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Between a Constitutional Rock and a Procedural Hard Place: Placing Petitioners in an Eighth Amendment Battle of Persuasion

Kelley E. Nobriga*

INTRODUCTION

In 1608, Captain George Kendall was the first person executed in the United States.¹ Since his death, citizens of the United States have been executed in pursuit of retribution and deterrence.² It is now, centuries after Captain Kendall's death that a more modern society is starting to ask tough questions in the face of old school thought. What happens when the desire for revenge fades after the prisoner spends decades on death row? What is the solution when arbitrary sentences diminish the purported penological purpose of death by state? Or simply, what happens when the death penalty no longer fits within society's

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1. *Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/part-i-history-death-penalty> (last visited Feb. 25, 2016).

2. *See Glossip v. Gross*, 135 S. Ct. 2726, 2767 (2015).

standard of decency?

The real issue though is not what questions are being asked, but rather what answers are being given. This Comment does not focus on the constitutionality of the death penalty per se, but rather on how the death penalty is implemented and the standard that the Supreme Court developed for evaluating a method's constitutionality. It will explore this controversial dialogue in the aftermath of the Supreme Court's most recent decision involving capital punishment in *Glossip v. Gross*, which set forth the requirement that petitioners, in order to challenge their states' execution protocol, must first present an alternative method of capital punishment to the court.³

This Comment begins with a brief introduction into the history of the capital punishment methods. In Part I, this Comment will summarize the Court's decision in *Baze v. Rees*⁴ and the subsequent issues—both practical and procedural—that have occurred as a result. On that groundwork, Part II will discuss the unattainable standard set forth in *Glossip*. This Comment will ultimately conclude that, under the *Glossip* standard, petitioners are closed off from seeking relief in court unless they somehow have insight into new, less painful methods of execution. Absent human experimentation or scientific discoveries, death row petitioners are burdened with a battle of persuasion that they likely will never win.

I. A BRIEF HISTORY OF EXECUTION METHODS AND STANDARDS

In 1897, a total of forty-eight states and territories used hanging as their primary execution method.⁵ New York was the first state to use electrocution as its method of capital punishment seven years earlier.⁶ Although electrocution was the preferred method of execution for almost a century, other methods, such as the firing squad, were also in use.⁷

3. *Id.* at 2739.

4. 553 U.S. 35 (2008).

5. Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 364 (1997).

6. *See Baze*, 553 U.S. at 42. Eleven states joined by 1915. *See id.*

7. *Id.*; *see also* Brief for the Louis Stein Center for Law and Ethics at Fordham University School of Law as Amicus Curiae in Support of Petitioners at 4, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955)

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When Oklahoma introduced lethal injection legislation in 1977, it quickly became the dominant method of execution in the United States.⁸ The original protocol called for a three-drug combination: thiopental, pancuronium bromide, and potassium chloride.⁹ In response to the introduction of this seemingly more humane method, thirty-seven other states quickly adopted Oklahoma's protocol without any independent testing of their own.¹⁰ This practice of quick decision-making became a trend that ultimately resulted in a 2008 challenge to Kentucky's lethal injection protocol that reached the Supreme Court—a protocol similar to that implemented by Oklahoma forty-one years earlier. It should be noted, however, that the Supreme Court “has never invalidated a [s]tate's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment,”¹¹ and each new method has been designed to be more humane, at least in theory.¹²

Prior to 2008, however, the Court upheld previous methods of execution as constitutional, and ultimately developed a working standard for Eighth Amendment challenges.¹³ For example, the Court in *Wilkinson v. Utah* held that, while the firing squad was not cruel and unusual, certain punishments that involved “unnecessary cruelty” would be.¹⁴ Expanding on that standard in 1890, the Court defined cruel punishments in *In re Kemmler* as

[hereinafter Amicus Curiae Brief] (“With the exception of a few states that permitted use of the firing squad, the general historical trend in the United States led to the transition from hanging to electrocution, which gave way briefly to reliance on the gas chamber, before settling on lethal injection.”). “In the 1880's, the Legislature of the State of New York appointed a commission to find ‘the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.’ The commission recommended electrocution. . . .” *Glossip*, 135 S. Ct. at 2731–32 (quoting *In re Kemmler*, 136 U.S. 436, 444 (1890)).

8. *Baze*, 553 U.S. at 42. Oklahoma began using lethal injection in 1977 using protocol with three drugs: First, sodium thiopental; second, a paralytic agent; and third, potassium chloride. See *Glossip*, 135 S. Ct. at 2733.

9. See Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1376 (2014).

10. *Id.* (“Instead, because it was easier to copy another state's procedure than to design a new one, state officials mimicked Oklahoma's approach without actually examining its benefits and risks.”).

11. *Glossip*, 135 S. Ct. at 2732 (quoting *Baze*, 553 U.S. at 48).

12. *Baze*, 553 U.S. at 48.

13. See *id.*

14. 99 U.S. 130, 136 (1878).

those that “involve torture or a lingering death . . . [or] something inhuman and barbarous, something more than the mere extinguishment of life.”¹⁵

II. BAZE STANDARD

In *Baze v. Rees*, the Supreme Court once again upheld an execution method in the United States with regards to a lethal injection protocol.¹⁶ The petitioners in *Baze* challenged the lethal injection procedures in Kentucky after each were sentenced to death.¹⁷ At the trial court level, certain findings of fact were made in determining that the petitioner’s argument failed; specifically, the trial court found that Kentucky’s procedures were within the realm of the Eighth Amendment’s prohibition of cruel and unusual punishment.¹⁸

The central issue in *Baze* focused on what legal standard should be used when evaluating the constitutionality of an execution method.¹⁹ Rejecting the petitioner’s challenge, the Court set forth additional standards to determine if a method of execution is constitutional under the Eighth Amendment.²⁰ The question put forth to the Supreme Court of the United States was whether Kentucky’s lethal injection procedures violated the Eighth Amendment; ultimately, the Court held that it did not.²¹

A. Kentucky’s Protocol

At the time, Kentucky used a three-drug combination for its lethal injection procedures: sodium thiopental, pancuronium bromide, and potassium chloride.²² If the inmate was unconscious from a proper administration of the first drug, it was undisputed that he or she would not feel any pain or discomfort associated with the effects of the second and third drugs, which has been

15. 136 U.S. 436, 447 (1890).

16. 553 U.S. at 48.

17. *Id.* at 41.

18. *Id.*

19. *Id.* at 50–53.

20. *Id.* at 61.

21. *Id.* at 47.

22. *Id.* at 44. The first drug induced a “deep, comalike unconsciousness” while pancuronium bromide, a paralytic that stops respiration, left the inmate unable to move; lastly, potassium chloride stopped the heart. *Id.*

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described as the “chemical equivalent of being burned at the stake.”²³

Kentucky’s lethal injection statute provided that “every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death.”²⁴ While the inmate could opt for death by electrocution, the statute would default to lethal injection if the inmate failed to make a decision within twenty days of the scheduled execution.²⁵

The officials at the Kentucky Department of Corrections developed the procedure for the execution.²⁶ According to the protocol, only personnel with at least one year of professional experience were permitted to insert the intravenous injection (IV), while a certified phlebotomist and an emergency medical technician (EMT) administered other necessary venipunctures.²⁷ Other potentially less qualified personnel, however, mixed the chemicals and filled the syringes.²⁸

In addition to the medical personal, the warden and deputy warden would be present in the execution chambers, as they were responsible for conducting a visual inspection of the inmate to observe any signs of consciousness as well as issues with the IV catheters.²⁹ A physician was present at all times “to assist in any effort to revive the prisoner in the event of a last-minute stay of execution.”³⁰ With the exception of verifying death, however, a physician was prohibited from participating in the actual

23. *Glossip v. Gross*, 135 S. Ct. 2726, 2781 (2015); *see also Baze*, 553 U.S. at 44. If properly administered, sodium thiopental “eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride.” *Baze*, 553 U.S. at 49.

24. *Id.* at 44–45; *see also* KY. REV. STAT. ANN. § 431.220(1)(a) (West 2006).

25. *See Baze*, 553 U.S. at 45; *see also* KY. REV. STAT. ANN. § 431.220(1)(b).

26. *See Baze*, 553 U.S. at 44–45. The procedure required 1 gram of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. *See id.* at 45. Between each injection, 25 milligrams of saline were injected to prevent any clogging from the previous substance. *Id.*

27. *See id.*

28. *See id.*

29. *See id.* at 45–46.

30. *Id.* at 46. It should also be noted that, at the time of this case, Kentucky had only used the above lethal injection procedure on one prior inmate, Eddie Lee Harper. *Id.* There were no issues reported in regards to his execution procedure. *Id.*

execution by the American Medical Association's Code of Medical Ethics.³¹

B. *Petitioner's Arguments in Baze*

The petitioners argued that Kentucky's lethal injection procedures were unconstitutional under the Eighth Amendment due to the potential for maladministration of the lethal drugs and the state's failure to adhere to safer alternatives, as set forth by petitioner.³² Moreover, the petitioners argued that Kentucky's lethal injection procedure created an unnecessary risk of pain.³³ Recognizing that some level of pain is inherent in the lethal injection process, petitioners argued that the Eighth Amendment does not allow for the "unnecessary risk" of pain, and the Court must evaluate "(a) the severity of pain risked, (b) the likelihood of that pain occurring, and (c) the extent to which alternative means are feasible, either by modifying existing execution procedures or adopting alternative procedures."³⁴

The petitioners conceded, however, that, under normal procedures, the process would be humane and constitutional because the first drug would render the inmate insensitive to pain.³⁵ However, if the personnel improperly administered the

31. See Lee Black & Robert M. Sade, *Lethal Injection and Physicians: State Law vs Medical Ethics*, 298 JAMA 2779, 2780, 2781 (2007).

32. *Baze*, 553 U.S. at 41.

33. *Id.* at 49. However, Kentucky urged the Court to use the same "substantial risk" test that the circuit court used, which focused on the likelihood of needless suffering. See *id.* at 48. For a claimant to succeed on the claim, there "must be 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.'" *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)). In this analysis, a distinction is drawn between "a series of abortive attempts at [execution]," "[a]ccidents . . . for which no man is to blame," and "isolated mishap[s]." *Id.* (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462, 471 (1947)) (internal quotation marks omitted). However, multiple incidents could constitute an intolerable risk of harm under the Eighth Amendment. See *id.*; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring).

34. *Baze*, 553 U.S. at 47.

35. *Id.* at 49. The trial court, using the "substantial risk" test, found that Kentucky's procedures were within the realm of the Eighth Amendment's requirement against cruel and unusual punishment. See *id.* at 41. After the Supreme Court of Kentucky affirmed, petitioners filed a writ of certiorari to the Supreme Court of the United States questioning whether

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second drug, a paralytic, it would leave the inmate unable to motion for help during what would be a painful administration of the second and third drugs.³⁶ The petitioners further argued that the risk of such improper administration was high due to the inadequacy of the protocol and inexperience of the staff.³⁷ As an alternative, the *Baze* petitioners suggested that the state use a one-drug protocol that “dispenses with the use of pancuronium [bromide] and potassium chloride.”³⁸ The petitioners also argued that Kentucky should be required to employ additional, trained personnel to assist in the monitoring of consciousness.³⁹

C. *Respondent’s Arguments in Baze*

In response, Kentucky urged the Court to use the “substantial risk” test that was used at the time in the lower courts.⁴⁰ Under the test, the risk of pain must be “sure or very likely to cause serious illness and needless suffering’ and give rise to ‘sufficiently imminent dangers’” for the protocol to be considered substantially risky.⁴¹ For a claimant to succeed under this high standard, there “must be 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.’”⁴²

Kentucky’s lethal injection procedure violated the Eighth Amendment. *See id.* The Court held that it did not. *Id.* at 49–51.

36. *See id.* at 44. “First, Kentucky’s use of pancuronium bromide to paralyze the inmate means he will not be able to scream after the second drug is injected, no matter how much pain he is experiencing.” *Id.* at 122 (Ginsburg, J., dissenting).

37. *Id.* at 54 (plurality opinion).

38. *Id.* at 51.

39. *Id.* The petitioners suggested that the personnel employ safeguards to monitor consciousness, such as a sphygmomanometer or an echocardiogram. *Id.* at 58–59.

40. *Id.* at 48; *see, e.g., Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006).

41. *Baze*, 553 U.S. at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)).

42. *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)).

D. *Baze Standard Defined*

1. *Plurality Opinion*

Initially, the Court noted that, while the Eighth Amendment prohibits cruel and unusual punishment, it “does not demand the avoidance of all risk of pain in carrying out executions.”⁴³ The Court also distinguished between “a series of abortive attempts,”⁴⁴ “[a]ccidents . . . for which no man is to blame,”⁴⁵ and “isolated mishap[s].”⁴⁶ Multiple isolated incidents, however, could constitute an “objectively intolerable risk of harm” under the Eighth Amendment.⁴⁷

The Court rejected petitioner’s argument and instead decided to adopt the substantial risk standard announced in *Farmer v. Brennan*.⁴⁸ Under this test, an “alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain.”⁴⁹ Notably, “a condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.”⁵⁰ If a petitioner were, however, able to meet this burden, and a state refused to change its protocol in response, the protocol would constitute cruel and unusual punishment under the Eighth Amendment.⁵¹

Applying the substantial risk analysis, the Court rejected the

43. *Id.* at 47.

44. *Id.*; see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) (analyzing a hypothetical situation where multiple “abortive attempts” could present different issues from the accident at issue in *Resweber*).

45. See *Resweber*, 329 U.S. at 463 (holding that accidental situations in execution procedures where malevolence is lacking does not constitute an Eighth Amendment violation).

46. *Baze*, 553 U.S. at 50 (quoting *Resweber*, 329 U.S. at 462, 471) (internal quotation marks omitted).

47. *Id.* (quoting *Farmer*, 511 U.S. at 846) (internal quotation marks omitted). The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

48. *Baze*, 553 U.S. at 52.

49. *Id.*

50. *Id.* at 51. The Court found that permitting such an argument would frustrate the legal system by requiring it to find “best practices” for executions. *Id.*

51. *Id.* at 41.

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contention that Kentucky's procedure was "objectively intolerable" because thirty states (out of the thirty-six states then using lethal injection), as well as the federal government, used the same three-drug sequence as Kentucky.⁵² Rather, the Court noted, "[n]o State uses or has ever used the alternative one-drug protocol belatedly urged by the petitioners."⁵³

Accordingly, the Court dismissed the petitioner's challenge to the protocol, including their request for additional personnel, on the basis of viable alternatives because "the Eighth Amendment [does not] require[] Kentucky to adopt the untested alternative procedures petitioners have identified."⁵⁴ The Court ultimately affirmed the lower court's decision, concluding that Kentucky's lethal injection procedure was constitutional.⁵⁵

2. *Concurrence by Justice Thomas*

The concurring opinion by Justice Thomas, which Justice Scalia joined, agreed that the petitioners failed to show that Kentucky's protocol violated the Eighth Amendment.⁵⁶ However, Justice Thomas disagreed with the plurality's standard, and instead argued that the inquiry should focus on whether the method of execution is "deliberately designed to inflict pain."⁵⁷ He noted that the Court has never held that an execution method violated the Constitution simply because it involved pain, "whether 'substantial,' 'unnecessary,' or 'untoward,'" that could be eliminated by adopting an alternative procedure.⁵⁸ Rather, methods of execution, such as burning at the stake and beheading, are in violation of the Constitution if they are "*designed* to inflict torture as a way of enhancing a death sentence"⁵⁹

52. *Id.* at 53.

53. *Id.*

54. *Id.* at 54. The dissent argued that requiring "rough-and-ready tests," such as "calling the inmate's name, brushing his [or her] eyelashes, or presenting him [or her] with strong, noxious odors—could materially decrease the risk of administering the second and third drugs before the sodium thiopental has taken effect." The Court rejected this, finding that the risk of consciousness is only apparent if the first drug is not administered properly. *See id.* at 60.

55. *Id.* at 41.

56. *Id.* at 94 (Thomas, J., concurring).

57. *Id.*

58. *Id.* at 101.

59. *Id.* at 102.

Justice Thomas further stated that the Court has never required additional safeguards for a procedure merely because there was a possibility of a defect.⁶⁰ In *Louisiana ex rel. Francis v. Resweber*, for example, the Court held that Louisiana would not violate the Constitution if it subjected an inmate to a second electrocution after the first attempt was unsuccessful.⁶¹ In that case, as Justice Thomas claimed, the state was not required to “implement additional safeguards or alternative procedures in order to reduce the risk of a second malfunction” unless the Court found evidence of an intention to inflict unnecessary pain.⁶² Lastly, because the plurality did not give more guidance as to what is considered “substantial,” or what reduced level of risk is “significant,” Justice Thomas predicted that the lower courts would struggle with the new, “unprecedented and unworkable standard”⁶³

3. *Dissenting Opinion*

Disagreeing with the plurality opinion, Justice Ginsberg argued that the true question was not only the adequacy of the first drug, but also whether Kentucky’s procedures contained sufficient safeguards to ensure that the sodium thiopental rendered the inmate unconscious before the administration of the last two drugs.⁶⁴ Justice Ginsberg would have remanded the matter to the lower courts to determine “whether the failure to include readily available safeguards to confirm that the inmate is unconscious after injection of sodium thiopental, in combination with the other elements of Kentucky’s protocol, creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain.”⁶⁵

Initially, Justice Ginsburg discussed the ability of Kentucky’s protocol to safeguard against harms caused by improper

60. *Id.* at 107.

61. *See id.* at 100 (citing 329 U.S. 459, 461 (1947)).

62. *See id.* at 103.

63. *Id.* at 106.

64. *Id.* at 114 (Ginsburg, J., dissenting).

65. *Id.* at 123. Justice Ginsburg cited to other state protocols, noting that many other procedures required closer attention to an inmate’s consciousness than Kentucky’s protocol then provided. *See id.* at 119–21.

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administration.⁶⁶ Even the petitioners conceded in their brief to the Kentucky Supreme Court that “[t]he easiest and most obvious way to ensure that an inmate is unconscious during an execution . . . is to check for consciousness prior to injecting pancuronium [bromide].”⁶⁷ However, much like Justice Thomas’s concurrence, Justice Ginsburg also argued that the plurality’s standard would lead to uncertainty in the lower courts.⁶⁸

III. POST-*BAZE* ISSUES

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.⁶⁹

The *Baze* standard came into existence at a time where known and available alternatives to lethal injection drugs existed—a time where states had options in regards to doses and chemicals. Shortly after the standard was announced, however, the lethal injection landscape changed, calling the *Baze* standard into question. Specifically, two aspects of the *Baze* standard were challenged. First, clarification on the term “substantially similar” when comparing alternative drugs, and second, what could a petitioner do if he or she cannot provide the court with a known alternative due to a drug shortage or unavailable scientific testing?

66. *Id.* at 114. Justice Ginsburg cited to the Supreme Court decisions in *Wilkinson* and *In re Kemmler*, noting that the Court “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 115–16 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002)) (internal quotation marks omitted).

67. *Id.* at 123 (second alteration in original) (quoting Brief for Appellants at 41, *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006) (No. 2005-SC-00543)) (internal quotation marks omitted).

68. *See id.* at 117.

69. *Id.* at 61 (plurality opinion) (emphasis added).

A. *Questionable Decision-Makers and Protocols*

One major issue with *Baze* was the uncertainty about what language constituted its holding and standard. In *Baze*, there were five concurring opinions from Justices Alito, Stevens, Scalia, Thomas, and Breyer.⁷⁰ Justice Ginsberg filed a dissenting opinion, which was joined by Justice Souter.⁷¹ Chief Justice Roberts announced the judgment of the Court, which Justices Kennedy and Alito joined.⁷² As one court described the confusion: “[T]he holding of the Court may be viewed as that position taken by those [m]embers who concurred in the judgments on the narrowest grounds”⁷³ As mentioned above, Justices Thomas and Scalia disagreed with the holding that a substantial risk of pain standard should be used and instead argued for an inquiry into whether a method involved a deliberate and unnecessary risk of pain.⁷⁴ Therefore, it is unclear whether the majority of the Court actually required that a petitioner prove that a particular method has a substantial risk of pain when compared to a known and available alternative.

Notably, soon after the *Baze* decision, sodium thiopental, the first drug in Kentucky’s protocol, was removed from the market by European manufacturers in an effort to protest capital punishment in the United States.⁷⁵ Without sodium thiopental, many states were forced to find an alternative drug to induce

70. See *Baze*, 553 U.S. at 63, 71, 87, 94, 107 (concurring opinions).

71. See *id.* at 113 (Ginsburg, J., dissenting).

72. See *id.* at 35.

73. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (internal quotation marks omitted).

74. See *id.* at 94 (Thomas, J., concurring).

75. See Juergen Baetz, *America’s Lethal Injection Drug Crisis Starts in Europe*, BUS. INSIDER (Feb. 18, 2014, 6:30 AM), <http://www.businessinsider.com/americas-lethal-injection-drug-crisis-starts-in-europe-2014-2>.

“The shortage of sodium thiopental led prison officials to seek out questionable alternative sources of the drug throughout the world, ranging from England to Pakistan.” Deborah Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1361 (2014); see also *Despite Drug Shortage, 2 States Carry on with Executions Using Single Dose of Potent Sedative*, FOX NEWS (Aug. 4, 2014), <http://www.foxnews.com/us/2014/08/04/despite-drug-shortage-2-states-carry-on-with-executions-using-single-dose/>; Erik Eckholm & Katie Zezima, *States Face Shortage of Key Lethal Injection Drug*, N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2011/01/22/us/22lethal.html>.

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unconsciousness.⁷⁶

1. *Quick Decisions*

Because lethal injection drugs became scarce on the market, some states were forced to find alternative drugs to carry out their procedures.⁷⁷ States sought out constitutionally adequate alternative procedures that would not be considered cruel and unusual punishment in light of the unavailability of known methods.⁷⁸

But how could states ensure that these new, alternative lethal injection methods would actually serve the penological purpose the states intended? The Director of the Death Penalty Information Center responded that experimentation with execution procedures could lead to “unexpected consequences,” and found that some states have been “winging it.”⁷⁹ Similarly, in

76. See, e.g., Chris McGreal, *Lethal Injection Drug Production Ends in the U.S.*, *GUARDIAN* (Jan. 23, 2011, 1:17 PM), <http://www.theguardian.com/world/2011/jan/23/lethal-injection-sodium-thiopental-hospira>. Again, the Court in *Baze* held that a request for a stay of execution should be rejected unless the prisoner can demonstrate a risk of substantial pain and prove that there are known drug alternatives available. *Baze*, 553 U.S. at 52. Additionally, the challenge should be rejected if the drug(s) being challenged is “substantially similar” to the protocol upheld in *Baze*; the true challenge has become deciding what chemicals are substantially similar or what combination is available in the face of a drug shortage. See *id.* at 61.

77. See, e.g., *Missouri Execution Halted Over Fears of Drug Shortage*, *GUARDIAN* (Oct. 11, 2013, 2:17 PM), <http://www.theguardian.com/world/2013/oct/11/missouri-execution-halted-execution-drug-shortage> (“Drug makers in recent years have stopped selling potentially lethal pharmaceuticals to prisons and corrections departments because they don’t want them used in executions. That has left the nearly three dozen death penalty states, including Missouri, scrambling for alternatives.”). Without an effective first drug, the effects of the second and third drugs could rise to the level of torture. See Denno, *supra* note 75, at 1361; Jeanne Whalen & Nathan Koppel, *Lundbeck Seeks to Curb Use of Drug in Executions*, *WALL ST. J.*, <http://www.wsj.com/news/articles/SB10001424052702304584004576419092675627536> (last updated July 1, 2011, 2:22 PM).

78. Mark Berman, *The Recent History of States Contemplating Firing Squads and Other Execution Methods*, *WASH. POST* (May 22, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/05/22/the-recent-history-of-states-contemplating-firing-squads-and-other-execution-methods/> (explaining that Virginia has been considering the electric chair, Missouri has been considering the gas chamber, and Utah may reinstitute the firing squad).

79. Tracy Connor, *Firing Squad and Gas Chamber Closer to Reality in Three States*, *NBC NEWS* (Feb. 13, 2015, 7:18 AM), <http://www.nbcnews.com/>

her *Glossip* dissent seven years after *Baze* was decided, Justice Sotomayor wrote about the painful consequences of an ineffective first drug in a lethal injection protocol:

The latter two drugs are intended to paralyze the inmate and stop his heart. But they do so in a torturous manner, causing burning, searing pain. It is thus critical that the first drug, midazolam, do what it is supposed to do, which is to render and keep the inmate unconscious.⁸⁰

Because the *Baze* plurality upheld Kentucky's protocol, which was created by correctional officers, it essentially set the precedent that such officers—without prior education or knowledge in the area of medicine or chemicals—were qualified to choose the methods that the state would use to execute those on death row. It follows then that “[n]o matter what lethal injection statute a legislature has in place or how a court interprets that statute, both legislatures and courts delegate the actual business of executions to a department of corrections.”⁸¹

Each time a state implements a new lethal injection protocol, it calls into question the method for choosing the particular drugs that are devoid of a known testing procedure to ensure that the protocol will induce its intended effect. This, in turn, raises the following: How can a state ensure that its protocol will be successful on prisoners without first engaging in human experimentation? The prison officials who craft these execution protocols and select the drugs do not have the requisite medical or scientific backgrounds that would qualify them to make these complicated determinations.⁸²

As history demonstrates, states adopted lethal injection generally and the three-drug protocol specifically without serious study or independent analysis. States uniformly followed Oklahoma in delegating prison officials the details of lethal injections. Contemporary evidence indicates that prison officials likely lack the necessary expertise to develop lethal injection

storyline/lethal-injection/firing-squad-gas-chamber-closer-reality-three-states-n305266.

80. *Glossip v. Gross*, 135 S. Ct. 2726, 2780–81 (2015) (Sotomayor, J., dissenting).

81. Denno, *supra* note 75, at 1356.

82. See Amicus Curiae Brief, *supra* note 7, at 26.

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protocols and fail to rely upon scientific or medical study. Yet, these prison officials, operating outside of the public eye, are tasked with developing procedures by which inmates will be executed.⁸³

In the face of an uncertain “substantially similar” standard and quick medical decisions made by those lacking medical experience, states have struggled to find suitable alternatives for their protocols. Conversely, petitioners have lacked an alternative method to challenge these protocols, as they could not find known or available drugs necessary to establish a claim—a requirement that might not even had been required by the *Baze* plurality.

2. *Midazolam*

The first alternative to sodium thiopental, pentobarbital, was adopted by fourteen states and appeared to be effective.⁸⁴ Pentobarbital, a strong barbiturate like sodium thiopental, is used to euthanize animals of all sizes, ranging from rabbits to beached whales.⁸⁵ The Danish manufacturer, Lundbeck Inc., discontinued supplying pentobarbital to facilities using its product for capital punishment, expressing strong anti-death penalty sentiments.⁸⁶

83. *Id.*

84. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Feb. 19, 2016). *But see* Denno, *supra* note 75, at 1364 (“Like sodium thiopental, pentobarbital’s effects are most difficult to measure when a state uses a three-drug protocol because the subsequent paralytic agent (pancuronium bromide) can mask the first drug’s effects.”). Oklahoma was the first state to use pentobarbital in 2010. *See* Amicus Curiae Brief, *supra* note 7, at 22; *see also* Jackson v. Danberg, 656 F.3d 157, 166 (3d Cir. 2011) (holding that substituting pentobarbital for sodium thiopental did not constitute a substantial risk of pain); Pavatt v. Jones, 627 F.3d 1336, 1340 (10th Cir. 2010) (holding that pentobarbital was sufficient for inducing consciousness); *State by State Lethal Injection*, *supra*.

85. Denise Grady, *Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One*, N.Y. TIMES, May 2, 2014, at A16.

86. *See* Whalen & Koppel, *supra* note 77. In a letter to Ohio Department of Rehabilitation and Corrections, the President of Lundbeck, Inc. wrote of its awareness that Ohio was using the drug for capital punishment purposes, and stated it was “adamantly opposed” to such use. Letter from Staffan Schuberg, President Lundbeck Inc., to Gary Mohr, Director Dept. of Rehabilitation and Correction (Jan. 26, 2011), <http://www.deathpenaltyinfo.org/documents/LundbeckLethalInj.pdf>. Oklahoma also used pentobarbital for its executions, but was unable to obtain the drug in March 2014. *See* Glossip v. Gross, 135 S. Ct. 2726, 2782 (2015) (Sotomayor, J., dissenting).

However, midazolam eventually took pentobarbital's place in the lethal injection "cocktail."⁸⁷

Unlike sodium thiopental and pentobarbital, both powerful barbiturates, midazolam is a benzodiazepine, which is used to induce sleepiness, relieve anxiety, and, most commonly, treat epilepsy.⁸⁸ The Federal Drug Administration (FDA), however, has not approved the use of midazolam as a sole anesthetic in medical procedures.⁸⁹ When used for lethal injection, midazolam is often coupled with either one or two other drugs to form a potentially deadly cocktail.⁹⁰ States such as Oklahoma and Florida use midazolam in a three-drug sequence with pancuronium bromide, a paralytic, and potassium chloride.⁹¹ Alternatively, Ohio and Arizona are known to use a two-drug procedure combining midazolam with hydromorphone, a strong painkiller.⁹²

Without adequate testing on humans, however, midazolam's effectiveness is ultimately unknown, and its use has led to speculation about lethal injection and the death penalty as a whole. For example, on January 16, 2014, Dennis McGuire was executed in Ohio with both midazolam and hydromorphone.⁹³ McGuire allegedly arched his back and clenched his fists during the twenty-six minute execution, which raised concern about the

87. See Amicus Curiae Brief, *supra* note 7, at 23–24. Oklahoma substituted midazolam for pentobarbital in 2014. See *Glossip*, 135 S. Ct. at 2733–34 (majority opinion).

88. *Drugs and Supplements Midazolam (Injection Route)*, MAYO CLINIC, <http://www.mayoclinic.org/drugs-supplements/midazolam-injection-route/description/drg-20064813> (last visited Feb. 19, 2016); see also Lesley K. Humphries & Lea S. Eiland, *Treatment of Acute Seizures: Is Intranasal Midazolam a Viable Option?*, J. PEDIATRIC PHARMACOLOGY & THERAPEUTICS, Apr.–Jun. 2013, at 79, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3668946/pdf/i1551-6776-18-2-79.pdf>; Ed Cara, *What is Midazolam: Why Are Doctors Worried the Lethal Injection Drug Won't Sedate Death Row Inmates?*, MED. DAILY (Jun. 29, 2015, 7:35 PM), <http://www.medicaldaily.com/what-midazolam-why-are-doctors-worried-lethal-injection-drug-wont-sedate-death-row-340468>.

89. See *Glossip*, 135 S. Ct. at 2783 (Sotomayor, J., dissenting).

90. *Lethal Injection*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/injection.html> (last visited Feb. 19, 2016).

91. *State by State Lethal Injection*, *supra* note 84.

92. *Id.*

93. Tracy Connor, *Ohio Says Controversial Execution of Dennis McGuire Was 'Humane'*, NBC NEWS (Apr. 28, 2014, 9:34 PM), <http://www.nbcnews.com/storyline/lethal-injection/ohio-says-controversial-execution-dennis-mcguire-was-humane-n91811>.

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new drug combination.⁹⁴ Later that same month, in Arizona, Joseph Rudolph Wood was injected with the very same chemicals in an execution that lasted one hour and fifty-seven minutes, during which witnesses claimed to have seen Wood continually gasping for air.⁹⁵ Again, in April 2014, Clayton Lockett was executed in Oklahoma during a procedure that lasted forty-three minutes.⁹⁶ After being declared unconscious, Lockett stated, “something is wrong,” and “[t]he drugs aren’t working.”⁹⁷

After an investigation, Oklahoma claimed that the failed procedure was the result of an infiltrated IV, “which means that ‘the IV fluid, rather than entering Lockett’s blood stream, had leaked into the tissue surrounding the IV access point.’”⁹⁸ However, upon the release of Lockett’s autopsy results, it was shown that the “concentration of midazolam in Lockett’s blood was more than sufficient to render an average person unconscious.”⁹⁹ Oklahoma’s response to the tense criticism was to increase the dose of midazolam from 100 to 500 milligrams for future execution procedures.¹⁰⁰

Moreover, even the very experts who use midazolam on a daily basis disagree with its use in lethal injection protocols.¹⁰¹ For example, Doctor Kent Diveley, an anesthesiologist in California, was asked to review Dennis McGuire’s execution.¹⁰² He found that personnel administered only ten milligrams of

94. *Id.*

95. Tom Dart, *Arizona Inmate Joseph Wood Was Injected 15 Times with Execution Drugs*, *GUARDIAN* (Aug. 2, 2014, 10:40 AM), <http://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood>.

96. Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett Was ‘a Bloody Mess’*, *GUARDIAN* (Dec. 13, 2014, 11:04 AM), <http://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>.

97. See *Glossip v. Gross*, 135 S. Ct. 2726, 2782 (2015) (Sotomayor, J., dissenting) (internal quotation marks omitted).

98. *Id.* at 2734 (majority opinion) (quoting *Warner v. Gross*, 776 F.3d 721, 725 (10th Cir. 2015)).

99. *Id.* at 2782.

100. *Id.* at 2734.

101. Alan Johnson, *Dennis McGuire’s Execution Was Not ‘Humane,’ Doctor Says*, *COLUMBUS DISPATCH* (Aug. 13, 2014, 7:19 AM), <http://www.dispatch.com/content/stories/local/2014/08/12/inmate-suffered-pain-during-execution-doctor-says.html>.

102. *Id.*

midazolam and forty milligrams of hydromorphone.¹⁰³ Dr. Diveley commented that an anesthesiologist “would not depend on a 10 mg dose of midazolam to provide for total loss of memory, or to produce an unconscious state.”¹⁰⁴ Dr. Diveley further noted that during the execution, McGuire was “straining against his restraints, struggling to breathe, and making hand gestures” and that such actions signified consciousness.¹⁰⁵ Dr. Diveley ultimately concluded that McGuire’s death “was not a humane execution,” and urged Ohio to consider other drug combinations.¹⁰⁶

IV. *GLOSSIP V. GROSS*

A. *Lower Court Decision*

Charles Warner, Richard Glossip, John Grant, and Benjamin Cole were all sentenced to death by jury in Oklahoma for heinous crimes.¹⁰⁷ John Grant, while imprisoned, stabbed to death a food service worker at his prison.¹⁰⁸ Richard Glossip, the manager of a motel, hired one of his employees to kill the motel’s owner with a baseball bat.¹⁰⁹ Charles Warner raped and murdered the daughter of his girlfriend, an eleven-month-old child.¹¹⁰ Lastly, Benjamin Cole snapped the spine of his nine-month-old daughter in half.¹¹¹

103. KENT DIVELEY, DIVELEY MED. CORP., MEDICAL REPORT ¶ 6 (Aug. 4, 2014), <http://www.otse.org/wp-content/uploads/2014/08/2014-08-12-Dr.-Report.pdf>.

104. *Id.* ¶ 7.

105. *Id.* ¶ 9.

106. *Id.* ¶¶ 9–11.

107. See Warner v. Gross, 776 F.3d 721, 723–24 (10th Cir. 2015), *aff’d*, Glossip v. Gross, 135 S. Ct. 2726 (2015).

108. See Grant v. State, 58 P.3d 783, 789 (Okla. Crim. App. 2002), *judgment vacated*, Grant v. Oklahoma, 540 U.S. 801 (2003), *and overruled by* Jones v. State, 134 P.3d 150 (Okla. Crim. App. 2006); *see also* Warner, 776 F.3d at 724.

109. See Glossip v. State, 157 P.3d 143, 147–48 (Okla. Crim. App. 2007), *stay of execution denied by* Glossip v. Oklahoma, 136 S. Ct. 26 (2015) (mem.); *see also* Warner, 776 F.3d at 724.

110. See Warner v. State, 144 P.3d 838, 856 (Okla. Crim. App. 2006), *stay of execution denied by* Warner v. Gross, 135 S. Ct. 824 (2015) (mem.); *see also* Warner, 776 F.3d at 724.

111. See Cole v. State, 164 P.3d 1089, 1092 (Okla. Crim. App. 2007), *stay of execution granted by* Glossip v. Gross, 135 S. Ct. 1197 (2015) (mem.); *see*

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At the time of their impending execution, Oklahoma was using the same drug combination as was used in Clayton Lockett's execution, except with a higher dosage of midazolam.¹¹² According to the protocol, the Director of Oklahoma's Department of Corrections had the sole discretion to choose from four alternative drug doses and combinations that could be used in a lethal injection procedure.¹¹³ For the four inmates, the Director chose the fourth method, consisting of 500 milligrams of midazolam, 100 milligrams of vecoronium bromide, and 240 milliequivalents of potassium chloride.¹¹⁴

In light of Lockett's execution, the death row inmates challenged Oklahoma's use of midazolam, arguing that the drug would not render them unconscious but rather leave them vulnerable to the burning effects that the second and third drugs would produce.¹¹⁵ They also argued that the procedure and drugs used in Oklahoma's lethal injection protocols were not scientifically sound and their use would be an attempt at nonconsensual human experimentation.¹¹⁶ The inmates requested a preliminary injunction from the United States District Court for the Western District of Oklahoma.¹¹⁷ The district court held a three-day evidentiary hearing and ultimately denied the motion, concluding that the petitioners had not established the requisite likelihood of success on the merits required to obtain a preliminary injunction.¹¹⁸

On appeal to the Tenth Circuit, the inmates argued that the district court erred in determining that Oklahoma's three-drug cocktail was substantially similar to the drugs upheld in *Baze*, and as such, the court below had applied an incorrect standard—one which required proof of an alternative execution method.¹¹⁹ The

also Warner, 776 F.3d at 724.

112. *See Glossip*, 135 S. Ct. at 2782 (Sotomayor, J., dissenting).

113. *Warner*, 776 F.3d at 726.

114. *Id.* Midazolam is supposed to induce unconsciousness while the second drug paralyzes the inmate, who will go into cardiac arrest with the administration of the third drug. *See Glossip*, 135 S. Ct. at 2732, 2734 (majority opinion).

115. *See Warner*, 776 F.3d at 726–27; *see also Glossip*, 135 S. Ct. at 2780–81 (Sotomayor, J., dissenting).

116. *See Warner*, 776 F.3d at 727.

117. *See id.* at 723–24.

118. *Id.* at 727.

119. *See id.* at 731. The plaintiffs also argued that the district court

Tenth Circuit ultimately affirmed the district court's denial of the motion, concluding that it was bound by its decision in *Pavatt v. Jones*—a decision that relied on the alleged plurality standard announced in *Baze*.¹²⁰ In *Pavatt*, the Tenth Circuit found that expert testimony regarding the effectiveness of pentobarbital coupled with the sufficiency of Oklahoma's procedures did not present an unconstitutional threat of harm under *Baze*, which required proof of a substantial risk of pain.¹²¹ Accordingly, the district court in *Warner v. Gross* relied on expert testimony¹²² to verify that 500 milligrams of midazolam would render a person unconscious and insensate to pain.¹²³

B. *Petition to the United States Supreme Court*

The four death row prisoners then filed a petition for writ of certiorari to the United States Supreme Court, alleging that midazolam is incapable of rendering a person insensate to pain.¹²⁴ Without achieving a deep level of unconsciousness, the inmates repeated their argument that they would be subject to cruel and unusual punishment by the administration of the second and

failed to consider the “evolving standards of decency.” *See id.*

120. *See id.* at 732; *see also* *Pavatt v. Jones*, 627 F.3d 1336, 1339 (10th Cir. 2010).

121. *See Pavatt*, 627 F.3d at 1339. Specifically, the Tenth Circuit agreed with the district court that “[a] stay of execution may not be granted on [such] grounds . . . unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain . . . [and] that the risk is substantial when compared to the known and available alternatives.” *Id.* (alterations in original) (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)) (internal quotation marks omitted).

122. At the three-day evidentiary hearing, the expert for the state, Dr. Roswell Evans, claimed that “a 500-milligram dose of midazolam would render the person unconscious and insensate during the remainder of the [execution] procedure.” *Glossip v. Gross*, 135 S. Ct. 2726, 2784 (2015) (Sotomayor, J., concurring) (alteration in original) (internal quotation marks omitted). Conversely, the expert for the plaintiffs, Dr. David Lubarsky, relied on evidence showing that “[m]idazolam cannot be used alone . . . to maintain adequate anesthesia.” *Id.* (quoting JG Reves et al., *Midazolam: Pharmacology and Uses*, 62 ANESTHESIOLOGY 310, 318 (1985)).

123. The district court relied on three specific elements of Oklahoma’s protocol, specifically: (1) the requirement of having two IV sites, (2) the monitoring of inmates’ consciousness throughout the procedure, and (3) the confirmation of IV viability. *See Warner*, 776 F.3d at 729–30.

124. *See* Brief for Petitioners at 2–3, *Glossip*, 135 S. Ct. 2726 (No. 14-7955); *see also Glossip*, 135 S. Ct. at 2731 (majority opinion).

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third drugs, which, due to a severe burning effect, would result in their painful deaths.¹²⁵ The Supreme Court initially denied a stay of execution on January 15, 2015, and, later that same evening, petitioner Charles Warner was executed with a drug sequence that included midazolam.¹²⁶ Warner's last words were "my body is on fire."¹²⁷

On January 23, 2015, just over a week after Warner's execution, the Supreme Court granted certiorari for the remaining three petitioners to address the following issues:¹²⁸

(1) Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where:

(a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and

(b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious?

(2) Does the *Baze*-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in *Baze*?

(3) Must a prisoner establish the availability of an alternative drug formula even if the state's lethal injection protocol, as properly administered, will violate the Eighth Amendment?¹²⁹

In a 5–4 decision, the Supreme Court rejected the petitioners' arguments and found that they failed to meet their burden under the standard set forth in *Baze*.¹³⁰ Justice Alito authored the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Kennedy. Justice Breyer, joined by

125. *See id.* at 2.

126. *See id.* at 21–22, 25.

127. *See id.* at 22.

128. *Id.* at 25. Respondent's application for stays were subsequently granted on January 28, 2015. *Id.*

129. *Id.* at i.

130. *Glossip v. Gross*, 135 S. Ct. 2726, 2730–31 (2015).

Justice Ginsberg, wrote a dissenting opinion.¹³¹ Justice Sotomayor also wrote a dissenting opinion, which Justices Breyer, Ginsberg, and Kagan joined.¹³²

C. *The Majority's Unattainable Standard and Justice Sotomayor's Response*

In finding for the respondent, Justice Alito began the majority opinion with the assumption that, “because it is settled that capital punishment is constitutional, [i]t necessarily follows that there must be a [constitutional] means of carrying it out.”¹³³ On that premise, the Court affirmed petitioner’s death sentences, mainly for the following two reasons: (1) petitioners failed to prove that midazolam presented a substantial risk of pain as required by *Baze*, and (2) petitioners did not establish that the district court committed clear error in finding that midazolam will not cause severe pain.¹³⁴

1. *The Battle of Persuasion*

The *Glossip* Court affirmed the district court’s decision because it found that (1) petitioners failed to prove that “midazolam is sure or very likely to result in needless suffering,” and that there was a “substantial risk of severe pain,” and (2) numerous courts had found midazolam sufficient to render a person insensate.¹³⁵

In analyzing the expert testimony from both sides, the Court commented on how Dr. Lubarsky, petitioner’s expert witness, was unable to rebut the respondent’s expert witness statement that 500 milligrams of midazolam would render a person sufficiently unconscious in the presence of the second and third drugs.¹³⁶ The Court concluded that “petitioners’ own experts effectively conceded that they lacked evidence to prove their case beyond

131. *Id.*

132. *Id.*

133. *Id.* at 2732–33 (alterations in original) (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)).

134. *Id.* at 2731.

135. *Id.* at 2739–40.

136. *Id.* at 2741. Dr. Lubarsky stated, “there is no scientific literature addressing the use of midazolam as a manner to administer lethal injections in humans.” *See id.* (internal quotation marks omitted).

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dispute.”¹³⁷ Ultimately, “the fact that a low dose of midazolam is not the *best* drug for maintaining unconsciousness during surgery says little about whether a 500-milligram dose of midazolam is *constitutionally adequate* for purposes of conducting an execution.”¹³⁸

In response to the majority’s finding that midazolam is constitutionally adequate, Justice Sotomayor focused her dissent on the drug’s purported ceiling effect.¹³⁹ Having noted the disputed testimony of experts on both sides, the dissent argued that the district court erred in finding that 500 milligrams of midazolam would render a person insensate to pain.¹⁴⁰ Furthermore, the dissent pointed out that the respondent’s expert, Dr. Evans, did not rely on scientific literature, but instead used less reliable sources, such as www.drugs.com.¹⁴¹ The dissent also believed that petitioners’ experts rebutted any purported evidence from Dr. Evans by offering evidence that midazolam’s ceiling effect is not limited to the person’s spinal cord, but also affects the brain, which prevents a deeper level of unconsciousness from occurring irrespective of the increased dosage.¹⁴² Justice Sotomayor recognized that such scientific testimony might sometimes be outside of a court’s area of expertise, but “[e]specially when important constitutional rights are at stake, federal district courts must carefully evaluate the premises and evidence on which scientific conclusions are based, and appellate courts must ensure that the courts below have in fact carefully considered all the evidence presented.”¹⁴³

The majority, however, found Oklahoma’s procedures and safeguards when monitoring the prisoner’s level of consciousness

137. *Id.*

138. *Id.* at 2742. Justice Sotomayor’s dissent argues that Lockett and Wood’s executions are proof that midazolam cannot maintain unconsciousness. *See id.* at 2790 (Sotomayor, J., dissenting). She further noted that Wood was given 750 milligrams of midazolam but still “gasp[ed] and snort[ed] for nearly two hours.” *Id.* at 2791.

139. *Id.* at 2783–84.

140. *Id.* at 2786.

141. *Id.*

142. *Id.* at 2786–87.

143. *Id.* at 2786. Justice Breyer also noted in his dissent that “the Constitution insists that ‘every safeguard’ be ‘observed’ when ‘a defendant’s life is a stake.’” *Id.* at 2764 (Breyer, J., dissenting) (quoting *Greg v. Georgia*, 428 U.S. 153, 187 (1976)).

to be adequate in preventing any constitutional violations, including a death row inmate's awareness, via the administration of the second and third drugs.¹⁴⁴

2. *Known and Available Methods of Execution*

Acknowledging the recent difficulties to obtain the drugs used in the *Baze*-approved protocol, the majority still insisted that petitioners must provide the Court with a known and available alternative to midazolam.¹⁴⁵ Justice Sotomayor responded in her dissent that “*Baze* held no such thing.”¹⁴⁶ She then distinguished the petitioner's claim in *Baze* from petitioner's claim in *Glossip*:

In *Baze*, the very premise of the petitioners' Eighth Amendment claim was that they had “identified a significant risk of harm [in Kentucky's protocol] that [could] be eliminated by adopting alternative procedures.” . . . Thus, the “grounds . . . asserted” for relief in *Baze* were that the State's protocol was intolerably risky given the alternative procedures the State could have employed.¹⁴⁷

Justice Sotomayor argued that the majority contradicted *Hill v. McDonough*, where the Court held that identifying an “alternative, authorized method of execution” was not required when challenging a state's execution protocol.¹⁴⁸ She asserted

144. *Id.* at 2742 (majority opinion). Justice Alito wrote, “many other safeguards that Oklahoma has adopted mirror those that the dissent in *Baze* complained were absent from Kentucky's protocol in that case.” *Id.*

145. *Id.* at 2738–39. *Baze* held that “the Eighth Amendment requires a prisoner to plead and prove a known and available alternative” to a challenged procedure, which petitioners failed to do. *See id.* at 2739. “Petitioners do not seriously contest this factual finding [(that sodium thiopental and pentobarbital are not available to Oklahoma)], and they have not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain.” *Id.* at 2738.

146. *Id.* at 2793 (Sotomayor, J., dissenting). “Simply stated, the ‘Eighth Amendment *categorically* prohibits the infliction of cruel and unusual punishments.’ . . . The Court today, however, would convert this categorical prohibition into a conditional one.” *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

147. *Id.* at 2794 (alterations in original) (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008)).

148. *Id.* (quoting *Hill v. McDonough*, 547 U.S. 573, 582 (2006)) (internal quotation marks omitted).

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that because the Court in *Hill* did not require proof of an alternative method as a requirement in order to bring a successful Eighth Amendment claim, holding otherwise would be contrary to the Court's precedent.¹⁴⁹ The dissent also found it "odd to punish [petitioners] for the actions of pharmaceutical companies and others who seek to disassociate themselves from the death penalty" because the result of the drug shortage is that petitioners were unable to source an alternative to midazolam to meet the Court's requirement.¹⁵⁰

Furthermore, not only did Justice Sotomayor find that the majority opinion contradicted *Hill*, but she argued that it also relied on a holding in *Baze* that did not exist.¹⁵¹ As discussed previously, it was uncertain what the *Baze* Court held because Justice Thomas' concurrence, joined by Justice Scalia, disagreed with the substantial risk analysis proffered in the judgment—the same analysis that also included the need for an alternative method.¹⁵² Even if a majority of the Court had agreed to that standard, the standard never required that *every* challenge undergo the same analysis since the challenge in *Baze* was different from the challenge in *Glossip*.¹⁵³

Justice Sotomayor also mentioned that this new requirement of an alternative method could become "an invitation to propose methods of execution less consistent with modern sensibilities."¹⁵⁴ Specifically, the dissent discussed how reverting back to use of the firing squad "could be seen as a devolution to a more primitive era," which she sees as a "step in the opposite direction," and possibly unconstitutional under an evolving standard of decency.¹⁵⁵ However, an inmate may find that "such visible yet

149. *Id.* at 2794–95, 2797.

150. *Id.* at 2796.

151. *Id.* at 2793–94.

152. *Id.* at 2793. "Because the position that a plaintiff challenging a method of execution under the Eighth Amendment must prove the availability of an alternative means of execution did not 'represent the views of a majority of the Court,' it was not the holding of the *Baze* Court." *Id.* (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987)).

153. *Id.* at 2794.

154. *Id.* at 2796.

155. *Id.* at 2796–97. Dissenting from a Ninth Circuit refusal to rehear a case resulting in a death sentence, Chief Judge Alex Kozinski wrote:

The guillotine is probably [the best method] but seems inconsistent with our national ethos. And the electric chair, hanging and the gas

relatively painless violence may be vastly preferable to an excruciatingly painful death hidden behind a veneer of medication.”¹⁵⁶ Lastly, in response to the majority’s conclusion that, because execution is constitutional, there must be a constitutional method of execution, the dissent argued that the execution methods that are “‘barbarous,’ or ‘involve[] torture or a lingering death,’ do[] not become less so because it is the only method currently available to a State.”¹⁵⁷

D. Gossip *Conclusion and Analysis*

Even if *Baze* did not hold that a petitioner must provide a known and available alternative in order to prove that a current method presents a substantial risk of pain, it is clear that the *Glossip* majority did. Now, death row inmates must enter into a battle of persuasion with the Court—not to prove that their death is unconstitutional—but, rather, to prove the most effective method for their execution. Setting the issues of the Court’s reliance on faulty precedent aside, how does this standard make sense in today’s society?

It is undisputed that past execution drugs have been withheld by their own manufacturers solely because the companies do not wish to be associated with the death penalty.¹⁵⁸ It is also undisputed that government-funded human experimentation is prohibited.¹⁵⁹ This begs the question: What exactly is a petitioner

chamber are each subject to occasional mishaps. The firing squad strikes me as the most promising. Eight or ten large-caliber rifle bullets fired at close range can inflict massive damage, causing instant death every time. There are plenty of people employed by the state who can pull the trigger and have the training to aim true. *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting), *vacated*, 135 S. Ct. 21 (2014) (mem.). Chief Judge Kozinski seems to suggest that the best way to ensure that a method will not cause cruel and unusual punishment is through certainty. *Id.* That is, a procedure that is successful and will not cause the inmate additional suffering. *Id.*

156. *Glossip*, 135 S. Ct. at 2797 (Sotomayor, J., dissenting).

157. *Id.* at 2795 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981)); *In re Kemmler*, 136 U.S. 436, 447 (1890)).

158. *Glossip*, 135 S. Ct. at 2796.

159. *Information on Protection of Human Subjects in Research Funded or Regulated by U.S. Government*, U.S. DEP’T OF HEALTH & HUM. SERVS., <http://www.hhs.gov/1946inoculationstudy/protection.html> (last visited Feb. 29, 2016).

supposed to do in the face of a controversial execution protocol? If he or she cannot somehow convince the manufacturers to distribute, or alternatively test, new drugs for their ability to obtain and maintain consciousness, then it is clear that the petitioner has no recourse in the courts as the standard is written. Is this really what the *Glossip* Court intended?

V. OVERARCHING ISSUE OF CONSTITUTIONALITY

The *Glossip* majority did not intend to start a conversation as to whether the death penalty is per se unconstitutional: Justice Alito was clear that, “because it is settled that capital punishment is constitutional, [i]t necessarily follows that there must be a [constitutional] means of carrying it out.”¹⁶⁰ However, both dissents in *Glossip* and a subsequent case in Connecticut proved that, while Justice Alito did not intend to spark the conversation, the dialogue has indeed begun.

A. *Justice Breyer’s Dissent in Glossip*

In his *Glossip* dissent, Justice Breyer questioned the constitutionality of the death penalty.¹⁶¹ He claimed that there are certain “constitutional defects,” such as “(1) serious unreliability, (2) arbitrariness in application, . . . (3) unconscionably long delays that undermine the death penalty’s penological purpose,” and finally “(4) most places within the United States have abandoned its use.”¹⁶²

Justice Breyer argued that excessive delays while on death row are cruel.¹⁶³ In comparison to 1960, where the average delay from the sentencing to the actual execution was two years, the average delay for a prisoner is now approximately eighteen years.¹⁶⁴ In light of this observation, the dissent argues that

160. *Glossip*, 135 S. Ct. at 2732–33 (majority opinion) (alterations in original) (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)).

161. *Id.* at 2755 (Breyer, J., dissenting).

162. *Id.* at 2756. Chief Judge Kozinski from the Ninth Circuit once wrote: “The death penalty, as we now administer it, has no deterrent value because it is imposed so infrequently and so freakishly. To get executed in America these days you have to be not only a truly nasty person, but also very, very unlucky.” Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 25 (1995).

163. *Glossip*, 135 S. Ct. at 2764.

164. *Id.*

“unless we abandon the procedural requirements that assure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases. Ultimately, though these legal causes may help to explain, they do not mitigate the harms caused by delay itself.”¹⁶⁵ Furthermore, Justice Breyer stated that “[a] death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place.”¹⁶⁶ Lastly, the dissent used the decline in executions as evidence to support the theory that the punishment itself is “unusual,” as it shows consistent change among the states.¹⁶⁷

B. *Decline in Connecticut*

On August 25, 2012, the Connecticut legislature repealed the death penalty prospectively.¹⁶⁸ Exactly three years later, the Connecticut Supreme Court, in *State v. Santiago*, held that the repeal applied retroactively to those still on death row because the “state’s death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose.”¹⁶⁹ The Connecticut Supreme Court ultimately found, like Justice Breyer in his *Glossip* dissent, that lengthy delays¹⁷⁰ and the historical development of the death penalty¹⁷¹ among other considerations, created profound issues for

165. *Id.* Justice Breyer also argued that lengthy delays are cruel because confinement on death row itself is dehumanizing. *Id.* at 2765.

166. *Id.* at 2772.

167. *Id.* at 2772–74 (noting that only seven states executed inmates in 2014).

168. An Act Revising the Penalty for Capital Felonies, Pub. Act 12-5, 2012 Conn. Acts (Reg. Sess. 2012).

169. 122 A.3d 1, 10 (Conn. 2015).

170. “The man you wanted to kill was the abusive robber, high on crack, who pistol-whipped and shot two customers . . . in 1984. Instead, in 1990, the state electrocutes a balding, religious, model prisoner in a neat blue-denim uniform.” *Id.* at 63 (quoting Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 *STUD. L. POL. & SOC’Y* 71, 82 (1993)) (internal quotation marks omitted).

171. The court found that the historical development of the death penalty shows that the state had only carried out only one execution in the past fifty-five years noting that the inmate “all but forced the state to carry out his sentence.” *Id.* at 38.

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a modern society.¹⁷² The dissent in *Santiago* argued that the majority used an improper analysis and violated the separation of powers in concluding that the state's repeal on the death penalty should apply retroactively; specifically, the legislature, in repealing the death penalty prospectively, did not intend for a retroactive repeal unless it had provided such.¹⁷³

CONCLUSION

While larger questions about the constitutionality of the death penalty exist, this Comment contemplates only the crucial questions and concerns stemming from the Court's decision in *Glossip*. Is the Court truly requiring petitioners to choose their own execution methods knowing full well that effective drugs are no longer on the market? Could the Court be suggesting that petitioners look to past methods, which could be seen as devolution of our society's modern view of capital punishment? Or, worse, must those petitioners attempt to test a new method on their own to determine how much pain it could cause when compared to the current method?

If so, then the Court is making it seemingly impossible for petitioners to challenge their death sentences on the basis of a substantial risk of pain. A petitioner's burden of persuasion is now practically insurmountable in light of the scarcity of several drugs. Psychologically, the burden of persuasion also rises to a level of cruelty when one imagines the circumstances where petitioners are researching how a state can best kill him or her with the least risk of pain. This burden—both emotional and legal—should not be on a petitioner. If a state wants to sentence its citizens to death, the burden should fall on the state to execute its citizens in way that comports with society's standard of decency.

172. *See id.*

173. *Id.* at 137 (Rogers, C.J., dissenting).