CAPITAL CASE: EXECUTION SET NOVEMBER 1, 2018 AT 7:00 P.M.

No. 18-6145
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDMUND ZAGORSKI

Appellant-Petitioner

v.

BILL HASLAM, et al.

Appellee-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
APPELLANT'S OPENING BRIEF

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal involves important constitutional issues in a capital case. Counsel believes that oral argument, even if by telephone, is necessary to facilitate fair resolution in this matter.

STATEMENT OF JURISDICTION

In this action arising out of a complaint brought pursuant to 42 U.S.C. § 1983, the district court entered its final judgment on counts I and II of the complaint on October 30, 2018. Order, R. 17, PageID # 600; Judgment, R. 18, PageID # 602. The district court specifically found "that there is no reason to delay entry of judgment and appeal regarding the dismissal of Counts I and II of the plaintiff's Complaint, and that immediate appeal is otherwise warranted. See Rule 54(b); 28 U.S.C. § 1292(b)." R. 17, PageID # 600. Appellant immediately filed his notice of appeal. R. 19, PageID # 603. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and/or 28 U.S.C. § 1292 (b).

ISSUES PRESENTED

Whether the district court erred in finding that Appellant is collaterally estopped from adjudicating his claim that he was coerced into choosing execution by electrocution?

Whether the district court erred in applying *Stewart v. LaGrand*, 526 U.S. 115 (1999), to hold that Appellant waived his right to challenge execution by electrocution?

STATEMENT OF THE CASE

On October 26, 2018, Appellant filed a complaint pursuant to 42 U.S.C. § 1983 alleging three causes of action. Complaint, R. 1, PageID # 1-32. The relevant claims for this appeal are Count I, that Zagorski was coerced into choosing execution by electrocution, in violation of the Fourteenth Amendment, and Count II, that Tennessee's electric chair violates the Eighth Amendment to the United States Constitution.[1] The district court *sua sponte* dismissed Counts I and II of the complaint.

[1] The district court entered a temporary restraining order with respect to Count III. Order, R. 15 at 8, Page ID# 597. That order does not stay the execution. Count III is not before this court and the district court retains jurisdiction over that portion of the complaint. Order, R. 17 at 2, PageID # 601 ("Count III remains pending before this court.")

Order, R. 8 at 1-3, PageID # 48-50. Appellant filed a motion to alter or amend pursuant to Federal Rule of Civil Procedure 59(e) and a Motion for a Temporary Restraining Order and/or Preliminary Injunction. Motion and Exhibits, R. 9, Page ID# 52-440. The district court denied the motion as to Counts I and II and denied a temporary restraining order with respect to those claims. Order, R. 15 at 1-7, PageID # 589-595. Appellant requested the Court enter immediate judgment with respect to those claims. Motion, R. 16, PageID # 598. The Court granted the motion. Order. R. 17, Page ID # 600. Judgment was entered. R. 18, PageID # 602. Appellant filed his notice of appeal. R. 19, PageID # 603. This Court set an expedited briefing schedule and ordered Appellant to file his brief by 10:00 AM EDT on October 31, 2018. This brief is filed pursuant to the Court's order.

SUMMARY OF ARGUMENT

Edmund Zagorski is a death row inmate who faces imminent execution. Two causes of action were dismissed by the District Court, *sua sponte*. Count I alleged that Edmund Zagorski was coerced, through threat of extreme suffering, to choose a less-painful, but truly horrible method of execution, in violation of his Fourteenth Amendment

due process rights. Count II alleged that the method of execution that Edmund Zagorski was coerced to choose, a faulty electric chair, was and is cruel and unusual in violation of the Eighth Amendment.

The District Court dismissed Count I based on collateral estoppel or issue preclusion. This holding was in error. The issues raised in Count I were not raised and have not been determined by the Tennessee courts. The Tennessee Supreme Court issued a very narrow opinion determining in a facial challenge applicable to all death row inmates that thirty-two plaintiffs failed to carry their burden to plead and prove a feasible and readily available alternative. The Tennessee Supreme Court declined to determine whether the three-drug protocol would cause pain, finding this issue "moot." Whether the three-drug protocol is certain to cause severe pain is one of two central issues to Count I, and is the issue that the District Court erroneously found to be precluded.[2] The issues in this suit, and those raised in Tennessee are entirely different, thus collateral estoppel does not apply.

[2] The second essential element would be whether threat of this pain and suffering is sufficient to unconstitutionally coerce Mr. Zagorski to choose death in the electric chair. The District Court did not address the substance of this element, because the Court found the first element to be precluded.

As to Count Two, the District Court found that any challenge to the electric chair was precluded by *Stewart v. LaGrand* and Mr. Zagorski's choice of that method of execution. *LaGrand* is not applicable for three reasons: first, a coerced waiver is of no significance, second, factually *LaGrand* is distinct, and third, the *Glossip* alternative requirement—as applied by Tennessee courts—makes *LaGrand* unworkable.

STANDARD OF REVIEW

The appeal of both issues involves mixed questions of law and fact. This Court reviews these matters *de novo*. *See*, *Ornelas v. U.S.*, 517 U.S. 690 (1996); *Hammer v. I.N.S.*, 195 F.3d 836, 840 (6th Cir. 1999).

ARGUMENT

I. Count I: The district court erred in dismissing Edmund Zagorski's compelling due process claim, based on an erroneous application of collateral estoppel.

a. The doctrine of collateral estoppel and the *de novo* standard of review.

Collateral estoppel, also known as issue preclusion, bars the subsequent relitigation between the same parties of a fact or issue where that fact or issue was fully litigated in a previous case. *Cincinnati Ins. Co. v. Beazer Homes Invest., LLC,* 594 F.3d 441, 444–45 (6th Cir. 2010); *St. Thomas Hosp. v. Sebelius*, 705 F. Supp. 2d 905, 915 (M.D. Tenn. 2010). Under the law of our circuit, "[f]our specific requirements must be met before collateral estoppel may be applied to bar litigation of an issue:

> (1) the precise issue must have been raised and actually litigated in the prior proceedings;
> (2) the determination of the issue must have been necessary to the outcome of the prior proceedings;
> (3) the prior proceedings must have resulted in a final judgment on the merits; and
> (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding."

St. Thomas Hosp., 705 F. Supp. 2d at 915 (citing *Cobbins v. Tenn. Dept. of Transp.,* 566 F.3d 582, 589–90 (6th Cir.2009)).

The Tennessee law of collateral estoppel is substantively identical to Sixth Circuit precedent; it merely divides the first element of federal precedent into two separate considerations: "(1) that the issue to be precluded is identical to an issue decided in an earlier proceeding and (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding." *Mullins v. State,* 294 S.W.3d 529, 535 (Tenn. 2009) (citing *Gibson v. Trant,* 58 S.W.3d 103, 118 (Birch, J., concurring and dissenting) and *Beaty v. McGraw,* 15 S.W.3d 819, 824–25 (Tenn.Ct.App.1998)).

Under either Tennessee or Sixth Circuit precedent[3] the relevant considerations, for this appeal, are: (1) was the issue presented to the Tennessee courts identical to the issue raised here, and (2) was that

[3] It appears to counsel that, while Sixth Circuit law is often applied, it is more correct, in an action under § 1983 to apply the law of the forum state. *Donovan v. Thames,* 105 F.3d 291, 294 (6th Cir. 1997) ("issues actually litigated in a state-court proceeding are entitled to preclusive effect in a subsequent federal § 1983 suit to the extent provided by the law of preclusion in the state where the judgment was rendered.")

precise issue decided on the merits in the earlier litigation. *St. Thomas Hosp.*, 705 F. Supp. 2d at 915; *Mullins*, 294 S.W.3d at 535.

On appeal, "the availability of collateral estoppel is a mixed question of law and fact which [the Court of Appeals] reviews de novo." *Wolfe v. Perry*, 412 F.3d 707, 716 (6th Cir. 2005) (quoting *Hammer v. INS*, 195 F.3d 836, 840 (6th Cir. 1999).

b. The District Court's rationale for dismissing Count I.

In the initial order dismissing Count I, the District Court summarily concluded that because the Davidson County Chancery Court and Tennessee Supreme Court had upheld the constitutionality of the three-drug lethal injection protocol, "the plaintiff is estopped from relitigating the constitutionality of that protocol in this court." R. 8, PageID# 49.

Subsequently, in response to Mr. Zagorski's Motion to Alter or Amend, R. 9, the court expanded on the legal conclusions finding that collateral estoppel barred a new cause of action because the new cause relied upon a previously determined issue. R. 15, PageID # 590-92. Crucially, the court held: "Even if the plaintiff's Complaint alleged only that Tennessee's lethal injection protocol entails some risk of pain, he

could not establish an entitlement to relief on Count I without disproving the Tennessee Supreme Court's conclusions." *Id.* at PageID# 591. Quite correctly, the district court identified the issue of whether the three-drug protocol will cause pain as being crucial to Mr. Zagorski's Fourteenth Amendment cause of action—if it does not involve the infliction of pain or suffering, then it is hard to see how it could be coercive.[4] But that issue was not decided adversely to Zagorski by the state court.

To best demonstrate the error of the district court's legal conclusion, it is necessary to turn to the Tennessee Supreme Court's very limited ruling.

c. The Tennessee Supreme Court issued a very limited ruling that relied exclusively on a finding that the plaintiffs had failed to carry their burden to plead and prove a feasible and readily available alternative to the three-drug protocol; the Court did not reach the issue of whether the protocol would be painful.

[4] It is worth noting that a threat of harm that the government has no intent to actually carry out can still be coercive. *E.g. U.S. v. Irons,* 646 F. Supp. 2d 927 (E.D. Tenn. 2009) (threat to arrest friend, if defendant did not confess—in fact the friend was cooperating with police and would never have been arrested). However, in this case, Mr. Zagorski is not submitting that the State is falsely threatening him—rather he contends that the reality of the three-drug protocol is coercive.

The Tennessee lethal injection lawsuit involved a challenge by thirty-two death row inmates to the "facial constitutionality" of Tennessee's three-drug lethal injection protocol. *Abdur'Rahman v. Parker,* – S.W.3d –, 2018 WL 4858002, *1 (Tenn. Oct. 8, 2018). This challenge encompassed claims by men sentenced to death for crimes occurring after January 1, 1999, who were not eligible for death in the electric chair (and thus could not have been coerced or compelled to choose such an execution). Tenn. Code Ann. § 40-23-114. This challenge encompassed claims from men from diverse backgrounds; and inevitably not all of these men would concur in Mr. Zagorski's view on the relative merits of death in the electric chair versus death by lethal injection. Thus, the Fourteenth Amendment claim raised in this lawsuit was not, and could not have been, raised in the facial Tennessee litigation.

The Tennessee Supreme Court rejected the lethal injection lawsuit plaintiffs' Eighth Amendment claim based solely on a finding that those plaintiffs in a facial challenge, failed to carry their burden to (1) plead and (2) prove a feasible and readily available alternative. *Abdur'Rahman v. Parker,* – S.W.3d –, 2018 WL 4858002, *10-15 (Tenn.

Oct. 8, 2018). They found that meeting the availability prong of *Glossip* was "prerequisite for a method-of-execution claim" and failure to satisfy this "essential element provides an independent reason for denying a method of execution claim." *Id.* at *7. Having found that for procedural reasons the plaintiffs failed to plead a two-drug alternative, and that factually they failed to prove a one-drug alternative, the court found that the plaintiffs had not proven the protocol to be unconstitutional. *Id.* at *13-15. In so doing, the court explicitly declined to decide whether the three-drug lethal injection protocol "creates a demonstrated risk of severe pain," finding that this issue was "pretermitted" by the plaintiffs' failure to plead and prove an alternative. *Id.* at *13-14. In conclusion they held:

> We conclude that the Plaintiffs failed to carry their burden of showing availability of their proposed alternative method of execution. For this reason, we hold that the Plaintiffs failed to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution. This holding renders moot the majority of their other issues.

Id. at *15. Indeed as Justice Sotomayor observed of the Tennessee court's opinion:

> Once again, a State hastens to kill a prisoner despite mounting evidence that the sedative to be used, midazolam, will not prevent the prisoner from feeling as if he is "drowning, suffocating, and being burned alive from the inside out" during a process that could last as long as 18 minutes. … And once again the State claims the right to do so under the Eighth Amendment **not because a court has concluded that these risks are overblown, but rather because of the "perverse requirement that inmates offer alternative methods for their own executions."** …This requirement was legally and morally wrong when it was promulgated, and it has been proved even crueler in light of the obstacles that have prevented capital prisoners from satisfying this precondition.

Zagorski v. Parker, No. 18-6238, 2018 WL 4900813, at *1 (U.S. Oct. 11, 2018) (Sotomayor, J. dissenting) (emphasis added, internal citations deleted).

Thus, the issue that was "decided on the merits" was narrowly limited to whether the plaintiffs carried their burden to plead and prove a feasible and readily available alternative under *Glossip.* No legal conclusion was reached regarding the "substantial risk" prong of *Glossip*, let alone regarding whether the three-drug protocol is certain to cause severe pain that would be so threatening that a reasonable inmate might choose to die in the electric chair.

d. The precise issues raised by Mr. Zagorski in Count I: he was unconstitutionally coerced to waive his Eighth Amendment rights against cruel and unusual punishment in violation of his due process rights as secured by the Fourteenth Amendment.

At the beginning of his complaint, in his first numbered paragraph, Mr. Zagorski summarized Claim I as follows:

> This suit is filed because the State of Tennessee has coerced Mr. Zagorski—with the threat of extreme chemical torture via a barbaric three-drug lethal injection protocol—to choose to die a painful and gruesome death in the electric chair. Such a death is clearly cruel and unusual, albeit to Mr. Zagorski less cruel than the threatened chemical torture. This coerced choice to choose a death by electrocution violates the Eighth and Fourteenth Amendments.

Complaint, R. 1, PageID# 4, ¶ 1.

While the Preamble to the Complaint stated: "Forcing Mr. Zagorski to choose death in Leuchter's electric chair[5] is cruel and unusual and violates due process." *Id.* at PageID# 4. The factual allegations in Mr. Zagorski's complaint made clear that death under Tennessee's three-drug protocol would involve 10 to 18 minutes of "dreadful and grim" punishment, involving three separate inflictions of

[5] Fred Leuchter, a subsequently disgraced, *faux* engineer, designed Tennessee's electric chair—his other claim to fame is his Holocaust denying report entitled "Engineering Report on the Alleged Execution Gas Chambers at Auschwitz, Birkenau, and Majdanek." R.1, PageID # 17, ¶¶ 64-65.

severe pain, mental anguish, and needless suffering. R. 1, PageID# 9-12, ¶¶ 25-38. He further explained that it was based on his rational desire to avoid such a painful death, that he had chosen to die in the electric chair, R. 1, PageID# 13-14, ¶¶ 41-45. He made this decision, despite the clear dangers of that method, and despite the reality that all across the country the electric chair has either been abandoned or declared unconstitutional. R. 1, PageID# 15-27, ¶¶ 56-92. As he explained, he was forced to choose between "the Scylla of Leuchter's chair and the Charybdis of midazolam poisoning." R. 1, PageID# 29, ¶ 102.

Mr. Zagorski submitted that, as a matter of law, he "cannot be compelled to abandon his Eighth Amendment Right not to be tortured and disfigured in the electric chair, by the State's threat to torture him for 10 to 18 minutes on the lethal injection gurney." R. 1, PageID# 29, ¶ 105. By making this threat, and by coercing "him to select a gruesome and painful death in the electric chair, the State of Tennessee has violated his rights under the Eighth and Fourteenth Amendments." R. 1, PageID# 30, ¶ 107.

Following the District Court's *sua sponte* dismissal of Count I, in his Motion to Alter or Amend Order Dismissing Counts I and II, Mr. Zagorski made no new factual allegations, but he explained the legal doctrines involved. R. 9, PageID# 54-58. Under well-established United States Supreme Court precedent the government may not coerce individuals to give up their enumerated constitutional rights. *Koontz v. St. Johns River Water Mngt. Dist*, 570 U.S. 595, 604 (2013). Such coercion violates the Due Process Clause of the Fifth and Fourteenth Amendments. *Id.; Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991). While, *Koontz* applied to a Fifth Amendment Takings clause claim, the rule preventing coercive waiver of constitutional rights has much wider applicability. *Fulminante*, 499 U.S. at 287-88 (Fifth and Sixth Amendments, confession coerced by threat of inmate violence); *U.S. v. Jackson*, 390 U.S. 570, 581 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (Fifth and Sixth Amendments, confession coerced by threat of job loss); *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (Fifth and Sixth Amendment, coerced guilty plea); *U.S. v. Ivy*, 165 F.3d 397, 402-03 (6th Cir. 1998) (Fourth Amendment, coerced consent to search).

Whether, Mr. Zagorski can prove that the three-drug lethal injection protocol is unconstitutional—by proving a feasible and readily available alternative—is not an element of his due process claim. The Supreme Court has found that the threat of facially constitutional sanctions, from job loss through the death penalty, can be unduly coercive. *Garrity*, 385 U.S. at 500 (firing of employees who did not waive Fifth and Sixth Amendment protections would unconstitutionally coerce waiver of such rights); *Jackson*, 390 U.S. at 580-82 (while death penalty is unconstitutional, only applying death penalty to individuals who plead not guilty unconstitutionally encouraged guilty pleas).

Thus, the legal issue that this case presents is whether the threat of dying under Tennessee's three-drug protocol, which involves a certainty of pulmonary edema (drowning in one's own fluids), paralysis (leading to terror and air hunger), and chemical burning from potassium chloride (described as the most painful drug that can be administered) is sufficiently terrible to coerce the waiver of a constitutional right. *Garrity*, 385 U.S. at 486; R. 1, PageID# 9-11, ¶¶ 25-35 (facts related to three-drug lethal injection). Significantly less compelling threats have been found to lead to waiver of significantly

less substantial constitutional rights.[6] *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991) (A "credible threat of violence" was found sufficiently coercive to invalidate a waiver of Fifth and Sixth Amendment rights); *Cooper v. Scoggy*, 845 F.2d 1385, 1391-92 (6th Cir. 1988) (abuse of co-defendant "created coercive environment in which [defendant] reasonably feared he too was threatened with physical abuse" invalidating confession); *U.S. v. Brown*, 557 F.2d 541, 552 (6th Cir. 1977) (fear of being beaten by police sufficiently coercive).

Thus, the issue presented in this suit is entirely different from any issue that was actually decided on its merits by the Tennessee Supreme Court. *St. Thomas Hosp.*, 705 F.Supp2d at 915; *Mullins*, 294 S.W.3d at 535. Thus, the District Court erred in dismissing Count One. Under applicable *de novo* review this Honorable Court should reverse the District Court's collateral estoppel holding, remand this case for further proceedings where the merits of this claim can fully litigated, and issue a stay so that such may take place.

[6] While, the Eighth Amendment is not any more important than the Fourth Amendment or the Fifth Amendment Takings Clause, the reality of what is given up when choosing to die by electric chair *vis a vis* allowing a temporary entry into one's home, or when suffering purely financial ills is profound.

e. Mr. Zagorski is entitled to relief.

Accepting all well-pled facts as true,[7] Mr. Zagorski has demonstrated a threat of pain and suffering that is significantly greater than that present in any known Fourteenth Amendment coercion case. *Fulminante*, 499 U.S. at 287 (a credible threat of inmate violence was sufficient to coerce defendant to confess to murder and rape of a child in violation of Fourteenth Amendment); *Perry v. Sindermann*, 408 U.S. 593 (1972) (threat of not having contract renewed); *Garrity*, 385 U.S. at 498 (threat of losing job). Consents to search, confessions, and guilty pleas have all been found to have been unconstitutionally compelled with lesser threats. *Garrity*, 385 U.S. at 500; *Ivy*, 165 F.3d at 402-03. The threat of the death penalty (without regard to the pain of its administration) has been found by the Supreme Court to be so coercive as to unconstitutionally encourage guilty pleas, *Jackson*, 390 U.S. at 580-82, and to coerce a confession. *Waley*, 316 U.S. at 102-04.[8]

[7] *O'Connor v. Bd. of Ed. of Sch. Dist. 23,* 449 U.S. 1301 (1980); *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010).

[8] In *Waley* the Supreme Court found the alleged threats to "tax credulity" and remanded for further proceedings—however, they held that if "the allegations are found to be true, petitioner's constitutional rights were infringed." 316 U.S. at 104.

It has long been recognized that "a decision to waive the right to pursue legal remedies is involuntary if it results from duress, including conditions of confinement." *Comer v. Stewart*, 215 F.3d 910, 917 (9th Cir. 2000) (citing *Smith v. Armontrout*, 812 F.2d 1050, 1058-59 (8th Cir. 1987)) *see also Miller ex rel. Jones v. Stewart*, 231 F.3d 1248, 1254 (9th Cir. 2000) (ordering evidentiary hearing to determine defendant's competency to waive his appeals and proceed to execution, recognizing that "the conditions of confinement may have adversely affected his mental state"). In *Groseclose ex rel. Harries v. Dutton*, the District Court examined the conditions at the old Tennessee State Penitentiary, and found them "so adverse that they caused [the death row inmate] to waive his post-conviction remedies involuntarily." 594 F.Supp. 949, 961-62 (M.D. Tenn. 1984). The district court quoted another death row inmate's testimony in reaching this conclusion:

> It constantly builds mental anguish, and physically not being able to exercise right deteriorates you physically. The heat, the coldness in winter, the food, it all makes a man just totally lose hope and makes a man where he would just about would rather get it all over with and go to the electric chair than continue to live in these conditions.

Id. at 961. In this case, Mr. Zagorski, like Mr. Harries, "would rather get it all over with and go to the electric chair" than face a more horrible death under the three-drug protocol. *Id.* But Harries waiver was found to be involuntary. So it is with Mr. Zagorski.

In *Comer* the Ninth Circuit defined the waiver/coercion issue as "whether Mr. Comer's conditions of confinement constitute punishment so harsh that he has been forced to abandon a natural desire to live." *Comer*, 215 F.2d at 918. Here, the three-drug lethal injection protocol is a "punishment so harsh" that Mr. Zagorski was "forced to abandon a natural desire" not to die in the electric chair. *Id.*

Mr. Zagorski's claim of coerced waiver is equal to, if not significantly stronger than those presented in any of the just mentioned cases. His otherwise incredible choice to choose a method of death that will surely be very painful, and will absolutely be gruesome, can only be explained by the coercive impact of Tennessee' three-drug lethal injection protocol. Thus, Mr. Zagorski has presented a meritorious claim warranting relief, or further proceedings in the District Court, including a trial on the merits.

II. Count II: The District Court misapplied *Stewart v. LaGrand* and incorrectly determined that Mr. Zagorski had waived his right to present an Eighth Amendment challenge to the death in the electric chair, which is a patently unconstitutional method of execution.

a. *LaGrand* does not apply, as the waiver was coerced and the facts are radically different.

Stewart v. LaGrand, 526 U.S. 115 (1999) does not 'save' a coerced and involuntary waiver. As has been set-forth, above, Mr. Zagorski was unconstitutionally compelled to select death in the electric chair. Such a compelled waiver, aside from violating due process and the Fourteenth Amendment, does not comport with the rationale of *LaGrand*, which involved the voluntary choice to forego a constitutional AND pain-free method of execution (a lethal injection protocol involving an actual anesthetic, sodium thiopental), for an obviously more painful method of death—one that had already been declared unconstitutional—poison gas. *LaGrand*, 526 U.S. at 119; *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996) (finding California's use of lethal gas to be cruel and unusual); *see also LaGrand v. Stewart*, 133 F.3d 1253, 1263-64 (9th Cir. 1998) (more history of LaGrand's choice). Here, Mr. Zagorski has done the exact opposite, he has chosen to avoid 10 to 18 minutes of "dreadful and grim" suffering, and to replace it with

his hope that the electric chair will work and will kill him painfully and gruesomely, but very quickly with its first jolt of electricity. Such a decision is factually distinct from the situation in *LaGrand,* and *LaGrand* is not controlling.

b. *LaGrand* cannot apply to a *Glossip* alternative scenario.

In our post-*Glossip* world a very painful method of lethal injection appears to be immune from challenge unless inmates do what Zagorski was unable to do given the extreme and unfair restrictions placed upon him by the state court, and find a willing supplier of more benign lethal injection chemicals.[9] Thus, a 'choice' to select a (hopefully) less-painful method of execution (such as the electric chair) does not presuppose that either the preferred method or the avoided method (midazolam protocol) do not involve severe pain, mental anguish and needless suffering.

At the time of *LaGrand,* prior to the comparative harm and alternative revolution of *Glossip* and *Baze*, courts still applied *In re*

[9] "When the prisoners tasked with asking the State to kill them another way are denied by the State information crucial to establishing the availability of that other means of killing, a grotesque requirement has become Kafkaesque as well." *Zagorski v. Parker*, No. 18-6238, 2018 WL 4900813, at *2 (Oct. 11, 2018) (Sotomayor, J. dissenting).

Kemmler, 136 U.S. 436 (1890), *Wilkerson v. Utah*, 99 U.S. 130 (1878) and even *Graham v. Florida,* 560 U.S 48 (2010) to evaluate punishments in a categorical and objective manner.[10] At the time of *LaGrand*, courts were only asked to consider whether a particular punishment was cruel and unusual. Now, post-*Glossip*, the same method of punishment may be challenged *ad infinitum* in a series of comparative harm cases, as inmates (ideally from their perspective) become better at finding purveyors of less risky and less painful methods of execution.

In this evershifting world, a coerced 'waiver' cannot pretermit a valid constitutional challenge to the electric chair. *LaGrand* is from a different time, and from different facts, and does not control.

c. The challenge to electrocution was raised at the first moment it was viable.

Mr. Zagorski timely attempted to challenge the constitutionality of electrocution in 2014; however, the Tennessee Supreme Court

[10] To be clear, Mr. Zagorski believes that *In re Kemmler, Wilkerson* and *Graham* are all still good law and controlling authority. He believes that *Baze v. Rees* made clear that if an inmate was exposed to the pain and suffering of a paralytic and potassium chloride that Eighth Amendment would be violated. *Baze*,, 553 U.S. at 53. However, his position has been rejected by the Supreme Court of Tennessee, which views the alternative requirement as a prerequisite to all method of execution claims. *Abdur'Rahman*, at *7.

concluded that the issue was not ripe, and would not be ripe unless lethal injection was found unconstitutional. *West v. Schofield*, 468 S.W.3d 482, 491-95 (Tenn. 2015) (Zagorski one of the named plaintiffs).

Mr. Zagorski expeditiously challenged the midazolam-based three drug protocol Tennessee adopted on January 8, 2018, filing suit in state court five weeks later on February 20, 2018. After an extremely-compressed discovery period, a Tennessee trial court conducted a ten-days of trial on the constitutional challenge brought by Mr. Zagorski and other Tennessee death row inmates from July 9 to July 26, 2018. This trial commenced a mere four days after Tennessee had revised the lethal injection protocol to remove the alternative of single-drug pentobarbital. After the trial court ruled against the inmates, the Tennessee Supreme Court reached down *sua sponte* and took the appeal from the intermediate court and set an expedited schedule for briefing and argument, resulting in argument on October 3, 2018 and decision on October 8, 2018, less than eight months after the inmates had filed suit. *See Abdur'Rahman*, at *15-20 (Lee, J. *dissenting*) (describing rushed time frame of suit).

Within two hours of the Tennessee Supreme Court issuing their ruling Mr. Zagorski informed the defendants that (a) he would choose to die by electric chair, as opposed to via lethal injection, but (b) he fully intended to challenge the constitutionality of the electric chair, should he have the opportunity. R. 1, PageID # 13-14, ¶ 45. However, Mr. Zagorski, due to the immutable limits of time, simply did not have the opportunity to perfect such a challenge prior to his scheduled execution of October 11, 2018. R. 1, PageID# 15, ¶ 54.

Having received a reprieve, and witnessing the inscrutable behavior of the defendants (who engaged in all required testing of the electric chair, prior to Mr. Zagorski's October 11 execution date, but then called it off), Mr. Zagorski filed the instant suit within four-days of being given a new date of November 1, 2018. R. 1, PageID # 1, 55.

d. Zagorski's challenge to electrocution is meritorious and should proceed to a trial on the merits.

In 2001, the Georgia Supreme Court declared that execution in the electric chair was unconstitutional, because of the attendant "specter of excruciating pain" and the "certainty of cooked brains and blistered bodies." *Dawson v. Georgia*, 554 S.E.2d 137, 144 (Ga. 2001).

In 2008, the Nebraska Supreme Court declared that executions in the electric chair were unconstitutional, finding that it causes "intolerable pain." *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008).

> ... Electrocution as a method of executing condemned prisoners is an extremely violent method of accomplishing death. It includes some burning, smoke, and involves extreme contortion of muscles and tissue of almost every part of a person's body. It includes no effort at all to anesthetize the person into unconsciousness before the mechanisms of death are employed.
>
> ... [T]here is no question that the Nebraska practice of executing condemned prisoners exclusively by electrocution is unique, outdated, and rejected by virtually all the rest of the world; including practices for the euthanasia of non-human animals. There is also no question that its continued use will result in unnecessary pain, suffering, and torture for some, but not all of [the] condemned murderers in this state. Which ones or how many will experience this gruesome form of death and suffer unnecessarily; and which ones will pass with little conscious suffering cannot be known.

Id. at 272.

> The Nebraska Supreme Court concluded:
>
> Besides presenting a substantial risk of unnecessary pain, we conclude that electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner's body. Electrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man.

Id. at 279.

When examining the electric chair under "objective indicia of society's standards" as required by *Graham v. Florida*, 560 U.S. 48, 61 (2010) we see that it has uniformly been rejected around this nation. Specifically:

a. In 1974 electrocution was the sole method of execution in Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Nebraska, New Jersey, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and Virginia.

b. In 1977 Texas abandoned electrocution. Tex. Crim. Proc. Code Ann. § 43.14.

c. In 1982 New Jersey abandoned electrocution. N.J. Stat. Ann. § 2C:49-2.

d. In 1983 Illinois abandoned electrocution. 725 Ill. Comp. Stat. 5/115-5.

e. In 1983 Arkansas abandoned electrocution as an imposed method of execution. Arkansas gave prisoners sentenced to death before July 4, 1983, the ability to avoid electrocution by choosing instead lethal injection or lethal gas. Arkansas abandoned electrocution as an execution method for prisoners sentenced to death after that date. Ark. Code Ann. § 5-4-617.

f. In 1984 South Dakota abandoned electrocution. S.D. Codified Laws § 23-A-27A-32.

g. In 1990 Louisiana abandoned electrocution. La. Rev. State. Ann. § 15:569.

h. In 1993 Ohio abandoned electrocution as an imposed method of execution. Ohio gave prisoners the ability to avoid electrocution by choosing instead lethal injection. Ohio Rev. Code Ann. § 2949.22.

i. In 1994 New York abandoned electrocution. N.Y. Correct. Law § 658.

j. In 1994 Connecticut abandoned electrocution. Conn. Gen. Stat. § 54-100.

k. In 1994 Virginia abandoned electrocution as an imposed method of execution. Virginia gave prisoners the ability to avoid electrocution by choosing instead lethal injection. Va. Code Ann. §§ 53.1-233, 53.1-234.[11]

l. In 1995 Indiana abandoned electrocution. Ind. Code Ann. § 35-38-6-1.

m. In 1995 South Carolina abandoned electrocution as an imposed method of execution. South Carolina gave prisoners the ability to avoid electrocution by choosing instead lethal injection. S.C. Code Ann. § 24-3-530.[12]

n. In 1998 Kentucky abandoned electrocution as an imposed method of execution. Kentucky gave prisoners sentenced to death on or before March 31, 1998, the ability to avoid electrocution by choosing instead lethal injection. Kentucky abandoned

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[11]"Electrocution is a violent, torturous and dehumanizing act. Carrying out executions should not require the state to stoop to the same level as the criminal. The objective is death, not violent torture." (Statement of Senator Edgar Robb). "[Electrocution is] a violent, torturous and, yes, dehumanizing way of carrying out the mandate of the people." (Statement of Delegate Phillip Hamilton).

[12] "The technology that was available for us at the turn of the century in South Carolina was electricity. . . . It's kind of cruel and inhumane." (Statement of Representative Harry Hallman).

electrocution as an execution method for prisoners sentenced to death after that date. Ky. Rev. Stat. Ann. § 431.220.

o. In 1998 Pennsylvania abandoned electrocution. Pa. Stat. Ann. Tit. 61, § 3004.

p. In 1998 Tennessee abandoned electrocution as an imposed method of execution. Tennessee gave prisoners sentenced to death before January 1, 1999, the ability to avoid electrocution by choosing instead lethal injection, with the default execution method being electrocution if the prisoner refused to select an execution method. Tennessee abandoned electrocution as an execution method for prisoners sentenced to death after that date. In 2000, Tennessee abandoned electrocution as the default execution method for prisoner sentenced to death before January 1, 1999. Tenn. Code Ann. § 40-23-114(a).[13]

q. In 2000 Florida abandoned electrocution as an imposed method of execution. Florida gave prisoners the ability to avoid electrocution by choosing instead lethal injection. Fla. Stat. Ann. §§ 922.10 and 922.105.

r. In 2000 Georgia abandoned electrocution as a method for executing future death sentences, but left electrocution in place as the method for prisoners sentenced to death before the new legislation took effect. Ga. Code Ann. § 17-10-38.

s. In 2001, the Georgia Supreme Court declared electrocution a cruel and unusual punishment. *Dawson v. State*, 554 S.E.2d 137, 143-44 (Ga. 2001).

[13]"We have reason to be very suspect of the technology of our Electric Chair, the maintenance of our Electric Chair, modifications that have been performed to the Electric Chair, as to whether or not this is actually gonna result in a death that would be quite heinous and cruel. . . ." (Statement of Representative Frank Buck).

t. In 2001 Ohio abandoned electrocution.[14]

u. In 2002 Alabama abandoned electrocution as an imposed method of execution. Alabama gave prisoners the ability to avoid electrocution by choosing instead lethal injection. Ala. Code § 15-18-82.[15]

v. In 2008 the Nebraska Supreme Court declared electrocution a cruel and unusual punishment. *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008).

Thus, in light of the sheer weight of precedent and of history, Mr. Zagorski challenge to electrocution is meritorious. *LaGrand* should not bar his ability to litigate this meritorious claim. The decision of the district court should be reversed and the case remanded for further proceedings, including a trial on the merits. The Court should enter a stay of execution to permit that trial to move forward.

CONCLUSION

WHEREFORE, the judgment of the district court should be reversed and the case remanded for further proceedings, including a

[14] "Electrocution is no longer a humane way of putting condemned prisoners to death. . . ." (Representative Jim Trakas).

[15] "[Electrocution is a] horrible way for us to put a person to death." (Statement of Representative Thomas Jackson).

trial on the merits. A stay of execution should be entered. The Court should issue any other relief as law and justice require.

Respectfully submitted,

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CERTIFICATE OF SERIVCE

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Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) in that it contains _____words. In certifying the number of words in the brief I have relied on the word count of the word-processing system used to prepare the brief.

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