Nos. 18-6238, 18A376

IN THE
SUPREME COURT OF THE UNITED STATES

EDMUND ZAGORSKI,
Petitioner,

v.

TONY PARKER, et al.,
Respondent.

ON APPLICATION FOR STAY OF EXECUTION AND ON PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Court should grant Petitioner a stay of execution under the All Writs Act, 28 U.S.C. § 1651, or 28 U.S.C. § 2101(f) pending disposition of a petition for writ of certiorari, when the Petitioner failed to prove an essential element of his Eighth Amendment method-of-execution claim under *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015), namely, that there is an alternative method of execution that is feasible, readily implemented, and that significantly reduces a substantial risk identified in Tennessee's method of execution.

2. Whether Tennessee's midazolam-based three-drug protocol violates the Eighth Amendment without regard to Petitioner's failure to plead and prove a feasible, readily implemented alternative method of execution.

3. Did *Glossip* hold that there are no methods of execution, which are categorically prohibited by the Eighth Amendment?

4. Did *Glossip* relieve states from any obligation under the Eighth Amendment to engage in a good-faith search for humane forms of execution and shift that burden to inmates?

5. Is an inmate deprived of fundamental due process under the Fourteenth Amendment when he is effectively prevented from establishing the existence of a feasible and readily implemented alternative by 1) state secrecy laws preventing discovery of willing drug suppliers, 2) the state's refusal to affirm or deny their ability to secure alternative drugs, 3) a rushed litigation schedule, which precludes full factual development, and 4) Tennessee's "perverse and unworkable" interpretation of *Glossip*.

6. Does the State violate an inmate's constitutional right to access to the courts by depriving an inmate's attorney telephone access during an execution?

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The October 8, 2018, judgment of the Tennessee Supreme Court affirming the trial court's judgment that death row inmates failed to establish that Tennessee's method of execution constitutes cruel and unusual punishment is not yet published but can be found at 2018 WL 4858002. *Abu-Ali Abdur'Rahman et al. v. Parker et al.*, __ S.W.3d __, No. M2018-01385-SC-RDO-CV (Tenn. Oct. 8, 2018). Pet. App. A A001-34. The order of the Tennessee Supreme Court denying Petitioner's motion for stay of execution is unpublished. *State of Tennessee v. Edmund Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Oct. 9, 2018). Stay Application, Exh. B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257, 28 U.S.C. § 1651, 28 U.S.C. § 2101(f), and Sup. Ct. R. 23.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

Twenty-eight U.S.C. § 1651(a) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Twenty-eight U.S.C. § 2102(f) provides in pertinent part:

> (f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

STATEMENT

Petitioner Edmund Zagorski was convicted by a Tennessee jury in 1984 of the first-degree murders of John Dale Dotson and Jimmy Porter.[1] The jury sentenced Petitioner to death for each of the murders, and the Tennessee Supreme Court affirmed. *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986). Petitioner sought post-conviction relief, which was denied in state court. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), *cert. denied*, 528 U.S. 829 (1999). Petitioner's application for federal habeas corpus relief was denied by the United States District Court, and the Sixth Circuit affirmed. *Zagorski v. Bell*, 326 Fed. Appx. 336 (6th Cir. 2009), *cert. denied*, 559 U.S. 1068 (2010).

When his efforts to upset his conviction and death sentence proved unsuccessful, Petitioner turned his attention to Tennessee's method of execution, joining other death row inmates in a series of challenges to Tennessee's lethal injection protocol. Those challenges have succeeded only in delaying the execution of Petitioner's criminal judgment, which has now been final for more than thirty years. They have never succeeded on the merits.

On September 7, 2010, the Tennessee Supreme Court ordered that Petitioner's death sentence be carried out on January 11, 2011. *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Order, Sept. 7, 2010). But the Court later vacated its order after Petitioner intervened in a state-court declaratory judgment action filed by another death-row inmate challenging the constitutionality of Tennessee's lethal injection protocol, which then called for a three-drug

[1] The facts of Zagorski's crimes are set out in the opinion of the Tennessee Supreme Court.

combination of sodium thiopental, pancuronium bromide, and potassium. *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Order, Nov. 29, 2010). That challenge failed in the trial court, and the Tennessee Court of Appeals affirmed, holding that the inmates failed to show that the protocol exposed them to an intolerable risk of severe and unnecessary pain and suffering and that they failed to prove an alternative method of execution that is feasible, readily implemented, and that significantly reduces any such risk. *West v. Schofield*, 380 S.W.3d 105 (Tenn. Ct. App. 2012) (citing *Baze v. Rees*, 553 U.S. 35 (2008)), *cert. denied*, 569 U.S. 927 (2013).

In September 2013, the Tennessee Department of Correction replaced the three-drug protocol with a single-drug protocol using pentobarbital, a change necessitated by the unavailability of one of the chemicals essential to carrying out a sentence under the previous three-drug protocol. The Tennessee Supreme Court then set a new execution date for Petitioner of December 9, 2014. *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Order, Jan. 31, 2014). But the Court later stayed Petitioner's execution pending the disposition of another state-court declaratory judgment action in which thirty-one inmates challenged the single-drug pentobarbital protocol. *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Order, Oct. 22, 2014). That challenge also failed in the trial court. On appeal, applying this Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the Tennessee Supreme Court ruled that the State's method of execution did not violate the Eighth Amendment and was not otherwise unlawful. *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017), *cert. denied*, *West v. Parker*, 138 S. Ct. 476 (2017), and *Abdur'Rahman v. Parker*, 138 S. Ct. 1183 (2018).

After this Court denied certiorari, the Tennessee Supreme Court reset Petitioner's execution date for October 11, 2018. *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Order, Mar. 15, 2018).

But during the three-year pendency of the litigation challenging Tennessee's single-drug protocol, pentobarbital too became unavailable to the Tennessee Department of Correction for use in executions, necessitating yet another change. The Tennessee Supreme Court described this course of events in its October 8, 2018 opinion:

> The *Glossip* Court recognized the practical difficulties in obtaining lethal injection drugs:
>
> > *Baze* cleared any legal obstacle to use the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion. But a practical obstacle soon emerged, as anti-death penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.
>
> *Id.*, 135 S. Ct. at 2733. States, including Tennessee, then began using pentobarbital as an alternative barbiturate. *See id.* "Before long, however, pentobarbital also became unavailable. Anti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions." *Id.* (citation omitted). "Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs." *Id.*, 135 S.Ct. at 2734. Tennessee is among those states turning to midazolam.

Abdur'Rahman, 2018 WL at *6.

On January 8, 2018, the Tennessee Commissioner of Correction approved a revised lethal injection protocol to ensure that the Department of Correction could comply with its statutory obligation to carry out death sentences by lethal injection when ordered to do so by the Tennessee Supreme Court. The revised protocol added an alternative protocol, which called for the use of one of two alternative chemical combinations, as determined by the Commissioner:

Protocol A, which called for the use of the single drug pentobarbital; or Protocol B, which called for a three-drug sequence, consisting of midazolam, vecuronium bromide, and potassium chloride. The midazolam-based three-drug lethal injection protocol is substantially the same as the protocol reviewed by this Court in *Glossip*.

On February 20, 2018, Petitioner and thirty-two other inmates filed yet another state-court declaratory judgment action challenging the midazolam-based three-drug protocol. Being aware of several impending execution dates, including the Petitioner's, the trial court established an expedited litigation schedule to allow for adjudication of the inmates' claims by those dates. The inmates filed two amended complaints before trial. Both amendments designated a single-drug pentobarbital protocol as Plaintiffs' "available alternative" under *Glossip*. *Abdur'Rahman*, 2018 WL 4858002, at *3, 10.[2] The pleadings did not allege that any other method of execution would significantly reduce the substantial risk of harm alleged with respect to the midazolam-based protocol.[3]

On July 5, 2018, the Commissioner of Correction removed Protocol A from the State's execution protocol and made additional changes not relevant to this proceeding. The amendment

[2] Plaintiffs' initial Complaint alleged no alternative method of execution at all. However, facing the prospect of dismissal under Tenn. R. Civ. P. 12.02(6), the Plaintiffs amended their pleading to include the single-drug pentobarbital alternative.

[3] After the close of proof at trial, the inmates moved to amend their Second Amended Complaint under Tenn. R. Civ. P. 15.02 to assert that the removal of vecuronium bromide from the three-drug protocol is a known, feasible, and available alternative method of execution. But the trial court denied the motion because the plaintiffs failed to meet the Rule 15.02 requirements for a post-trial amendment, since, as the trial court found, the issue was known or could have been known before trial, and the issue had not been tried by consent of the parties.

left intact the only method under review in this case, *i.e.*, the midazolam-based three-drug protocol.

After a ten-day trial, on July 26, 2018, the state trial court dismissed the inmates' Second Amended Complaint as meritless. Applying *Glossip*, the state court ruled that the inmates failed to prove an essential element of their Eighth Amendment claim, namely, that there exists an available alternative to the method of execution they are challenging that significantly reduces a substantial risk of severe pain. Pet. App. B A055.

> The inmates who filed this lawsuit have failed to prove the essential element required by the United States Supreme Court that there exists an available alternative to the execution method they are challenging. On this basis alone, by United States law, this lawsuit must be dismissed.
>
> It is therefore ORDERED that after considering the pleadings, studying the law and the evidence, and listening to arguments of Counsel, the Court finds that the Plaintiffs have failed to establish that Tennessee's three-drug lethal injection protocol issued July 5, 2018, is unconstitutional and/or unlawful, and dismisses the Plaintiffs' Second Amended Complaint for Declaratory Judgment with prejudice.

Pet. App. B A038.

Plaintiffs appealed the trial court's decision to the Tennessee Court of Appeals on July 30, 2018. While the appeal was pending, Tennessee executed one of the Plaintiffs, Billy Ray Irick, using the midazolam-based three-drug protocol. That execution was carried out only after the Tennessee Supreme Court had denied Irick's motion to vacate his execution date because he had failed to show, as required to obtain a stay of execution under Tenn. Sup. Ct. R. 12.4(E), "a likelihood of success on the merits" of his collateral litigation in state court. This Court likewise declined to stay Irick's execution on the same record and the same findings now before this Court. *Irick v. Tennessee*, No. 18A142, 2018 WL 3767151 (U.S. 2018).

In the meantime, the Tennessee Supreme Court *sua sponte* assumed jurisdiction over the appeal, received briefs and oral argument from the parties, and affirmed the judgment of the trial court. The Tennessee Supreme Court concluded that "the evidence [in the record] does not preponderate against the trial court's finding that Tennessee does not have access to and is unable to obtain pentobarbital with ordinary transactional effort." *Abdur'Rahman*, 2018 WL 4858002, at *13.

> [W]e agree with the trial court's finding that pentobarbital—the only alternative method of execution that the Plaintiffs sufficiently pleaded—is not available for use in executions in Tennessee. Therefore, the Plaintiffs failed to carry their burden of showing availability of their proposed alternative method of execution, as required under the *Glossip* standard set forth by the United States Supreme Court and recently adopted by this Court in *West v. Schofield* for state constitutional purposes. As we noted earlier, this requirement is an independent requirement, separate and apart from the requirement to prove that the protocol creates a demonstrated risk of severe pain. Therefore, for this reason, we hold that the Plaintiffs failed to carry their burden 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 1, section 16 of the Tennessee Constitution. As a result, we need not address the Plaintiffs' claim that the three-drug protocol creates a demonstrated risk of severe pain. Accordingly, we affirm the trial court's dismissal of this action.

Id.

On October 9, 2018, the Tennessee Supreme Court denied Petitioner's motion for stay of execution pending the disposition of a petition for writ of certiorari in this Court. In denying that motion, the state court considered the adverse holding in *Abdur'Rahman* and this Court's denial of a stay in *Irick v. Tennessee*, 2018 WL 3767151 (U.S., Aug. 9, 2018), which had presented the same issues. *State of Tennessee v. Edmund Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Oct. 9, 2018).

REASONS FOR DENYING A STAY AND DENYING REVIEW

Petitioner contends that the All Writs Act, 28 U.S.C. § 1651(a), gives this Court the power to stay his execution, but he is mistaken. Pursuant to the All Writs Act, this Court "may issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). But this Court has made clear that reliance on the All Writs Act does not excuse an inmate who seeks a stay of execution "'to challenge the manner in which the State plans to execute him'" from "satisfy[ing] all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Dunn v. McNabb*, 138 S. Ct. 369 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)).

Moreover, 28 U.S.C. § 2101(f) provides no basis for a stay either, because Petitioner cannot show, as he must, a likelihood that his petition for writ of certiorari will be granted *and* that there is a significant possibility of reversal of the lower court's decision. Indeed, the latter requirement that "there must be a significant possibility of reversal" is conspicuously absent from Petitioner's quotation from *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Stay Application, 1. But Petitioner's motion should be denied for precisely that reason: he has not shown and cannot show that there is a significant possibility of reversal, because the Tennessee Supreme Court's decision conformed entirely with this Court's directives in *Glossip* and *Baze*. 135 S.Ct. at 2739 ("*Baze* . . . made clear that the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative.") (emphasis added). Nor would a stay of his execution aid this Court's jurisdiction. Petitioner's motion for a stay of execution should be denied.

A. Petitioner Cannot Show a Significant Possibility of Success on the Merits of His Challenge to Tennessee's Lethal Injection Protocol.

Petitioner asks this Court to stay his execution pending the disposition of a petition for writ of certiorari in this Court challenging the decision of the Tennessee Supreme Court that upheld the constitutionality of the State's lethal injection protocol. His application should be denied because he can show no likelihood that review by this Court, even if granted, will result in reversal of the State court's decision.

"[A] stay of execution is an equitable remedy," and "equity must be sensitive to the State's interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Inmates like Petitioner who seek to challenge how the State plans to execute their sentences must show "a significant possibility of success on the merits" of that collateral litigation. *Id*. Petitioner cannot make that showing here because he failed to prove an essential element of his Eighth Amendment method-of-execution claim in the state trial court. And that failure was not just one of degree: Petitioner presented *no direct proof* to the trial court that his proposed method of execution—the single drug pentobarbital—is available to the State of Tennessee for use in executions. *Abdur'Rahman*, 2018 WL 4858002, at *13. "All of the Plaintiffs' expert witnesses confirmed that they were not retained to identify a source for pentobarbital and that they had no knowledge of where TDOC could obtain it." *Id*. And the trial court "found convincing" and fully credited the testimony of the officials of the Tennessee Department of Correction ("TDOC") that "TDOC would use pentobarbital if it were available, because [the Tennessee Supreme Court] recently upheld the one-drug protocol using pentobarbital." *Id*. The Tennessee Supreme Court found that credibility finding to be supported

by the record. *Id.* That ruling is legally unremarkable and provides no basis for a grant of certiorari, let alone reversal of the decision.

Petitioner insists, however, that the case raises other "questions of exceptional importance" that warrant a grant of certiorari. Application, at 1-2. But he is incorrect. Petitioner's failure to prove an essential element of his Eighth Amendment method-of-execution claim pretermits many of the other issues that were before the Tennessee Supreme Court, and his challenge to the State court's application of Tennessee statutes and rules governing discovery and the confidentiality of Tennessee public records exceeds this Court's certiorari jurisdiction. This Court has long recognized that a State's highest court is the best authority on the State's own law. *See C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967). And Petitioner's other questions related to the legal requirements of a method-of-execution challenge are all answered unambiguously by *Glossip* itself.

In *Glossip*, this Court instructed that prisoners "cannot successfully challenge a method of execution" unless they (1) establish that the method presents a risk that is "sure or very likely to cause serious illness and needless suffering" and (2) identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." 135 S. Ct. at 2737. This Court was clear that "the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative" to the method they are challenging. *Id.* at 2739 (emphasis added). This is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S.Ct. at 2731 (emphasis added). The burden of establishing these elements rests entirely with the inmate challenging a State's method of execution. A prisoner

cannot successfully challenge a method of execution unless "they establish" the two requirements outlined in *Baze* and *Glossip*. 135 S.Ct. at 2737.

Petitioner's reliance on dicta in *Baze* regarding the legal significance of the administration of pancuronium bromide and potassium chloride is unavailing. Application, 4. This Court explained the operative requirements of *Baze* in *Glossip*: "*Baze* . . . made clear that the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative." 135 S.Ct. at 2739. Indeed, a majority of this Court ruled in *Glossip* that Oklahoma's inability to obtain pentobarbital, and the inmate's failure to identify any available alternative to Oklahoma's midazolam-based protocol was an *independent basis* for affirmance of the lower court's decision denying the inmate's motion to enjoin the use of midazolam. *Glossip*, 135 S.Ct. at 2738.

Nor does the pendency of *Bucklew v. Precythe*, No. 17-8151 (U.S.), alter the analysis. Application at 7. *Bucklew* raises a question about a plaintiff's burden to prove "an adequate alternative method of execution *when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition*." Petition for Writ of Certiorari at (i), *Bucklew v. Precythe*, No. 17-8151 (U.S. Mar. 5, 2018) (emphasis added). None of the Plaintiffs in this case raised that sort of claim. Plaintiffs here asked the state court to declare as a matter of law that the State's midazolam-based three-drug protocol *on its face* violates the Eighth Amendment. And "identify[ing] a known and available alternative method of execution that entails a lesser risk of pain [is] a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S. Ct. at 2731 (emphasis added).

Moreover, unlike this case, the point of contention in *Bucklew* was not whether the inmate's proposed alternative—lethal gas—was a feasible and available alternative. *See Bucklew v. Precythe*, 883 F.3d 1087, 1094 (8th Cir. 2018) (cert. granted). Instead, the point of contention was the comparative risk of harm between the State's existing method of execution (lethal injection) and the inmate's proposed alternative (lethal gas), considering the inmate's unique congenital medical condition. *Id.* at 1093. The contours of any comparative analysis have no bearing here whatsoever, because Petitioner failed to meet the threshold showing that pentobarbital is even available to the Tennessee Department of Correction. *Bucklew* thus provides no basis for this Court to interfere with Tennessee's interest in enforcing Petitioner's thirty-two-year-old death sentence.

This Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Glossip*, 135 S. Ct. at 2732. The state trial court's rejection of Petitioner's challenge to Tennessee's lethal injection protocol is in line with this Court's decision in *Glossip* and the decisions of other federal appellate courts that have uniformly rejected Eighth Amendment challenges to lethal injection protocols that use midazolam as the first drug in a three-drug combination. *See Glossip*, 135 S. Ct. at 2739-40 (observing that "numerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from the administration of the paralytic agent and potassium chloride"). *See also In re: Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017) (reversing order enjoining three-drug protocol using midazolam and explaining that "[Ohio's] chosen procedure here is the same procedure (so far as the combination of drugs is concerned) that the Supreme Court upheld in *Glossip*"), *cert. denied*,

137 S. Ct. 2238 (2017); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir. 2017) (concluding that evidence fell short of showing a significant possibility that Arkansas protocol is "sure or very likely" to cause severe pain and needless suffering), *cert. denied*, 137 S. Ct. 1275 (2017); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016) (inmate "ha[d] not carried his heavy burden to show that Alabama's current three-drug protocol—which is the same as the protocol in *Glossip*—is 'sure or very likely to cause' [inmate] serious illness, needless suffering, or a substantial risk of serious harm"), *cert. denied*, 137 S. Ct. 725 (2017).[4]

B. A Stay of Execution Will Harm the Significant State Interests.

A stay of execution is an equitable remedy, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. *Hill*, 547 U.S. at 584. This Court cautioned in *Baze* that adherence to the feasible alternative requirement was necessary to avoid transforming courts into boards of inquiry "with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51.

> Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death. *See Bell v.*

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[4] Although not necessary to its disposition of Petitioner's Eighth Amendment claim, the trial court also found that the Plaintiffs failed to prove the other element of *Glossip*—that the protocol "presents a risk that is 'sure or very likely to cause serious illness and needless suffering and give rise to sufficient imminent dangers.'" *West*, 519 S.W.3d at 563-64 (citing *Glossip*, 135 S.Ct. at 2737). The trial court explained that "the Inmates have not established the other *Glossip* prong that with the use of midazolam there is an objectively intolerable risk of harm." Pet. App. B A064. The Tennessee Supreme Court did not reach this issue in its decision because *Glossip* did not require it to.

> *Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government").

Id.

Three rounds of litigation—over more than a decade—aimed at undermining Tennessee's efforts to carry out lawful criminal sentences clearly illustrate the danger warned against in *Baze*. Tennessee has a strong interest in enforcing its criminal judgments without undue interference from the federal courts. Tennessee courts have closely hewed to this Court's decisions. The Petitioner's desire to advocate for a departure from this Court's settled precedent provides no basis for review or for further delay of the Petitioner's judgment. At this juncture, with Zagorski having long since completed state and federal review of his convictions and sentence, the State's interests in finality are "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998).

C. A Stay of Execution Will Not Aid This Court's Jurisdiction Because There is No Basis for Certiorari Review.

A stay of Petitioner's execution is also not necessary to preserve this Court's ability to consider a petition for certiorari from the state court's decision because none of the issues presented by the Petitioner is worthy of review.

Glossip plainly outlines an inmate's burden for succeeding on an Eighth Amendment method-of-execution claim. This Court held in *Glossip* that a prisoner bears the burden of identifying a feasible, readily implemented alternative that effectively addresses and in fact significantly reduces a substantial risk of serious harm or severe pain. *Baze*, 553 U.S. at 52; *Glossip*, 135 S.Ct. at 2739 ("*Baze* . . . made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative.") (emphasis added). This is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S.Ct. at 2731

(emphasis added). Because Petitioner failed to meet that requirement here, the Tennessee Supreme Court correctly concluded that he "failed to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment." *Abdur'Rahman*, 2018 WL 4858002, at *15.

Petitioner's challenges to the State court's application of Tennessee statutes and rules governing discovery, the confidentiality of Tennessee public records, and the course of trial and appellate proceedings provide no basis for review either. This Court has long recognized that a State's highest court is the best authority on its own law. *See C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967).

Petitioner was convicted and sentenced according to law and was afforded the right to direct and post-conviction review in the state and federal courts. Petitioner was denied no due process in this proceeding. He received extensive process in the trial court and was permitted every opportunity to make a complete record on their claims. Petitioner was heard before the Tennessee Supreme Court—an impartial tribunal—through counsel in writing and in person. The issues in this case are governed by established precedent of this Court. The method of execution to be employed by the State of Tennessee to carry out Petitioner's lawful death sentence has been upheld by this Court and numerous other courts. It has *never* been held unconstitutional. Nor has this Court ever held that an inmate has a constitutional right to a telephone during an execution.

Thus, none of issues raised by Petitioner requires or warrants review by the Court. Indeed, on precisely the same record and same issues, this Court has already once declined to intervene when Billy Ray Irick sought a stay of execution. And even if Petitioner's execution

proceeds as scheduled, nothing will prevent the remaining inmates from seeking certiorari or will otherwise interfere with this Court's eventual jurisdiction over the method-of-execution claims asserted by inmates in the state-court proceedings. Sup. Ct. R. 12.4.

CONCLUSION

Petitioner's Application for Stay of Execution and Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition was forwarded by United States mail, first-class postage prepaid, and by email on the 10th day of October, 2018, to the following:

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