

# State Resources and Compliance with the Eighth Amendment

by Caroline Johnson Levine



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"After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." — Justice Alito, *Glossip v. Gross*, 576 U.S. \_\_\_\_, 135 S. Ct. 2726, 2732 (2015).

After declaring its independence from England, the United States began drafting a written expression of its desire to create a national government and ratified the U.S. Constitution on March 4, 1789. Soon thereafter, the First U.S. Congress and the states ratified the first 10 amendments to the U.S. Constitution on Dec. 15, 1791.<sup>1</sup> These amendments are routinely referred to as the Bill of Rights.<sup>2</sup> Drafted by James Madison, the Bill of Rights was created in an effort to guarantee individual freedoms, limit federal power, and reserve power to the states.<sup>3</sup>

The U.S. Constitution has been the legal guidepost of every American citizen's rights for more than 200 years. Impressively, the plain language of the Constitution is as clear to the modern day practitioner as it was in the 18th century. However, the privileges granted by the Bill of Rights are routinely debated in state and federal courts. As seemingly novel issues are litigated in courtrooms throughout the 50 states, the judicial branch has been tasked with interpreting the Constitution's controlling text.

The Eighth Amendment is frequently litigated by prisoners, who require a state response to the plaintiff's perceived injustices in the manner of their punishment and incarceration. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," and is the constitutional text that provides an opening for state prisoners to pursue federal litigation through 42 U.S.C. § 1983. As prisoners file suit against the states, issues may be raised as to the states' ability to comply with the Eighth Amendment, due to a lack of access to resources necessary in order to be in legal compliance. A recent U.S. Supreme Court ruling in *Glossip v. Gross*,

576 U.S. \_\_\_\_, 135 S. Ct. 2726 (2015), illuminates the quandaries facing the states as they attempt to carry out duly enacted state laws and comply with the U.S. Constitution.

The *Glossip* decision provides a historical perspective of the death penalty in the United States and asserts that the death penalty has been utilized to execute prisoners for centuries and "was an accepted punishment at the time of adoption of the Constitution and the Bill of Rights."<sup>4</sup> Initially, executions were carried out by hanging, and various methods have been instituted subsequently, such as lethal gas, electrocution, firing squads, and lethal injection. These various methods have been instituted by the states in an attempt to find "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases."<sup>5</sup> Importantly, the Court noted that "[w]hile methods of execution have changed over the years, [t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."<sup>6</sup>

Lethal injection has become the overwhelming preferred method of protocol in executions that are carried out in the states. However, state access to the three drugs administered in an execution have led to inmate claims of suffering "cruel and unusual punishment." Accordingly, in June 2014, "21 Oklahoma death row inmates filed an action under 42 U.S.C. § 1983 challenging the State's new lethal injection protocol. The complaint alleged that Oklahoma's use of midazolam violates the Eighth Amendment's prohibition of cruel and unusual punishment."<sup>7</sup> Further, four of those plaintiffs also "filed a motion for a preliminary injunction."<sup>8</sup> The Supreme Court's decision in *Glossip* details the manner of those four inmates' crimes by noting that plaintiff *Glossip* hired an individual to beat *Glossip's* employer to death with a baseball bat; plaintiff *Cole* murdered his 9-month-old daughter by snapping her spine in half; plaintiff *Grant* murdered a prison worker by stabbing her to death; and plaintiff *Warner* brutally abused and bludgeoned an 11-month-old girl.

The plaintiffs sought the preliminary injunction in

an attempt to prevent the state of Oklahoma from carrying out those plaintiffs' executions with the use of the drug midazolam. The Court provided some historical background as to how midazolam became a part of the three-drug protocol in Oklahoma's lethal injection executions. Initially, Oklahoma used a protocol of (1) sodium thiopental to induce unconsciousness and pain insensation, (2) a paralytic agent to inhibit muscular-skeletal movements and breathing, and (3) potassium chloride to induce cardiac arrest. However, the only American manufacturer of sodium thiopental was pressured into halting production of the drug by anti-death penalty activists in 2011.<sup>9</sup> Subsequently, Oklahoma and other states replaced sodium thiopental with pentobarbital. However, anti-death penalty activists were able to convince the Danish manufacturer of pentobarbital to prevent the release of the drug for use in executions.<sup>10</sup> Therefore, Oklahoma replaced pentobarbital and began utilizing midazolam hydrochloride as the first drug in the protocol in 2014. The four plaintiffs argued that the use of midazolam violates the Eighth Amendment because it may pose a substantial risk of being negligently administered and result in severe pain or needless suffering.<sup>11</sup>

The U.S. District Court for the Western District of Oklahoma held a three day evidentiary hearing and elicited testimony from lay and expert witnesses. The district court denied the motion for preliminary injunction and found that the "plaintiffs failed to establish a likelihood of success on the merits" of an Eighth Amendment challenge.<sup>12</sup> The plaintiffs appealed the court's decision to the Court of Appeals for the Tenth Circuit. The Tenth Circuit reviewed the district court's "decision to deny a preliminary injunction under a deferential abuse of discretion standard,"<sup>13</sup> which requires a de novo examination of the lower court's legal determinations and a finding of clear error as to any factual conclusions. When reviewing a case to determine whether to grant the extraordinary remedy of a preliminary injunction, the court requires that a "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."<sup>14</sup> Based on the evidence presented in the district court, the Court of Appeals for the Tenth Circuit affirmed the lower court's decision, found that it did not abuse its discretion, and held that the "plaintiffs have failed to establish a likelihood of success on the merits of their claims."<sup>15</sup>

The Supreme Court stayed the executions of Glossip, Cole, and Grant to determine its decision regarding the issues raised by plaintiffs. However, Oklahoma executed Warner prior to the Supreme Court's vote to grant review of the issues raised. The Court reaffirmed the "controlling opinion in *Baze* [which] outlined what a prisoner must do to succeed on an Eighth Amendment method-of-execution claim."<sup>16</sup> That outline requires that 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."<sup>17</sup> Therefore, the plaintiffs in this case were required "to establish a likelihood that they can establish both that Oklahoma'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."<sup>18</sup>

Challenging a method of execution requires a legitimate evidentiary establishment that the execution method is likely to cause

serious illness or imminent danger. Prevailing on this claim requires the plaintiff to prove that there is an "objectively intolerable risk of harm"<sup>19</sup> and that there is a viable alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."<sup>20</sup> In *Glossip*, the Supreme Court found that the plaintiffs failed to "satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution."<sup>21</sup> The plaintiffs also argued that the previously utilized drugs, sodium thiopental or pentobarbital, might be constitutional; however, "the record shows that Oklahoma has been unable to procure those drugs despite a good-faith effort to do so." Further, the plaintiffs "have not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain. Nor have they shown a risk of pain so great that other acceptable, available methods must be used. Instead, they argue that they need not identify a known and available method of execution that presents less risk."<sup>22</sup> The Supreme Court found that the plaintiffs' argument, that there was no need to identify an available alternative, was an unsuccessful attempt to counteract the precedent established in *Baze*.

In *Glossip*, the Supreme Court concluded that "the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims."<sup>23</sup> Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain."<sup>24</sup> When the Eighth Amendment was ratified by the states and Congress in 1791, those lawmakers could not have anticipated the opportunity for litigation through the modern development of execution methods led by science or the lack of access to resources routinely faced by the states who duly enact statutes and procedures to punish criminal activities. ©

## Endnotes

- <sup>1</sup> The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 103-6, 103rd Cong., 1st Sess. U.S. Government Printing Office. 1996. p. 25, n.2.
- <sup>2</sup> *Miranda v. Arizona*, 86 S. Ct. 1602, 1620, (1966) (quoting *Boyd v. United States*, 6 S. Ct. 524, 535, (1886) ("Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing \* \* \* by silent approaches and slight deviations from legal modes of procedure.'")).
- <sup>3</sup> U.S. Constitution's 10th Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See *U.S. v. Darby*, 61 S. Ct. 451, 462 (1941) (finding that "the [10th] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."); see *State of Kansas v. State of Colorado*,

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206 U.S. 46, 90, 27 S. Ct. 655, 664 (1907) (stating that the 10th Amendment’s “principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—‘we, the people of the United States,’ not the people of one state, but the people of all the states; and article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States.”).

<sup>4</sup> *Glossip v. Gross*, 576 U.S. \_\_\_\_\_, 135 S.

Ct. 2726, 2731 (2015).

<sup>5</sup> *Id.* at 2731 (quoting *In re Kemmler*, 10 S. Ct. 930 (1890)).

<sup>6</sup> *Id.* at 2732 (quoting *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion)).

<sup>7</sup> *Id.* at 2735.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2733.

<sup>10</sup> *Id.*

<sup>11</sup> See *Warner v. Gross*, 776 F.3d 721, 727 (10th Cir. 2015).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 728 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008)).

<sup>15</sup> *Id.* at 724.

<sup>16</sup> See *Glossip*, 135 S. Ct. 2737.

<sup>17</sup> See *Baze v. Rees*, 128 S. Ct. 1520 (2008).

<sup>18</sup> See *Glossip*, 135 S. Ct. 2737.

<sup>19</sup> See *Farmer v. Brennan*, 114 S. Ct. 1970, n. 9 (1994).

<sup>20</sup> See *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion).

<sup>21</sup> See *Glossip*, 135 S. Ct. 2738.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2731 (citing *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion)).

<sup>24</sup> *Id.* at 2731.

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<sup>2</sup> 8 U.S.C. §§1101 *et seq.* [INA]. Under the INA, “removal” is the legal term for deportation of noncitizens. See INA § 240(a)(1) (“An immigration judge shall conduct [removal] proceedings for deciding the inadmissibility or deportability of an alien.”) (WESTLAW 2015).

<sup>3</sup> *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014) [*Chairez I*]; *modified in part*, 26 I&N Dec. 478 (BIA 2015) [*Chairez II*].

<sup>4</sup> *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011)); see also *Matter of Lanferman*, 25 I&N Dec. 721, 723 (BIA 2012), *withdrawn on other grounds*, 26 I&N Dec. 349 (BIA 2014) (“The principal purpose served by the categorical approach is to limit the inquiry to what crime the offender was necessarily convicted of . . . and, thus, to avoid ad-hoc mini trials on whether an offender’s conduct was more or less culpable than what his actual conviction required.”) Former FBA ILS Chair H. Raymond Fasano wrote an introduction to the categorical approach in our 2014

Immigration Law issue. 61[8] THE FEDERAL LAWYER 47 (Oct./Nov. 2014).

<sup>5</sup> *Moncrieffe*, 133 S. Ct. at 1685-86; see also *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 822 (2007) (“To show that realistic probability, an offender . . . must at least point to his own case or other cases in which the state courts in fact did apply the statute” in the manner for which he argues.).

<sup>6</sup> INA §§ 212(a)(2)(A)(i)(I); 237(a)(2)(A)(i).

<sup>7</sup> *Matter of Sanudo*, 23 I&N Dec. 968, 969 (BIA 2006) (assessing CAL. PEN. CODE §§ 242, 243(e)(1)) (other citations omitted).

<sup>8</sup> INA § 237(a)(2)(C).

<sup>9</sup> 25 I&N Dec. at 730.

<sup>10</sup> *Id.* at 721.

<sup>11</sup> Amicus Br. for Pet’r, American Immigration Law Association and National Immigration Project of the National Lawyers Guild, *Cardenas Garcia v. Holder*, No. 14-606920 (5th Cir. 2015), AILA Doc. No. 15043008 (Apr. 30, 2015), 18, (citing *Schad v. Arizona*, 111 S. Ct. 2491, 2499 (1991)).

<sup>12</sup> 222 S.W.3d at 529 (citing *Aguire v. State*, 732 S.W.2d 320, 325-26 (Tex. Crim. App. 1982)).

<sup>13</sup> 189 S.W.3d 305 (Tex. Crim. App. 2006).

<sup>14</sup> *Burks v. State*, 693 S.W.2d 932, 936 (Tex. 1985).

<sup>15</sup> “Deprive” is defined at T.C.A. § 39-11-106(a)(8).

<sup>16</sup> See, e.g., *State v. Hammonds*, 30 S.W.3d 294, 298 (Tenn. 2000) (listing elements of aggravated assault under T.C.A. § 39-13-102); *State v. LeMacks*, 996 S.W.2d 166 (Tenn. 1999) (criminal responsibility is not an additional “element” in a DUI offense); *Carter v. State*, 958 S.W.2d 620, 624 (Tenn. 1997) (addressing jury requirements for first degree murder finding).

<sup>17</sup> Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 11.17 (WESTLAW 2015).

<sup>18</sup> Telephonic interview with Dean DeCandia, Sept. 18, 2015 (notes on file with author).