminary injunction in that case was higher than Plaintiffs' burden in this case. Unlike in *Glossip*, the Chancery Court here found the evidence established a risk that midazolam will not prevent pain and suffering caused by the other two drugs. (R. XVI, 2251) ("the inmate being executed may be able to feel pain").

The lower court also elevated the fact-based findings and outcome in a federal district court case from Virginia over the evidence presented below. The Chancery Court relied on *Gray* as a basis to defer to the outcomes in other cases where courts rejected lethal injection challenges. (R. XVI, 2253) (citing *Gray*, 2017 WL 102970, at *11). In *Gray*, the Eighth Amendment challenge to Virginia's lethal injection protocol was denied because—unlike this case—there was only "speculation" and "an absence of expert testimony quantifying the risk Gray actually faces in the current execution scheme."[17] *Id.* at *6. As set forth herein and the record below, Plaintiffs' evidence established the risk of serious harm that Plaintiffs are very likely to face if subjected to Tennessee's three-drug midazolam protocol.

Finally, the lower court relied on considerations set forth in two cases arising from Ohio where the courts found that Plaintiffs did not meet the burden of proof required to issue injunctive relief. (R. XVI, 2254) (citing *In re Ohio Execution*

On cross-examination, Dr. Evans admitted the testimony he provided in *Glossip* and other cases was incorrect. (Tr. XLVI, 2145-48). Dr. Evans in his testimony below agreed that midazolam has no analgesic properties. (Tr. XLVI, 2148-54). The Miller Plaintiffs anticipate that the other Plaintiffs will address Dr. Evans' testimony in detail and adopt that discussion.

[17] The Chancery Court relied on findings from *Walker v. Johnson*, 448 F. Supp. 2d 719, 723 (E.D. Va. 2006). (R. XVI, 23-24). The protocol at issue in *Walker*, did not involve midazolam; the first drug was sodium thiopental. The *Walker* court found sodium thiopental "should cause the inmate to fall asleep and be unconscious for about two hours." *Id.* at 720.

Protocol Litig., No. 2:11-CV-1016, 2017 WL 5020138, at *18 (S.D. Ohio Nov. 3, 2017), and, *In re Ohio Execution Protocol*, 860 F.3d 881, 887 (6th Cir. 2017)). The court below failed to engage with the facts presented below, and instead, erroneously treated fact-based findings of other courts like they were rules of law. (*See* R. XVI, 2251-2254, 2258.)

Whether the Plaintiffs established that the use of Tennessee's three-drug midazolam protocol creates a substantial risk of pain under *Baze* and *Glossip* is a mixed question of fact and law to be determined based upon the facts before the Chancery Court. *West*, 519 S.W.3d at 563; *see also Glossip*, 135 S. Ct. at 2740 ("[A]n 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."). The court violated the most fundamental requirement of due process when it weighed holdings of other courts, based on different facts and circumstances, against the evidence presented during the evidentiary hearing below. *West*, 519 S.W.3d at 563; *Ohio Bell Tel. Co.*, 301 U.S. at 300. Accordingly, the decision below should be vacated, reversed and remanded for a proper analysis of the issue where the court analyzes the facts under the legal test set forth in *Baze*, *Glossip*, and *West.*

II. Plaintiffs were denied notice and an opportunity to be heard on *Glossip*'s second prong: an alternative method of execution that significantly reduces the risk of pain and suffering.

The second issue before the Chancery Court was whether there is a feasible and readily available alternative method of execution that significantly reduces the substantial risk of pain inherent in the three-drug midazolam protocol. *West*, 519 S.W.3d at 565 (quoting *Glossip*, 135 S. Ct. at 2731). Plaintiffs' amended complaint

expressly alleged that the one-drug pentobarbital protocol (Protocol A) was such an alternative. The only dispute was whether pentobarbital was available for use in Plaintiffs' executions.[18] The manner in which the lower court answered this question failed to account for, or afford Plaintiffs, due process of law.

The Chancery Court faulted Plaintiffs for not presenting evidence of their own which established the availability of pentobarbital.[19] (R. XVI, 2239) ("[U]nlike other cases where this element has been tried, the Inmates in this case presented none of their own witnesses to show that their proposed method of execution—pentobarbital—is available to the State of Tennessee."). The court said proving availability "is not an impossible burden," (R. XVI, 2241) and held that Plaintiffs had not met that burden. For this reason alone, it denied Plaintiffs' claims and dismissed the lawsuit. (R. XVI, 2234, 2239, 2250, 2264). The Court held:

> The Inmates who filed this lawsuit have failed to prove the essential element required that there exists an available alternative. On this basis alone, by United States law, this lawsuit must be dismissed.

(R. XVI, 2234).

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[18] Defendants did not dispute at the evidentiary hearing that a one-drug pentobarbital protocol significantly reduces the substantial risk of serious pain posed by the three-drug midazolam protocol.

[19] Plaintiffs presented evidence establishing: (1) Defendants have a physician willing to write a prescription for pentobarbital; (2) Defendants have a pharmacy and pharmacist at the DeBerry Special Needs (adjacent to Riverbend) with the proper licensing to obtain pentobarbital; (3) Defendants have two contracts with two different compounding pharmacists to compound pentobarbital for executions; (4) other States had sources of pentobarbital and conducted executions using pentobarbital as recent as during the evidentiary hearing in this case; (5) Defendants' records showed that there are sources for pentobarbital and they could have obtained pentobarbital for the recent executions; and (6) Defendants retained the one-drug pentobarbital method in Tennessee's January 8, 2018 protocol. Before July 5, 2018, Defendants refused to indicate whether or not they would possess pentobarbital for the upcoming executions; they even implied they would.

Grounds for this lawsuit arose on January 8, 2018, when Tennessee issued a new lethal injection protocol. It retained the prior one-drug pentobarbital method of execution as the primary method, Protocol A.[20] A second method, Protocol B, was added: a three-drug protocol consisting of midazolam, vecuronium bromide and potassium chloride.[21] The new protocol did not contain standards for the Warden to use when selecting between the two different methods for a particular execution.

Plaintiffs' original complaint, filed February 20, 2018, alleged that Protocol B, the three-drug midazolam protocol, creates a substantial risk of unnecessary, serious pain in violation of the Constitutions of the United States and the State of Tennessee. The complaint also alleged that Protocol A, which had been intentionally retained in the new protocol, constitutes a feasible and readily-available method of execution entailing a lesser risk of pain.[22] On March 29, 2018, Defendants filed a motion to dismiss which did not deny the truth of Plaintiffs' allegations. Instead, Defendants argued the complaint was legally insufficient because Plaintiffs had not specifically alleged that Protocol A significantly reduced a substantial risk of severe pain. Plaintiffs filed an amended complaint containing those specific allegations.

What followed were repeated attempts by both the Chancery Court and the Plaintiffs to get Defendants to answer a simple question: "Was the drug necessary

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[20] The one-drug pentobarbital protocol has been upheld as constitutional. *West*, 519 S.W.3d at 563-64. In other words, it does not present a substantial risk of serious pain.

[21] The addition of Protocol B marked a return to using three-drugs that had been abandoned years before. The abandoned protocol utilized sodium thiopental, pancuronium bromide (a paralytic), and potassium chloride.

[22] The complaint also alleged that other states have sources for pentobarbital and have recently carried out executions using pentobarbital.

for carrying out Protocol A, pentobarbital, going to be available at the time inmate Billy Ray Irick, or, for that matter, any of the Plaintiffs, were to be executed?" *See, e.g.*, Tr. XX, 24-27; Tr. XXII, 22.

That question was not answered until July 5, 2018, when Defendants revealed Protocol A would not be used for any Tennessee executions. Defendants issued a new lethal injection protocol containing only the three-drug midazolam protocol (formerly known as Protocol B). Defendants' removal of Protocol A (Plaintiffs' proposed alternative) as a method of execution substantially affected Plaintiffs' case on the eve of trial.

The same date that Defendants chose to reveal a new protocol, July 5th, Plaintiffs' trial brief was due to be filed.[23] That brief notified the court and Defendants about evidence that removal of vecuronium bromide from Protocol B significantly reduces the substantial risk of severe pain created by Protocol B.

Plaintiffs' unimpeached and unrebutted expert testimony establishes: the use of vecuronium bromide causes horrific pain and suffering; vecuronium bromide is not needed to cause Plaintiffs' deaths; and, the third drug contained in Protocol B, potassium chloride, causes the swift cessation of cardiac function and death. Expert evidence proves the administration of vecuronium bromide causes severe terror and pain akin to drowning or being buried alive. The administration of vecuronium bromide also prolongs executions by a number of minutes and therefore prolongs

[23] Plaintiffs learned in discovery that Defendants had decided on the new protocol as early as the end of March 2018.

the duration of pain before death. The Chancery Court found the average time of a three-drug midazolam execution is almost 14 minutes, with 18 minutes marking the longest execution at that time. Defendant Parker, the official with discretion over how to carry out executions, testified that vecuronium bromide served no purpose and could be removed from the protocol. (Tr. XXXVII, 1315-16).

The Chancery Court refused to hear Plaintiffs' evidence of the two-drug method of execution as an alternative method of execution in accordance with *Glossip*'s second prong. (R. XV, 2138). This denial violated the fundamental core of Due Process. *See Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708 (1884) ("Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard[.]").

A. Plaintiffs were deprived of notice regarding the availability of pentobarbital.

The Chancery Court recognized that Defendants possessed unique knowledge about the availability of pentobarbital for use in the executions scheduled for 2018. Defendants refused, however, to reveal this information. When Defendants finally provided that notice four days before trial, it was in the form of a new lethal injection protocol that substantially affected Plaintiffs' lawsuit and their alleged alternative method of execution by removing Protocol A.

Two months after Plaintiffs first alleged Protocol A as a feasible and available alternative method of execution, the Chancery Court held a Rule 16 scheduling conference. At that conference, the court asked counsel for Defendants to

state their position on whether Protocol A was available. (Tr. XX, 20). Defendants alluded to "difficulty obtaining the drugs for Protocol A." (Tr. XX, 20).

The Chancery Court noted the inadequacy of Defendants' answer. It explained that Defendants' answer put the court and the Plaintiffs in an untenable position regarding Plaintiffs' burden to plead and prove an alternative method of execution. (Tr. XX, 20). Defendants claimed it was "somewhat premature" to answer the court's question. (Tr. XX, 20). The court disagreed:

> It's not premature because we have an August execution date. We need to know whether it will be available for that execution for the plaintiffs to be able to fulfill the condition of *Glossip* and for you to be able to argue to me they have not fulfilled their position under *Glossip*. So we need to know that. That is essential for the case . . . or these proceedings are just futile and useless if we don't know that.

(Tr. XX, 20-21).

The Chancery Court directly asked Defendants: "What will be used for the August 9th--will it be available for the August 9th execution? That's the question." Defendants' counsel responded, "I can't answer that question, Your Honor."

> THE COURT: Well, if you can't answer it then our proceedings here are really meaningless. We've got to have the answer to that because then they can't allege – know what alternative to allege.

(Tr. XX, 21)

"Two of the 'essential requirements of due process ... are notice and an opportunity to respond.'" *Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 153 (Tenn. 2013) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). "The purpose of notice is to allow the affected party to marshal a case against the party whose actions amount to a deprivation of life, liberty or property."

Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys., 863 S.W.2d 45, 50 (Tenn. 1993). *See also Hagar*, 111 U.S. at 708. The Chancery Court had identified the basic tenets of due process required *vis-à-vis* the Plaintiffs' burden to plead an alternative method of execution: notice from the Defendants as to whether Protocol A (one-drug pentobarbital protocol) would be available for the scheduled executions and, if not, the opportunity for Plaintiffs to be heard on a different alternative.

Throughout the remainder of the scheduling conference, the Chancery Court urged Defendants to state whether pentobarbital (Protocol A) would be available for the upcoming executions (specifically former Plaintiff Irick's August 9th execution). At one point, the Court warned Defendants their recalcitrance would require extensive and time-consuming discovery so Plaintiffs could get that answer from other sources.[24] (Tr. XX, 24). Even when the Court attempted to infer notice from the hedged statements it was receiving, Defendants rebuffed the court:

> MR. SUTHERLAND: I think that what we can say is what we told the Tennessee Supreme Court and that is because we did not have--we don't have--did not have and don't have and have had no reasonable--there's been no reasonable expectation of obtaining anything to perform Protocol A, that that's why Protocol B was added to the procedures.
>
> THE COURT: And the Court would characterize that as constituting a statement that A is unavailable. So okay. That's--that informs me about your position and whether this is pleading or substantive will help me to plan.
>
> MR. SUTHERLAND: I guess what I would say just to follow up is I hate to sound evasive but the Department certainly has a duty to carry out

[24] The Chancery Court subsequently severely restricted discovery and denied a deposition of a person with personal knowledge about Defendant's efforts to obtain pentobarbital and sources of pentobarbital. Defendants argued that Tennessee's secrecy law prevented Plaintiffs from learning this information.

> its statutory mandate and has been attempting to do that. Because for all the reasons stated in the *Glossip* decision, because anti-death penalty opponents have made it very difficult for states to obtain lethal injection chemicals, we've had to amend, adopt another protocol.[25]
>
> Certainly, if Protocol A were--the Department has not been able to identify a source to accomplish Protocol A and that was the reason why Protocol B was adopted. Now, that doesn't mean at some day in the future. I'm just saying at this point there's no reasonable expectation that –
>
> THE COURT: You used the word "evasive" I'll use, I guess, something from literature, a Catch 22. It makes it almost impossible to have a meaningful determination of what's before the Court.
>
> . . .
>
> THE COURT: And we know what *Glossip* tells us and the answer that I have been given does not enable you, me, or the other side to do what we need to do in this case. …

(Tr. XX, 25-27).

At a hearing six weeks later, Defendants continued to imply they might obtain pentobarbital for the upcoming executions.[26] When asked whether Defendants would use Protocol A (Plaintiffs' proposed one-drug pentobarbital alternative) or Protocol B (the three-drug midazolam protocol) to carry out Plaintiff Irick's execution, Defendants refused to state which protocol would be used.

> MR. SUTHERLAND: We continue to look for a source of <u>both drugs</u>. And we anticipate having <u>some drug</u> on August the 9th.

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[25] Defendants' own records, admitted for the truth at the hearing, show that only 20% of potential sources contacted were unwilling to supply pentobarbital for use in executions. (Exh. 105, Exh. Vol. 10, 1477).

[26] This hearing was held after Defendants answered Plaintiffs' amended complaint and after Defendants had filed an affidavit from Defendant Parker stating that he adopted the January 8th Protocol because they had been unable to obtain pentobarbital to carry out Protocol A.

> THE COURT: So if that's the position that you're going to continue--if you're going to continue to pursue the alternative, then that keeps in all of our claims here due process *et cetera*. So that answers my question.
>
> The State is still proceeding under its protocol that it can use one or the other.

(Tr. XXII, 22) (emphasis added).

The court observed Plaintiffs were unable to know whether they needed to plead additional alternatives.

> THE COURT: [W]e have about five different logics going here depending on which drug is available. If both are available, that takes us to certain legal claims. If one is available, that takes us another route. So we need to get some clarity on that.
>
> . . .
>
> THE COURT: It's your position, if I get clarity, that Protocol 1 is no longer an alternative that you would seek to amend. So summary judgment would be futile or should be delayed, because you would seek to amend.

(Tr. XXII, 20-21).

Four calendar days before trial, Defendants issued a new lethal injection protocol. The new protocol contained only the three-drug midazolam protocol. By negative inference, Plaintiffs became aware of Defendants' decision on whether Defendants would possess pentobarbital for the scheduled executions.

B. Unrebutted proof establishes that Plaintiffs' proposed two-drug protocol significantly reduces the substantial risk of severe pain inherent in the three-drug protocol.

The Chancery Court found Plaintiffs' expert witnesses were well-qualified and eminent experts.[27] (R. XVI, 2251). Plaintiffs' first expert witness, Dr. Stevens,

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[27] In contrast, the Chancery Court found that Defendants' experts were "qualified" but "did not have the research knowledge and [e]minent publications that Plaintiffs experts did." (R.

testified about two ways the use of vecuronium bromide in the three-drug midazolam protocol increases pain and suffering. First, he described scientific studies where people reported feeling like they were dead after being given paralytic drugs; a feeling he described as "horrific." (Tr. XXV, 156). This horror will increase excitation of neurons in the brain, making the already ineffective midazolam even more ineffective. (Tr. XXV, 156, 157, 161) ("[W]hen the vecuronium is then given, . . . the paralysis, the fear, suffocation . . . will cause increased excitation . . . causing less sedation as midazolam could provide.") (Tr. XXV, 161). Vecuronium bromide does not cause death under the three-drug protocol; potassium chloride causes death. (Tr. XXV, 159-60) ("[I]t would be the potassium chloride that is the final and critical drug that causes death.").

Second, Dr. Stevens testified:

> Q: From a pharmacological perspective and to a reasonable degree of scientific certainty, will vecuronium bromide do anything to expedite the inmate's death or make it less painful?
>
> A: No, it wouldn't.
>
> Q: From a pharmacological perspective and to a reasonable degree of scientific certainty, would a two-drug protocol involving just midazolam and potassium chloride, but removing the three-minute interlude with vecuronium, be less painful and cause less suffering than the present three-drug protocol?
>
> A: It would in the sense of death comes sooner.

(Tr. XXV, 162-163)

XVI, 2251 fn.7).

Dr. Greenblatt testified vecuronium bromide is a "neuromuscular junction blocking agent" and described the pain caused by its use: "basically, you're suffocating and you want to breathe, but you can't because you can't work your muscles." (Tr. XXVIII, 507, 510-511). The use of vecuronium bromide does not hasten death and there is not "any benefit" to including it in the three-drug midazolam protocol. (Tr. XXVIII, 542-543).

Likewise, Dr. Lubarsky, testified vecuronium bromide does nothing to protect an inmate from pain. It increases the risk the inmate will feel pain. (Tr. XLII, 1821). He confirmed Dr. Stevens' opinion that pain and suffering caused by vecuronium bromide will stimulate the excitatory neurons. It will initiate the fight or flight response and a surge of adrenaline, and overcome any sedative state midazolam produced. (Tr. XLII, 1775). Dr. Lubarsky described the pain:

> A: Basically, it's like burying someone alive. They lose the ability to communicate their distress. They lose the ability to breath[e]. They still have the air hunger. It's as if you're basically locked in a box and someone now has basically covered your mouth and you can't take a breath and your lungs and your brain are screaming.
>
> I try to think of how to describe this, but I can only harken back to what I most remember, the first time I remember being dunked under water for too long and how terrifying and how desperate we were to reach the surface. I'm sure everybody remembers that. I remember that. And that's two seconds, not minutes.

(Tr. XLII, 1774).

Defendant Parker admitted vecuronium bromide is unnecessary to carry out executions, and he can easily remove it from Tennessee's lethal injection protocol.[28] (Tr. XXXVII, 1315-1316).

C. Plaintiffs were denied an opportunity to be heard on alternative methods of execution.

Two of the "essential requirements of due process ... are notice and an opportunity to respond." *Moncier*, 406 S.W.3d at 153 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). *See also In re Riggs*, 612 S.W.2d at 465 ("Notice and opportunity to be heard are the minimal requirements of due process."). The purpose of notice is to allow the affected party to marshal a case against the party whose actions amount to a deprivation of life, liberty or property. *Phillips*, 863 S.W.2d at 50. Plaintiffs were deprived of this opportunity.

On January 8, 2018, Defendants reasserted the viability of a one-drug pentobarbital protocol when they issued a new execution protocol that retained that method. The January 8th Protocol also including a new, second method (the three-drug midazolam protocol). Throughout the pendency of Plaintiffs' complaint wherein they proposed the one-drug pentobarbital protocol as a viable alternative method of execution, until July 5, 2018, Tennessee's protocol—on its face—represented that Defendants could execute Plaintiffs using the one-drug pentobarbital protocol. Despite direct questioning, Defendants failed to provide adequate notice that they would not possess pentobarbital for use in the upcoming

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[28] When Plaintiffs proposed the two-drug alternative method, counsel for Defendants responded, "It sounds like to me it's certainly something we'd do." (Tr. XLII, 1937-38).

executions. To the contrary, they intentionally left that possibility open and did not indicate any affirmative decision regarding the availability of pentobarbital until July 5, 2018, when they issued a new lethal injection protocol that omitted the one-drug pentobarbital protocol. On July 23, 2018, the last day of proof, Defendants provided formal notice to former Plaintiff Billy Ray Irick that the three-drug midazolam protocol would be used for his execution. (R. XVI, 2235).

The lack of notice deprived Plaintiffs of a meaningful opportunity to be heard on an alternative execution method. *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (quotation and citation omitted). "The opportunity to be heard is an essential requisite of due process of law." *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.4 (1996). The essence of this requirement is that "[t]he one who decides *must hear*." *Morgan v. United States*, 298 U.S. 468, 481 (1936) (emphasis added). One's opportunity to present evidence is meaningless unless the decision maker actually "listens to what he has to say." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Due Process "requires that the [judge] actually consider the evidence and argument that a party presents." *Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (citing *Morgan v. United States*, 298 U.S. 468, 481 (1936)). As explained below, Plaintiffs were not heard on this issue.

1. The Chancery Court refused to consider proof regarding Plaintiffs' proposed two-drug alternative method of execution.

On the eve of trial, Defendants issued a new lethal injection protocol which removed Plaintiffs' alleged alternative (Protocol A, one-drug pentobarbital).

Six hours after Plaintiffs received the new July 5th Protocol that removed their pled alternative method of execution, Plaintiffs filed their trial brief. The brief informed the court and Defendants of other alternative execution methods:

> Finally, discovery in this case has revealed at least three other feasible and readily implemented alternatives to Protocol B as written: (1) Defendants could eliminate the use of vecuronium bromide—according to their own witnesses it is unnecessary to cause death or preventing pain, is a noxious stimuli capable of overcoming any sedative effect of the midazolam, and prolongs Plaintiffs suffering by at least three minutes; (2) Defendants could reduce the amount of midazolam to its maximum effective dose thus reducing the pain and suffering caused by injecting a bolus dose of an acidic chemical into the veins of Plaintiffs and eliminate the vecuronium bromide; or (3) Defendants could eliminate both vecuronium bromide and potassium chloride.

(R. XIII, 1747) (footnotes omitted).

Consistent with what Plaintiffs pled throughout this matter, the trial brief informed the court and Defendants of the pain and suffering caused solely by vecuronium bromide, (R. XIII, 1726, 1728, 1730, 1742, 1743, 1757), and said vecuronium bromide serves no legitimate function in carrying out Plaintiffs' sentences of death. (R. XIII, 1727, 1743, 1777).

As trial began, counsel for the Miller Plaintiffs echoed the court's earlier warnings that when one party changes its position, due process demands the opposing party be given an opportunity to be heard. (Tr. XXIV, 36-37).[29] Plaintiffs

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[29] Counsel for the Miller Plaintiffs said, based upon the pleadings, only the January 8th Protocol was at issue. Counsel asserted the Miller Plaintiffs' right to due process in challenging the new July 5th Protocol and proposed a procedure for doing so. (R. XV, 2141-59). The Chancery Court did not provide the Miller Plaintiffs an opportunity to litigate newly-ripe and newly-arising grounds for relief stemming from the new July 5th Protocol. At the end of Plaintiffs' direct case, and without prior notice or the Miller Plaintiffs' consent, the Chancery Court amended the pleadings to include the new July 5th Protocol. (R. XVI, 2217).

presented unrebutted evidence that a two-drug protocol significantly reduces the substantial risk of pain due to the removal of vecuronium bromide. In its absence, terror and pain caused paralysis is eliminated. In addition, the duration of the execution is significantly reduced thereby resulting in a significant reduction of pain that Plaintiffs will likely suffer from the remaining two drugs. The evidence also demonstrates that the two-drug protocol was readily available.

Plaintiffs' evidence proves a two-drug alternative (i.e., the three-drug midazolam protocol minus vecuronium bromide) significantly reduces the substantial risk of serious pain caused by the three-drug midazolam protocol. At the close of proof, counsel for Plaintiffs made a motion to conform the pleadings to the evidence. (Tr. XLIII, 1929). In particular, Plaintiffs requested that the court consider the evidence regarding the two-drug alternative method of execution.

Plaintiffs' counsel explained that changing circumstances and the accelerated timeframe of the case necessitated this action:

> First, this has been a fluid situation. It has been very, very rushed. We did get a new protocol July 5th and we have constantly been almost like hamsters in a wheel trying to keep this whole thing going.

(Tr. XLV, 1965-66).

. . .

> And so we kept getting new information as this case has evolved. And, you know, I think normally we would have had ample time pretrial to think this through. And it just simply--I'm not fussing at the Defendants for this. It's not their fault either. But we've just been rushed.

(Tr. XLV, 1969-70; *see also* Tr. XLV, 1977).

The court refused to consider the two-drug alternative method of execution. The court claimed the evidence had come too late despite: (1) the court's prior

remarks regarding notice of Defendants' position on the availability of pentobarbital; (2) the court's representations that Plaintiffs could file an amended if Defendants' position changed; (3) Plaintiffs' justified reliance on those remarks; and (4) until the eve of trial Defendants would not disclose whether they would possess pentobarbital to carry out upcoming executions under Protocol A.

Instead, the Chancery Court decided, "[t]his potential cause of action was known or could have been known by the Plaintiffs upon the filing of the lawsuit[.]" (R. XV, 2138). The court also said the two-drug alternative protocol was not tried by consent. (R. XV, 2138). This ruling violated the Miller Plaintiffs' right to be heard, it was contested below, and the Miller Plaintiffs maintain it is not only an erroneous deprivation of Due Process it also constitutes an abuse of discretion.

At a minimum, the two-drug alternative was tried by consent. *See, e.g.,* Tr. XLV 1975, 1978-79, 1982-83, 1988-89. Defendants did not object to allegations in Plaintiffs' trial brief regarding vecuronium bromide. They did not object to Plaintiffs' proof regarding vecuronium bromide, and specifically the opinions of Plaintiffs' experts that a two-drug alternative significantly reduced pain and suffering. Finally, Defendants maintained throughout the proceeding below that they had no burden of proof and could not have been prejudiced by a finding of implied consent.[30] *See, e.g.*, Tr. XX, 19-34; Tr. XXI, 49-54, 90-91; Tr. XXII, 16-31, 44-46. In fact, both Defendant Parker and counsel for Defendant represented in court

[30] Defendants conflated the burden of proof with their obligation to provide notice of whether they would possess pentobarbital for the upcoming executions.

that Defendants could remove vecuronium bromide from the three-drug midazolam protocol. For these reasons, the Miller Plaintiffs' sought reconsideration of the court's ruling that the issue was not tried by consent. (R. XV, 2141-59).

The Chancery Court did not "hear," "listen to," or "actually consider" Plaintiffs' unrebutted evidence of another alternative method of execution. It explicitly denied Plaintiffs that opportunity. It then denied Plaintiffs' cause of action reasoning that Plaintiffs had not met the burden of proof on *Glossip*'s second prong. These rulings are erroneous and also constitute an abuse of discretion. The decision below should be vacated, reversed, and remanded for due consideration of Plaintiffs' proposed two-drug alternative method of execution.

2. The Chancery Court faulted Plaintiffs for not presenting in a certain manner evidence establishing that the one-drug pentobarbital alternative method of execution was available, and rejected facts originating from Defendants that—on their face—established availability.

The Chancery Court faulted Plaintiffs for not presenting evidence of their own to establish the availability of pentobarbital. *See, e.g.*, R. XVI, 2239 ("[U]nlike other cases where this element has been tried, the Inmates in this case presented none of their own witnesses to show that their proposed method of execution—pentobarbital—is available to the State of Tennessee."). It said: (a) proving availability "is not an impossible burden;" (b) Plaintiffs' experts were not retained to investigate sources of pentobarbital; and (c) Plaintiffs' experts were unable to provide any information about availability. (R. XVI, 2241).

The lower court held Plaintiffs had not met their burden of proof on availability.[31] For this reason alone, the court denied Plaintiffs' claims and dismissed the lawsuit. (R. XVI, 2234, 2239, 2250, 2264).

The Supreme Court has accepted for review a case that speaks precisely to what Plaintiffs must prove in order to make a successful showing of *Glossip*'s second prong. The Supreme Court granted a stay of execution and then granted a writ of certiorari.[32] *Bucklew v. Precythe*, No. 17-A911 (Stay Grant); *Bucklew v. Precythe*, 138 S. Ct. 1706 (2018). In *Bucklew*, the Court is now going to review the *Glossip* standard and how it is to be applied. More specifically, the Court will clarify confusion regarding the burden of proof and how the *Glossip* analysis is to be conducted. The lower court held that *Bucklew* did not carry his burden because he relied on evidence from the State's expert and did not present that evidence through his expert. The following questions will be answered:

> [2] Must evidence comparing a state's proposed method of execution with an alternative proposed by an inmate be offered via a single

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[31] Plaintiffs evidence also establishes: (1) Defendants have a physician willing to write a prescription for pentobarbital; (2) Defendants have a pharmacy and pharmacist at the DeBerry Special Needs (adjacent to Riverbend) with the proper licensing to obtain pentobarbital; (3) Defendants have two contracts with two different compounding pharmacists to supply drugs for executions; (4) other States have sources of pentobarbital and conduct executions using pentobarbital; (5) Defendants' records show there are sources for pentobarbital and they could have obtained pentobarbital for the recent executions; and (6) Defendants retained the one-drug pentobarbital method in the January 8, 2018 protocol. Before July 5, 2018, Defendants refused to directly state whether or not they would possess pentobarbital for the upcoming executions. They did not provide formal notice until July 23, 2018, the final day of proof at the hearing below, and then only Plaintiff Irick received notice.

[32] The Chancery Court ordered the parties to brief the implications of *Bucklew* on this case. (R. X, 1260-65). In its final order, however, the court did not address the fact that the Supreme Court will soon issue a decision regarding the burden of proof for *Glossip*'s second prong and the permissible nature of that proof. In contrast, the court repeatedly commented that the Supreme Court has not intervened in a three-drug midazolam execution.

> witness, or should a court at summary judgment look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate?

Petition for Writ of Certiorari, *Bucklew*, No. 17-8151, at i (Mar. 15, 2018).

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

Bucklew, 138 S. Ct. at 1706.

The Supreme Court also will decide whether the Eighth Amendment requires an inmate to prove an alternative when he raises an "as-applied" challenge. Petition for Writ of Certiorari, *Bucklew v. Precythe*, No. 17-8151, at i, Question [3]. The answer to this question may impact Plaintiffs' claim that the Eighth Amendment does not require proof of an alternative when the method of execution inflicts torture. The Chancery Court concluded that the Supreme Court would not agree and, in any event, would not find the facts in this case established torture. (R. XVI, 2251-52). Plaintiffs should be heard on this issue after *Bucklew* is decided.

The Supreme Court's forthcoming merits determination on these issues will bear directly on Plaintiffs' ability to succeed here. The Chancery Court faulted Plaintiffs for not presenting proof through their own expert witnesses. The court failed to engage with the evidence that Plaintiffs discovered from Defendants and presented at the hearing; it discounted that evidence, characterizing it as Plaintiffs' "attempt[] to prove their case solely by discrediting State officials." (R. XVI, 2241). Plaintiffs' evidence, however, established on its face that Defendants knew of at least one source for pentobarbital. The proof was accepted for its truth. (Tr. XXXVII,

1334-35). Instead of accepting the proof at face value, the court below supplied its own inferences favorable to Defendants and inconsistent with facts presented by Plaintiffs and then interpreted the proof as "not weighty evidence."[33] *See, e.g.,* R. XVI, 2245-46.[34] The Supreme Court's opinion in *Bucklew* will address the manner of proof regarding the availability and effectiveness of an alternative method of execution (*Glossip* second prong).

The issues soon to be decided by the Supreme Court are central to Plaintiffs' claims and this appeal. An adjudication before the Supreme Court renders an opinion on how such claims are to be proved and to what extent, would be premature and deny Plaintiff David Miller equal protection of the law before he is executed and result in wasteful future proceedings involving the remaining Plaintiffs. The Court should, therefore, stay Plaintiff Miller's December 6th execution date and hold this appeal in abeyance pending the decision in *Bucklew*.

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[33] When addressing whether jurors may base a verdict on speculation, this Court affirms: "[b]oth the State and the defendant are entitled to a verdict that is based solely and alone upon the facts of the case[.]" *Graham v. State*, 202 Tenn. 423, 427, 304 S.W.2d 622, 624 (1957).

[34] For example, the court's opinion contains a text message from a TDOC "staffer" who asks the drug supplier "can u send me a list of all companies etc u reached out to about sourcing so I can have it for when we have to show it's unavailable?" (Exh. 105, Exh. Vol. 10, 1486). This word usage is not common; it is associated with the legal test in *Glossip*. Plaintiffs argued this message—on its face—shows TDOC was creating a record of unavailability almost one year before Plaintiffs' lawsuit was filed. (Plaintiffs were prevented from deposing the author of the text). The court, however, did not accept the plain language of text, i.e., that the information was requested for when the state has to show pentobarbital is unavailable. The court said, "it shows the staffer … was putting together a PowerPoint presentation for the boss/superior and the staffer's conclusion was there were no ordinary, transactional sources for pentobarbital." (R. XVI, 2246). This cannot be the more likely inference because the text was sent in April 2017 (Exh. 105, Exh. Vol. 10, 1486). and the PowerPoint was not created for the staffer's superiors until August 31, 2017 (*Id.*, 1468).

CONCLUSION

Undersigned anticipates the Other Plaintiffs will argue in their brief that the Chancery Court committed reversible errors during the course of the proceedings below, and the Miller Plaintiffs agree. Other errors occurred and the Miller Plaintiffs do not waive their right to relief based on those errors and they incorporate the errors briefed by the Other Plaintiffs' in this case. Given the extreme time constraints for filing this brief, and a lack of resources to provide full and complete briefing, the Miller Plaintiffs have focused on how the proceedings failed to afford adequate notice and a meaningful opportunity to be heard in a meaningful way, as required by the Due Process Clause of the Fourteenth Amendment and Article I § 6 and §8 of the Tennessee Constitution.

Plaintiffs have a right to have their entire case heard and decided by the Chancery Court based upon the evidence before it and not based upon what some other tribunal discussed in a court opinion under different circumstances and after reviewing different evidence presented by different parties. Plaintiffs pray this Court holds they have been denied the right to due process and, therefore, vacates, reverses, and remands the case for due consideration.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, Inc.
s/Dana C. Hansen Chavis
Dana C. Hansen Chavis, BPR 0190980
Assistant Federal Community Defender
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7979
Dana_Hansen@fd.org

CERTIFICATE OF SERVICE

I, Dana C. Hansen Chavis, hereby certify that a true and correct copy of the foregoing document was sent to the following via first-class mail and email on this the 6th day of September, 2018, to:

ANDRÉE S. BLUMSTEIN
Solicitor General
JENNIFER L. SMITH
Associate Solicitor General
301 6th Ave. North
P.O. Box 20207
Nashville, TN 37202
Phone: 615-741-3487
Email: jennifer.smith@ag.tn.gov

KELLEY HENRY
Supervisory Assistant Federal
Public Defender
Federal Public Defender
for the Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37203
Phone: 615-736-5047
Email: kelley_henry@fd.org

BRADLEY MacLEAN
Attorney at Law
1702 Villa Place
Nashville, TN 37212
Phone: 615-943-8716
Email: brad.maclean9@gmail.com

KATHLEEN MORRIS
Attorney at Law
42 Rutledge Street
Nashville, TN 37210
Phone: 615-242-3200
Email: morris@KMorris.net

s/Dana C. Hansen Chavis
Dana C. Hansen Chavis

Counsel for Miller, McKay, Sutton and West