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FYI: BUCKLEW v. PRECYTHE

The United States Supreme Court rejects petitioner's as-applied Eighth Amendment challenge to execution by lethal injection due to his unique medical condition.

In *Bucklew v. Precythe*, No. 17–8151 (April 1, 2019), Bucklew was convicted of murder and sentenced to death. The State of Missouri plans to execute him by lethal injection using a single drug, pentobarbital. Mr. Bucklew presented an as-applied Eighth Amendment challenge to the State's lethal injection protocol, alleging that, regardless whether it would cause excruciating pain for *all* prisoners, it would cause *him* severe pain because of his particular medical condition. In a 5-4 decision, the Supreme Court disagreed.

The Court stated that in *Baze v. Rees*, 553 U. S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), a plurality of the Court concluded that a State's refusal to alter its execution protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." *Id.*, at 52, 128 S. Ct. 1520, 170 L. Ed. 2d 420. A majority of the Court subsequently held *Baze's* plurality opinion to be controlling. See *Glossip v. Gross*, 576 U. S. ___, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015). Nevertheless, Bucklew contended that the *Baze-Glossip* test applied to facial challenges only and not to an as-applied challenge like his.

The Court noted that the Eighth Amendment forbids "cruel and unusual" methods of capital punishment but does not guarantee a prisoner a painless death. As originally understood, the Eighth Amendment tolerated methods of execution, like hanging, that involved a significant risk of pain, while forbidding as cruel only those methods that intensified the death sentence by "superadding" terror, pain, or disgrace. Thus, under the *Baze-Glossip* test, to establish that a State's chosen method cruelly "superadds" pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt it without a legitimate penological reason. And this standard governs **all** Eighth Amendment method-of-execution claims, whether facial or as-applied. Moreover, the Court stated, *Baze* and *Glossip* recognized that the Constitution affords a measure of deference to a State's choice of execution procedures and does not authorize courts to serve as boards of inquiry charged with determining "best practices" for executions. Nor does *Baze* and *Glossip* suggest that traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as an arguably more humane method becomes available.



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Thus, having rejected Bucklew's argument that the *Baze-Glossip* test does not apply to his as-applied Eighth Amendment, the Court addressed whether Bucklew satisfied the test and found that he did not.

Bucklew argued that execution by "lethal gas" of nitrogen was a feasible and available alternative method that would significantly reduce his risk of pain. The Court disagreed. First, an inmate must show that his proposed alternative method is not just theoretically "feasible" but also "readily implemented." This means the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly. But here, the Court found, Bucklew's proposal fell well short of that standard. He presented no evidence on numerous questions essential to implementing his preferred method; instead, he merely pointed to reports from correctional authorities in other States indicating the need for additional study to develop a nitrogen hypoxia protocol. Second, the State had a "legitimate" reason for declining to switch from its current method of execution as a matter of law, namely, choosing not to be the first to experiment with a new, "untried and untested" method of execution. And, even if nitrogen hypoxia were a viable alternative, the Court found that Bucklew failed to show that nitrogen hypoxia would significantly reduce a substantial risk of severe pain. Accordingly, the Court affirmed.

In so holding, the Court stated this case has frustrated the interest of the State and the victims in having a timely enforcement of a sentence. After two decades of continuous appeals and state and federal habeas challenges, this particular case was filed just days before Bucklew's date of execution. "[The State] and surviving victims of ... Bucklew's crimes deserve better...[and t]he answer is not...to reward those who interpose delay with a decree ending capital punishment by judicial fiat." In fact, the Court stated, "[l]ast-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay....If litigation is allowed to proceed, federal courts can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories." (internal quotes and citations omitted).