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Legally Indefensible:

Requiring Death Row Prisoners to Prove Available Execution Alternatives

The Supreme Court has twice considered and rejected Eighth Amendment challenges to state lethal injection procedures, concluding in both cases that the condemned prisoners failed to show that the execution process in their states posed sufficient risks of pain and suffering to be adjudged cruel and unusual punishment.[1] More broadly, the Court's decisions in an array of lethal injection challenges have declined to seriously entertain claims that execution procedures are constitutionally infirm, while insisting that method-of-execution challenges not delay executions.[2] Most recently, the Court reasserted the very high legal bar condemned prisoners must meet to satisfy the Eighth Amendment, and added to this burden a requirement that the plaintiff "identify a known and available alternative method of execution that entails a lesser risk of pain" than the challenged procedure.[3]

In its 2008 *Baze v. Rees* plurality opinion, the Court established the legal standard for an Eighth Amendment challenge to an execution procedure. A petitioner must prove a "'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the *Eighth Amendment*.'"[4] This legal standard is a difficult, "heavy burden."[5] In the eight years since the Supreme Court decided *Baze*, no court has held that an existing procedure violates the cruel and unusual punishment clause, despite several high-profile, gruesomely bungled executions, experimentation with new drug formulas, and questions about the quality and sources of the drugs departments of corrections are using. However, what tips the condemned prisoners' burden from heavy to extraordinary is the requirement announced in the Court's 2015 decision in *Glossip v. Gross* that the condemned prisoners themselves must present and prove a "readily available" and "feasible" execution procedure to replace the challenged procedure.[6]

The requirement that petitioners proffer and prove an alternative method of execution may prove to be unworkable, both legally and practically. If, however, condemned prisoners are ever to meet this standard, they must have access to relevant information regarding their department of corrections' current execution protocol, other procedures considered but rejected, and the department's capacity to perform other procedures. This type of information, which is unquestionably relevant to the plaintiff's legal burden, is largely unavailable because of the secrecy that currently surrounds execution procedures.

Over the past five years, as states encountered obstacles to purchasing the drugs they use in executions, they responded by passing secrecy statutes that broaden the categories of information related to execution procedures that must be kept confidential and enhance the

BY MEGAN MCCRACKEN

degree of secrecy surrounding such information.[7] With these laws in place, departments of corrections are able to obscure important details about executions, particularly information about their purchases of execution drugs and what, specifically, those drugs are.

The Evolution of the Alternative Requirement

Prior to *Glossip*, the Supreme Court never held that a method-of-execution claim requires proving the existence of an alternative. In *Nelson v. Campbell*, the Court held that David Nelson, a death-sentenced prisoner in Alabama who had severely compromised veins as a result of years of drug abuse, could lodge a civil rights action under 42 U.S.C. § 1983 to challenge the state's planned use of a "cut-down" procedure to access his vein for execution. The Court's reasoning relied in part on the fact that the lawsuit did not "call into question the death sentence itself" because it would allow Alabama to execute Mr. Nelson, as long as the executioner did not use the cut-down procedure, which the petitioner characterized as "wholly unnecessary to gain venous access." The Court acknowledged that Mr. Nelson had "alleged alternatives that, if they had been used, would have allowed the state to proceed with the execution as scheduled," without the need for a stay of execution. The fact that Mr. Nelson pointed out this alternative was viewed favorably, as a sign that his lawsuit did not seek to invalidate his death sentence and, therefore, was not a habeas claim in disguise, as argued by the state, but rather properly brought under Section 1983.

The Court's analysis in *Nelson* left no doubt that a method-of-execution challenge could not be used to undermine the validity of the prisoner's death sentence. Habeas claims call into question the legality of a prisoner's conviction and/or sentence, whereas a claim under Section 1983 traditionally challenges conditions of confinement, i.e., whether the government is carrying out the sentence in a constitutional manner.[8] While a challenge to the way a lethal injection is performed may not initially appear to be a perfect fit for Section 1983, method-of-execution challenges are distinguishable from habeas claims precisely because they address only the way in which a department of corrections performs executions and do not disturb underlying convictions or sentences.

The idea that a death-sentenced prisoner ought to provide an alternate method of execution arose again in *Hill v. McDonough*, where the Supreme Court held that the petitioner's challenge to Florida's lethal injection procedure was cognizable under Section 1983. The United States filed an amicus brief in *Hill*, arguing that prisoners who challenge execution procedures under Section 1983 must "identif[y] an alternative, authorized method of execution." The government argued that if a petitioner does not plead an alternative method, the legal challenge "is more like a claim challenging the imposition of any method of execution — which is to say, the execution itself — because it shows the complainant is unable or unwilling to concede acceptable alternatives."[9]

The Court explicitly declined to adopt the heightened pleading standard sought by the government, noting that *Nelson* had not done so. The Court reasoned that as long as the civil rights challenge did not foreclose execution, it was properly styled, and the condemned prisoner was not required to plead or prove an alternative method of execution. However, the Court made clear that if a Section 1983 action sought relief that "would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper."[10] As in *Nelson*, the Court found that Mr. Hill's challenge left the state "free to use an alternative lethal injection procedure," and therefore did not bar carrying out his death sentence.

Baze v. Rees and Alternatives to a Concededly Humane Execution Procedure

After *Nelson* and *Hill*, litigation challenging lethal injection procedures began to reveal that states were engaging in risky execution practices and employing incompetent execution personnel. In response, courts put executions on hold to review the constitutionality of execution protocols in those states.[11] Following the Supreme Court's grant of *certiorari* in *Baze*, executions were halted across the country while the Court considered the case.

The *Baze* plaintiffs did not directly challenge the constitutionality of Kentucky's execution procedure, which called for serial administration of a barbiturate anesthetic (sodium thiopental), followed by a paralytic and concentrated potassium chloride. The plaintiffs conceded that executions would be humane, as long as the protocol was performed correctly, because a properly administered dose of the barbiturate would place prisoners under general anesthesia and render them insensate to all subsequent stimuli.[12] Rather, the plaintiffs argued that the process was constitutionally infirm because of a significant and unnecessary risk of maladministration of the procedure, which would lead to pain and suffering in violation of the Eighth Amendment. *Baze* was a case about risk of maladministration and whether the state employed adequate procedures to safeguard against errors and mistakes in carrying out the execution procedure.

As in *Nelson*, in which the condemned prisoner proposed a different type of IV access to obviate the need for a cut-down procedure, the *Baze* plaintiffs argued that the risks of maladministration were unnecessary, given the existence of readily available alternatives that presented less risk of pain and suffering. The petitioners proffered one alternative procedure and one safeguard to be added to the existing procedure. The proposed alternative procedure called for administration of one drug, a large barbiturate overdose, which would reduce the risks of harm by simply not using the paralytic or potassium, the drugs that cause pain and suffering and are not necessary to cause death. The proposed safeguard to ensure proper administration of the existing protocol called upon the state to have a doctor present to monitor the prisoner throughout the execution, which would reduce risks of harm by better ensuring that the condemned prisoner remains anesthetized until death occurs.[13]

A plurality of the Court agreed that maladministration of a humane protocol could cause an inhumane, unconstitutional execution and that risk of maladministration of an execution protocol implicates Eighth Amendment protections.[14] A majority of the justices concluded, however, that the *Baze* petitioners did not meet the "threshold requirement" of showing a "substantial risk of serious harm" because the risks of maladministration presented could not "remotely be characterized as 'objectively intolerable.'"[15] The *Baze* plurality opinion agreed that the showing of "substantial risk" was "the threshold requirement" for a prisoner challenging a method of execution.[16] The plurality also discussed, without precisely defining, a role for proposed, alternative execution procedures under the Eighth Amendment, stating that "a condemned prisoner cannot successfully challenge a state's method of execution merely by showing a slightly or marginally safer alternative."[17]

> Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." [] To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a state refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a state's refusal to change its method can be viewed as "cruel and unusual" under the *Eighth Amendment*.[18]

Given the context of *Baze*, in which the plaintiffs conceded that the execution procedure was humane, it makes sense that they presented alternatives that would decrease the risk of maladministration. It also makes sense that the Court concluded that a mere showing of a "marginally safer alternative" cannot satisfy the legal standard to demonstrate an Eighth Amendment violation. However, absent these circumstances — specifically, when a petitioner demonstrates that the challenged procedure presents a "substantial risk of serious harm" — the state would violate the Eighth Amendment if it carried out an execution using that procedure, regardless of the existence of a less risky procedure.

Glossip v. Gross and the Impossible Pleading Standard

The *Baze* plurality opinion clearly set out to resolve concerns about lethal injection procedures in a way that would shut down future lethal injection litigation and, specifically, prevent the litigation from delaying additional executions.[19] Indeed, following the decision, courts in Tennessee reversed previous findings of unconstitutionality, and executions resumed in many jurisdictions.[20] At the same time, however, serious problems with lethal injection executions continued, and troubling information about the states' execution practices continued to come to light. Despite these problems, many condemned prisoners were told they could not prevail on an Eighth Amendment challenge to a lethal injection procedure unless they provided an alternative means to carry out their executions.[21]

The *Baze* opinion did not hold that petitioners challenging a method of execution must provide an alternative means to carry out their executions, but several circuit courts interpreted it this way. Then the Supreme Court made it official with the *Glossip* decision.

Despite sharing obvious similarities — both cases challenged lethal injection procedures under the Eighth Amendment, and both challenged protocols that called for administration of three drugs — *Baze* and *Glossip* were very different cases that addressed different risks of harm. Whereas *Baze* challenged the risk of pain and suffering that would result from maladministration of a concededly humane procedure,[22] *Glossip* challenged the risk of harm caused by use of a drug that is not suited to the task of protecting condemned prisoners from pain and suffering during execution.[23]

Glossip was not a case about safeguards against maladministration of an otherwise humane procedure. Rather, the prisoners in *Glossip* contended that Oklahoma's execution procedure, performed properly, put condemned prisoners at substantial risk of pain and suffering because of the use of a benzodiazepine sedative (midazolam) as the first of three drugs. The *Glossip* plaintiffs argued that the use of midazolam rendered the three-drug procedure inhumane and unconstitutional because the drug's properties make it unsuitable for protecting condemned prisoners from the known pain and suffering caused by the paralytic drug and concentrated potassium chloride. In this context, the Court in *Glossip* explicitly held that "identifying a known and available alternative method of execution that entails a lesser risk of pain" than the challenged procedure is "a requirement of all Eighth Amendment method-of-execution claims."[24]

The *Glossip* Court found that the petitioners did not demonstrate a substantial risk of serious harm because they "failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain."[25] Under *Baze*, that conclusion should have resolved the case because the plaintiffs had not satisfied the "threshold requirement" of demonstrating a substantial risk of serious harm.[26] While nominally reaffirming the legal standard established in *Baze*, however, *Glossip* did not follow that standard. First, the Court combined the "threshold requirement" with a requirement that the prisoner prove the availability and feasibility of an alternative execution procedure. Next, the Court inverted the standard by first addressing the alternative requirement — concluding that the plaintiffs had "not proved any risk posed by midazolam is substantial when compared to known and available alternative methods of execution" — before considering the "threshold requirement."[27]

By making the provision of an alternate procedure an element of the Eighth Amendment showing, the Court did not address the differences between a challenge to an admittedly humane procedure that could be performed incorrectly, thus leading to pain and suffering, and a challenge to an inherently risky procedure, in which the risks of harm arise from the actual drugs used. In a dissenting opinion, Justice Sotomayor called the Court's conclusion that the petitioners' challenge failed because they did not provide an alternative means of execution "legally indefensible" and accused the majority of "faulting petitioners for failing to satisfy the *wholly novel* requirement of proving the availability of an alternative means for their own executions."[28] Justice Sotomayor plainly laid out the absurdity of the holding that the Eighth Amendment's constitutional protection against cruel and unusual punishment is conditional, rather than absolute.[29]

Secrecy Laws Insulate States From Eighth Amendment Challenges

As interpreted and applied by trial courts, *Glossip*'s alternative requirement appears to be unprovable. Since *Baze*, death-sentenced prisoners have argued that a requirement to provide an alternative method is unethical and improper. But in just the past year, several courts have followed the Supreme Court's lead by dismissing lethal injection challenges based on findings that the proffered alternatives were either not available or not feasible, without first examining the constitutionality of the existing procedure. Such analyses cannot stand. Courts must determine whether the existing procedure meets constitutional muster.

Moreover, condemned prisoners must have access to relevant evidence to support their arguments regarding both existing procedures and proffered alternatives. Currently, much of that information — about drugs and drug acquisition, facilities, capabilities, budgets, competence, personnel, etc. — is held by the state, and courts have consistently refused to order its disclosure. Secrecy

statutes that make unavailable virtually all information about execution procedures, particularly the sources and kinds of drugs used, increase the difficulty. Petitioners can demonstrate that available and feasible execution methods exist,[30] but only if the courts insist upon transparency from the state and order discovery regarding the abilities and capacities of departments of corrections with regard to performing executions.

The question remains whether an alternative method of execution presented in the course of litigation has any constitutional, legal, or real-world relevance. There is no scheme by which a court can order a state agency to carry out an execution according to a procedure crafted by a condemned prisoner, and, generally speaking, courts tend to be reluctant to order states to act. The alternative requirement effectively forces petitioners into the role of policy maker, which simply cannot work, because state statutes direct departments of corrections to develop and promulgate execution procedures.[31] When plaintiffs have presented straightforward alternatives, such as the firing squad or use of an inert gas, courts balk, announcing that the options are not "available" because they are not permissible under the state's statute.[32]

Although the provision of an alternative procedure — or recognition that constitutional options exist — originated as a reassurance in the course of litigation that a prisoner's death sentence was not itself at issue, the notion of providing an alternative procedure has taken on a perverse life of its own. This is an insidious aspect of the legal standard: it would allow states to continue acting in an unconstitutional manner because men and women on death row were not able to convince the court of an alternative means to carry out their executions.

Notes

1. *Baze v. Rees*, 553 U.S. 35 (2008); *Glossip v. Gross*, 576 U.S. __, 135 S. Ct. 2726 (2015).

2. *See, i.e., Nelson v. Campbell,* 541 U.S. 637, 650 (2004) ("there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay"); *Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("like other stay applicants, inmates seeking time to challenge the manner in which the state plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits"); *Brewer v. Landrigan,* 562 U.S. 996 (2010) (district court erred in granting restraining order where the risk of harm was speculative because "speculation cannot substitute for evidence that the use of the drug is 'sure or very likely to cause serious illness and needless suffering'").

3. *Glossip*, 135 S. Ct. at 2731 (citing *Baze*, 553 U.S. at 61 (plurality opinion)).

4. *Baze*, 553 U.S. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9, 114 S. Ct. 1970, (1994)).

5. *Baze*, 553 U.S. at 53 (quoting *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

6. *Glossip*, 135 S. Ct. at 2731.

7. *See, i.e.,* A.R.S. § 13-757 C ("The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2."); AR CODE § 5-4-617(g) (2014) ("The procedures under subdivision (e)(1) of this section and the implementation of the procedures under subdivision (e)(1) of this section are not subject to disclosure under the Freedom of Information Act of 1967."); FLA. STAT. § 945.10(l)(g) ("Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution: … Information which identifies an executioner, or any persons prescribing, preparing, compounding, dispensing, or administering a lethal injection."); GA. CODE ANN., § 42-5-36(d)(2) ("The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret."); LSA-R.S. 15:570 G ("The identity of any persons other than the persons specified in Subsection F of this Section who participate or perform ancillary functions in an execution of the death sentence, either directly or indirectly, shall remain strictly confidential and the identities of those persons and information about those persons which could lead to the determination of the identities of those persons shall not be subject to public disclosure in any manner. Any information contained in records that could identify any person other than the persons specified in Subsection F of this Section shall remain confidential, shall not be subject to disclosure, and shall not be admissible as evidence nor discoverable in any proceeding before any court, tribunal, board, agency, or person."); V.A.M.S. 546.720 2-3 (defining the pharmacy and pharmacist who provide compounded drugs as members of Missouri's execution team in order to make their identities confidential under the statute that requires confidentiality for persons "who administer or provide direct support for the administration of the lethal chemicals."); N.C. G.S. § 132-1.2 (exempts from disclosure the "name, address, qualifications, and other identifying information of any person or entity that manufactures, compounds, prepares, prescribes, dispenses, supplies, or administers the drugs or supplies obtained for any purpose authorized by Article 19 of Chapter 15 of the General Statutes."); OHIO CODE § 2949.221 ("(B) If, at any time prior to the day that is 24 months after the effective date of this section, a person manufactures, compounds, imports, transports, distributes, supplies, prescribes, prepares, administers, uses, or tests any of the compounding equipment or components, the active pharmaceutical ingredients, the drugs or combination of drugs, the medical supplies, or the medical equipment used in the application of a lethal injection of a drug or combination of drugs in the administration of a death sentence by lethal injection as provided for in division (A) of section 2949.22 of the Revised Code, notwithstanding any provision of law to the contrary, all of the following apply regarding any information or record in the possession of any public office that identifies or reasonably leads to the identification of the person and the person's participation in any activity described in this division: (1) The information or record shall be classified as confidential, is privileged under law, and is not subject to disclosure by any person, state agency, governmental entity, board, or commission or any political subdivision as a public record under section 149.43 of the Revised Code or otherwise."); SDCL § 23A-27A-31.2 ("Confidentiality of identity of person or entity supplying or administering intravenous injection substance — Violation as misdemeanor. The name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection substance or substances under chapter 23A-27A are confidential. Disclosure of the foregoing information may not be authorized or ordered. Disclosure of confidential information pur-

suant to this section concerning the execution of an inmate under chapter 23A-27A is a Class 1 misdemeanor."); T. C. A. § 10-7-504 (h)(1) ("identifying an individual as a person who has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection. For the purposes of this section 'person' includes, but is not limited to, an employee of the state who has training related to direct involvement in the process of executing a sentence of death, a contractor or employee of a contractor, or a volunteer who has direct involvement in the process of executing a sentence of death. Records made confidential by this section include, but are not limited to, records related to remuneration to a person in connection with such person's participation in or preparation for the execution of a sentence of death. Such payments shall be made in accordance with a memorandum of understanding between the commissioner of correction and the commissioner of finance and administration in a manner that will protect the public identity of the recipients; provided, if a contractor is employed to participate in or prepare for the execution of a sentence of death, the amount of the special payment made to such contractor pursuant to the contract shall be reported by the commissioner of correction to the comptroller of the treasury and such amount shall be a public record. (2) Information made confidential by this subsection (h) shall be redacted wherever possible and nothing in this subsection (h) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains confidential information."); Tex. Gov. Code Ann. § 552.1081 ("Information is excepted from the requirements of Section 552.021 if it contains identifying information under Article 43.14, Code of Criminal Procedure, including that of: (1) any person who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution; and (2) any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.").

8. *Nelson,* 541 U.S. at 645-647; *Hill,* 547 U.S. at 578-583; *Glossip*, 135 S. Ct. at 2738.

9. *Hill*, 547 U.S. at 582. *See also* Brief for the United States as Amicus Curiae, at 6-7, *Hill v. McDonough,* 547 U.S. 573 (2006) ("Where a prisoner challenges a particular method of execution but identifies an alternative, permissible method of execution, that claim is akin to a conditions-of-confinement claim, and therefore is cognizable in a Section 1983 action. But where a prisoner contends that execution per se constitutes cruel and unusual punishment — i.e., that the particular method of execution being contemplated by the state and any other method of execution would be unconstitutional — that claim amounts to a challenge to the prisoner's sentence because it effectively seeks a reduction in the sentence from death to life imprisonment, and therefore is cognizable only in a habeas petition.").

10. *Hill*, 547 U.S. at 582 (quoting *Nelson*, 541 U.S. at 644, 646).

11. *See, i.e., Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, (W.D. Mo. Jun. 26, 2006); *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006).

12. *Baze*, 553 U.S. at 49. *See also Glossip*, 135 S. Ct. at 2737 (*Baze* plaintiffs "conceded that the protocol, if properly administered, would result in a humane and constitutional execution because sodium thiopental would render an inmate oblivious to any pain caused by the second and third drugs.").

13. *Baze*, 553 U.S. at 51 ("Much of petitioners' case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as … additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered.").

14. *Baze*, 553 U.S. at 53 ("It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.").

15. *Baze*, 553 U.S. at 62.

16. *Baze*, 553 U.S. at 52 n.3.

17. *Baze*, 553 U.S. at 51.

18. *Baze*, 553 U.S. at 52 (quoting *Farmer*, 511 U.S. at 842).

19. *See, e.g., Baze*, 553 U.S. at 61 ("[T]he standard we set forth here resolves more challenges than [Justice Stevens's concurring opinion] acknowledges. A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.").

20. *Harbison v. Little*, 571 F.3d 531(6th Cir. 2009); *see also Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007) (reversing finding of unconstitutionality following *Baze* decision).

21. *In re Lombardi*, 741 F.3d 888, 895-96 (8th Cir. 2014); *Whitaker v. Livingston*, 732 F.3d 465, 468 (5th Cir. 2013); *Valle v. Singer*, 655 F.3d 1223, 1237 (11th Cir. 2011); *Cooey v. Strickland*, 589 F.3d 210, 220 (6th Cir. 2009).

22. *Baze*, 553 U.S. at 62 ("Petitioners agree that, if administered as intended, that procedure will result in a painless death.").

23. Brief for Petitioners, *Glossip v. Gross*, 576 U.S. __, 135 S. Ct. 2726 (2015).

24. *Glossip*, 135 S. Ct. at 2731 (citing *Baze*, 553 U. S. at 61 (plurality opinion)). *See also Kelley v. Johnson*, 2016 Ark. 268 (slip. op. at 15) ("As the Court made clear in *Glossip*, the burden of showing a known and available alternative is a substantive component of an Eighth Amendment method-of-execution claim.").

25. *Glossip*, 135 S. Ct. 2731.

26. *Baze*, 553 U.S. at 52, n.3.

27. *Glossip*, 135 S. Ct. at 2737.

28. *Glossip*, 135 S. Ct. at 2781 (Sotomayor, J., dissenting) (emphasis added). *See also id.* at 2794 ("Nowhere did the plurality suggest that all challenges to a state's method of execution would require this sort of comparative-risk analysis. Recognizing the relevance of available alternatives is not at all the same as concluding that their absence precludes a claimant from showing that a chosen method carries objectively intolerable risks.").

29. *Glossip*, 135 S. Ct. at 2793 (Sotomayor, J., dissenting) ("The Court today, however, would convert this categorical prohibition into a conditional one.").

30. *See, i.e.,* Plaintiff's Second Amended Complaint, *Whitaker v. Livingston*, U.S. District Court for the Southern District of Texas, 4:13-CV-02901 (Sept. 11, 2015) (presenting alternative lethal injection procedure with a single dose of an FDA-approved barbiturate, with appropriate safeguards and selected and purchased through a transparent process); Amended Complaint for Declaratory and Injunctive Relief, *Johnson v. Kelley*, Circuit Court of Pulaski County, Arkansas, No. 60CV-15-2921 (Sept. 28, 2015) (presenting three alternative lethal injection procedures, the firing squad, death by anesthetic gas overdose (three gasses), and death by opioid patch); Third Amended Complaint, *Arthur v. Dunn*, U.S. District Court Middle District of Alabama, 2:11-cv-438 (Oct. 13, 2015) (presenting two alternative, single-drug lethal injection procedures and the firing squad).

31. Ala. Code 1975 § 15-18-82(c) ("The warden of the William C. Holman unit of the

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Legally Indefensible:

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prison system at Atmore or, in case of his or her death, disability, or absence, his or her deputy, shall be the executioner. In the case of execution by lethal injection, the warden, or in the case of his or her death, disability, or absence, his or her deputy, may designate an employee of the unit to administer the lethal injection. In the event of the death or disability or absence of both the warden and deputy, the executioner shall be that person appointed by the Commissioner of the Department of Corrections."); ARIZ. REV. STAT. ANN. § 13-757A ("The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections."); ARK. CODE ANN. § 5-4-617(e) ("the Director of the Department of Correction shall develop logistical procedures necessary to carry out the sentence of death"); CAL. PENAL CODE § 3604(a) ("The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections."); COLO. REV. STAT. § 18-1.3-1204 ("The executive director of the department of corrections, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within the walls of the correctional facilities at Canon City and therein at all times have in preparation all necessary implements requisite for carrying into execution the death penalty by means of the administration of a lethal injection. The execution shall be performed in the room or place by a person selected by the executive director and trained to administer intravenous injections."); FLA. STAT. tit. XLVII, § 922.10 ("A death sentence shall be executed by electrocution or lethal injection in accordance with s. 922.105. The warden of the state prison shall designate the executioner."); GA. CODE ANN., § 17-10-38 ("In all cases in which the defendant is sentenced to death, it shall be the duty of the trial judge in passing sentence to direct that the defendant be delivered to the Department of Corrections for execution of the death sentence at a state correctional institution designated by the department."); IDAHO CODE § 19-2716 ("The punishment of death shall be inflicted by continuous,

intravenous administration of a lethal quantity of a substance or substances approved by the director of the Idaho department of correction until death is pronounced by a coroner or a deputy coroner. The director of the Idaho department of correction shall determine the procedures to be used in any execution. This act shall apply to all executions carried out on and after the effective date of this enactment, irrespective of the date sentence was imposed."); KRS § 431.220 ("(2) All executions of the death penalty by electrocution or lethal injection shall take place within the confines of the state penal institution designated by the Department of Corrections, and in an enclosure that will exclude public view thereof."); LSA-R.S. 15:568 ("The secretary of the Department of Public Safety and Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of his execution, the Department of Public Safety and Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution."); Miss. Code Ann. § 99-19-51 ("(2) The Commissioner of the Department of Corrections shall select an execution team to assist the executioner and his deputies. This team, including the state executioner and his deputies who are responsible for the administration of lethal chemicals, shall consist of those persons, such as medical personnel, who provide direct support for the administration of lethal chemicals. This team shall also include those individuals involved in assisting in the execution in any capacity, as well as those personnel assigned to specific duties related to an execution."); N.C.G.S.A. § 15-188 ("[T]he mode of executing a death sentence must in every case be by administering to the convict or felon an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the person is dead, and that procedure shall be determined by the secretary of the Department of Public Safety, who shall ensure compliance with the federal and state constitutions; and when any person, convict or felon shall be sentenced by any court of the state having competent jurisdiction to be so executed, the punishment shall only be inflicted within a permanent death chamber which the superintendent of the state penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina."); Ohio Rev. Code Ann. § 2949.22B (West) (the warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed); 22 Okla. Stat. Ann. § 1015B ("The judgment of execution shall take place under the authority of the director of the Department of Corrections and the warden must be present along with other necessary prison and corrections officials to carry out the execution."); Tenn. Code Ann. § 40-23-114(c) ("The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section."); Tex. Crim. Proc. Code Ann. art. 43-14(a) (West) ("Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice."); Va. Code Ann. § 53.1-234 ("Execution by lethal injection shall be permitted in accordance with procedures developed by the Department.").

32. *Kelley v. Johnson*, 496 S.W.3d 346 (Ark. 2016) (finding that proposed method of execution by firing squad was not readily implemented and available method of execution because it is not authorized by statute); Order, *Arthur v. Dunn*, No. 2:11-cv-438 (M.D. Ala. Oct.5, 2015) ("firing squad is not permitted by statute and, therefore, is not a method of execution that could be considered either feasible or readily implemented by Alabama right now"). ■

About the Author

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