1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF OKLAHOMA
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4 CHARLES F. WARNER, et al.,
5 Plaintiffs,
6 vs. Case No. CIV-14-665-F
7 KEVIN J. GROSS, et al.,
8 Defendants.
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12 TRANSCRIPT OF COURT'S RULING
13 BEFORE THE HONORABLE STEPHEN P. FRIOT
14 UNITED STATES DISTRICT JUDGE
15 DECEMBER 22, 2014
16 3:00 P.M.
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24 Proceedings recorded by mechanical stenography; transcript
25 produced by computer-aided transcription.

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1 (PROCEEDINGS HAD DECEMBER 22, 2014.)
2 THE COURT: Good afternoon. We're here in Civil
3 14-665, Charles Warner and others v. Kevin Gross and others,
4 for the Court's ruling on the motion of four plaintiffs for
5 preliminary injunction. Counsel will please give your
6 appearances.
7 MS. GHEZZI: Patti Ghezzi for the plaintiffs that are
8 represented by the Federal Public Defender's Office in the
9 Western District.
10 MS. HENRICKSEN: Lanita Henricksen for Andrew,
11 Warner, Hancock, Jackson, and Glossip.
12 MR. AUTRY: David Autry for James Coddington, Your
13 Honor.
14 THE COURT: We have Arizona counsel present by
15 telephone?
16 MS. KONRAD: Yes. Robin Konrad and Dale Baich for
17 Plaintiff Tremane Wood.
18 MR. HADDEN: John Hadden for state defendants, Your
19 Honor.
20 MR. STEWART: Aaron Stewart for state defendants,
21 Your Honor.
22 THE COURT: I'll now make my findings of fact and
23 conclusions of law with respect to the preliminary injunction
24 which has been -- motion for preliminary injunction which has
25 been filed by Plaintiffs Charles Warner, Richard Glossip, John

1 Grant, and Benjamin Cole.
2 The hearing on these plaintiffs' motion for preliminary
3 injunction was held on December 17, 18, and 19, 2014. The
4 plaintiffs were ably represented by Dale A. Baich, Robin C.
5 Konrad, Patti P. Ghezzi, and Randy A. Bauman. The defendants
6 were ably represented by John D. Hadden, Aaron J. Stewart, and
7 Jeb E. Joseph. Over three full days of hearings, generating
8 694 pages of transcript, the plaintiffs called 14 witnesses,
9 including several Oklahoma Department of Corrections employees,
10 and the defendants called three witnesses.
11 My scheduling of the hearing on the motion for preliminary
12 injunction, as well as my scheduling of the preparatory steps
13 leading to the hearing was driven by the fact that these four
14 movants are scheduled for execution beginning in the case of
15 Charles Warner on January 15, 2015. That necessitated a rather
16 compressed schedule. Even though the schedule was compressed,
17 there were certain essential steps that, although unfolding on
18 a tight time schedule, certainly could not be eliminated. As
19 an example, it was my conclusion that the plaintiffs ought to
20 have the benefit of discovery as thorough and searching as was
21 possible under the circumstances. And I believe that
22 plaintiffs have indeed had the benefit of thorough discovery.
23 Plaintiffs' discovery began, at least in terms of
24 substantial discovery, with the production of thousands of
25 pages of documents that were either turned over to the

1 Department of Public Safety or generated by the Department of
2 Public Safety in the investigation that was conducted by that
3 agency following the Lockett execution. That included
4 thousands of pages of interview transcripts as well as numerous
5 original source documents.
6 And before I go any further, I will say again that I
7 applaud the diligence and professionalism of counsel on both
8 sides. For the reasons I have described, among others, this
9 has been, to put it mildly, a very demanding case, especially
10 in the run-up to the three-day hearing last week. Although
11 there were some instances in which I had to referee discovery
12 disputes on fairly short notice, I can say without hesitation
13 that preparation for the preliminary injunction hearing
14 proceeded with less rancor than there would have been if
15 counsel on both sides had not made every effort as true
16 professionals to bring the matter to this stage with a hard
17 focus on the merits and with minimal diversions unrelated to
18 the merits.
19 I am making my findings of fact and conclusions of law in
20 this setting, on the record, as permitted by Rule 52(a). As I
21 said at the end of the day last Friday, I could take another
22 five or six working days to turn out a polished 35- or 40-page
23 order, but I am certain that the parties and their counsel
24 would rather have those five or six days back so that they can
25 prepare for the next stage of this litigation, which will

1 necessarily unfold between now and January 15, 2015. I will
2 assure all concerned, however, that even though I am ruling
3 from the bench rather than taking another five or six days to
4 produce a formal written order, the findings and conclusions
5 that I'm about to express are made with all of the thought
6 process that would ultimately go into a formal order.
7 Many of the matters that I'm about to address involve
8 mixed issues of fact and law. For that reason, it is in some
9 ways a bit artificial to speak in terms of findings of fact
10 separately from conclusions of law. I will separate the two as
11 much as I reasonably can. However, I am confident that the
12 parties, as well a reviewing court, will be able to discern the
13 difference between my factual findings and my legal
14 conclusions. In any event, of course, to the extent that I
15 express a legal conclusion as if it were a matter of fact, it
16 should be regarded as a legal conclusion and vice versa.
17 My exceedingly capable reporter is prepared to produce a
18 transcript of my ruling in very short order. For ease of
19 reference by the parties and by a reviewing court, the reporter
20 has advised me that it would be permissible for me to insert
21 headings into the transcript before the transcript is filed. I
22 think that would be helpful to all concerned and I will do that
23 before the transcript is filed. I assure you, however, that
24 because of the very nature of a ruling from the bench, I will
25 not make any change of any kind in the record of my ruling as

1 taken by the reporter.

2 I'll now turn to the factual history of this matter.

3 FACTUAL HISTORY

4 Clayton Derrell Lockett, having been convicted of first
5 degree murder and sentenced to death, was scheduled for
6 execution at the Oklahoma State Penitentiary on April 29,
7 2014. The execution took place as scheduled and it achieved
8 the intended result, the death of Clayton Lockett, but the
9 execution was ineptly performed in some ways, as I will discuss
10 later in these findings.

11 As a result of the extraordinary events surrounding the
12 Clayton Lockett execution, Governor Mary Fallin issued
13 Executive Order 2014-11 on April 30, 2014, which mandated an
14 independent investigation of the events leading up to and
15 during the execution of Clayton Lockett. The Governor's
16 Executive Order appointed Michael Thompson, the Secretary of
17 Safety and Security and the Commissioner of the Department of
18 Public Safety to lead the independent investigation process.

19 The Department of Public Safety investigation culminated
20 in the issuance of a report entitled "The Execution of Clayton
21 D. Lockett," Case Number 14-0189SI, by the Oklahoma Department
22 of Public Safety. On September 16, 2014, that report was filed
23 in this action as Docket Entry Number 49-1.

24 The DPS report contains a wealth of information, much of
25 it favorable to the plaintiffs. The plaintiffs have asserted

1 that for their purposes there are some relevant facts that are
2 not included in the DPS report. That is correct. An
3 encyclopedic report on the Lockett execution would probably
4 have run to 3- or 400 pages rather than 29 pages. But the DPS
5 report, which resulted from a thorough investigation that was
6 conducted with noticeable professional integrity by Captain
7 Jason Holt, under the supervision of Commissioner of Public
8 Safety Michael Thompson, certainly provided plaintiffs with a
9 good starting point. By the time Captain Holt left the witness
10 stand last Thursday, no one in this courtroom could have
11 doubted the seriousness with which he took his assignment to
12 lead the DPS investigation.
13 Meanwhile, this action was filed on June 25, 2014. As
14 indicated by the allegations on pages 6 to 9 of the original
15 complaint in this case, Docket Entry Number 1, the plaintiffs'
16 original complaint in this action centered substantially on the
17 events surrounding the execution of Clayton Lockett. The same
18 is true of the amended complaint, Docket Entry Number 75, filed
19 on October 31, 2014.
20 The amended complaint also focuses on the revised
21 execution protocol adopted by the Oklahoma Department of
22 Corrections, DOC Policy OP-040301, with an effective date of
23 September 30, 2014. I will discuss that revised protocol as
24 relevant to the issues now before the Court later in my
25 findings.

1 **THESE FOUR PLAINTIFFS**

2 Although the plaintiffs in this action include all or
3 nearly all of the death row inmates in the state of Oklahoma,
4 the matter now before the Court is the motion for preliminary
5 injunction which was filed by four of those plaintiffs; namely,
6 Charles Frederick Warner, Richard Eugene Glossip, John Marion
7 Grant, and Benjamin Robert Cole. The four plaintiffs who have
8 filed this motion for preliminary injunction have been
9 scheduled for execution, respectively, on January 15, January
10 29, February 19, and March 5, 2015.

11 As recounted by the Oklahoma Court of Criminal Appeals at
12 144 P.3d 838, Charles Warner raped and murdered an 11-month-old
13 baby girl on August 22, 1997, an assault which resulted in,
14 among other injuries, two skull fractures including a depressed
15 fracture and two fractures of the baby girl's left jaw.

16 As recounted by the Oklahoma Court of Criminal Appeals,
17 157 P.3d 143, on January 7, 1997, Richard Glossip hired Justin
18 Sneed to kill Barry Van Treese, the employer of Glossip and
19 Sneed, which Sneed proceeded to do by bludgeoning Van Treese to
20 death with a baseball bat.

21 As recounted by the Oklahoma Court of Appeals, 95 P.3d
22 178, on November 13, 1988, John Grant, then an inmate at the
23 Connor Correctional Center in Hominy, Oklahoma, murdered Gay
24 Carter, a food service supervisor at the Connor Correctional
25 Center, by stabbing her 16 times with a shank.

1 As recounted by the Oklahoma Court of Criminal Appeals,
2 164 P.3d 1089, on December 20, 2002, Benjamin Cole murdered his
3 nine-month-old daughter, Brianna Cole, by snapping her spine in
4 half and inflicting other fatal injuries because she would not
5 stop crying.
6 All four of the moving plaintiffs have reached the end of
7 their trial, direct review and collateral review process, which
8 includes, in the case of Messrs. Warner and Glossip, two
9 trials, two first degree murder convictions, and two sentences
10 of death.
11 I will now address the facts surrounding the Lockett
12 execution.
13 **THE LOCKETT EXECUTION**
14 Although a number of preliminary steps took place earlier
15 in the day on April 29, 2014, and even before that day, the
16 final sequence of events leading to the execution of Clayton
17 Lockett began at approximately 5:22 p.m. on April 29 when
18 Lockett was placed onto the execution table and strapped down.
19 Earlier in the day, Lockett had twice refused visits from his
20 attorneys. He had also cut himself twice on April 29 at "the
21 bend of the elbow," as described by Warden Trammell. That is
22 as page 225 of the transcript.
23 The execution of Clayton Lockett was the first Oklahoma
24 execution using midazolam. The protocol called for the
25 administration of 100 milligrams of midazolam, 40 milligrams of

1 vecuronium bromide, and 200 milliequivalents of potassium
2 chloride. Midazolam had been added to the protocol
3 approximately two weeks before the Lockett execution after it
4 was determined that pentobarbital would not be available for
5 the Lockett execution.
6 On April 29, before the blinds between the execution
7 chamber and the reviewing rooms were raised, the execution team
8 had worked for nearly an hour trying to establish intravenous
9 access to Lockett's cardiovascular system. Postmortem
10 examination revealed at least a dozen needle puncture marks on
11 Lockett's body indicating at least that many attempts to
12 establish IV access.
13 The first member of the execution team who was involved in
14 securing intravenous access to Lockett's cardiovascular system
15 was an emergency medical technician licensed as a paramedic.
16 The paramedic attempted, without success, to establish IV
17 access in the typical location in the crook of Lockett's left
18 arm. Three attempts to establish IV access at that location
19 were unsuccessful.
20 Next a physician member of the execution team attempted to
21 establish IV access through Lockett's left jugular vein.
22 Although it appeared momentarily that this attempt had been
23 successful, that success was short-lived. At the same time,
24 the paramedic attempted to establish IV access by way of
25 Lockett's right arm. Three attempts to do so were

1 unsuccessful. After those unsuccessful attempts, the physician
2 sought unsuccessfully to establish IV access through Lockett's
3 left subclavian vein and the paramedic attempted to establish
4 IV access in two locations on Lockett's right foot.
5 The physician next attempted to establish IV access by way
6 of Lockett's right femoral vein. The physician and the
7 paramedic concluded that this attempt had been successful. To
8 facilitate right femoral IV access, the physician asked for a
9 longer catheter so that they could attempt to establish IV
10 access through Lockett's femoral vein.
11 A one-and-a-quarter-inch 14-gauge angiocatheter was used
12 for this purpose. The one-and-a-quarter-inch needle was
13 inserted and was "positional," meaning the patency of the IV
14 flow was dependent upon relatively precise positioning of the
15 catheter. This one-and-one-quarter-inch catheter was taped in
16 place. The use of the one-and-a-quarter-inch catheter was
17 clearly inappropriate, a failure that is made all the more
18 inexplicable by the fact that a central line IV kit was
19 available.
20 After the physician and the paramedic concluded that
21 femoral IV access had been established, Warden Trammell covered
22 Lockett's body with a sheet. For the purpose of preserving
23 Lockett's privacy, his genital area was covered. This was an
24 improvident decision. From that point until it appeared that
25 there may be a problem with intravenous flow, Lockett's genital

1 area remained covered and the IV access point could not be
2 observed.
3 There was approximately a 23-minute delay in the beginning
4 of the execution. This delay was evidently due to the
5 difficulties in establishing acceptable IV access. The blinds
6 were raised at approximately 6:23 p.m. After the blinds were
7 raised, Warden Trammell read the death warrant and Lockett was
8 asked whether he had any last words. He had none.
9 The execution team began to push the midazolam into the IV
10 manifold. Administration of the midazolam was followed by
11 administration of the vecuronium bromide and potassium
12 chloride, both by way of the right femoral IV access point.
13 Confirmation of continuous IV flow was, to put it mildly,
14 hampered by the fact that the execution team put a hemostat on
15 the IV line and then they covered the IV injection access point
16 with a sheet with the result that, in the words of Captain Holt
17 at page 408 of the transcript, they had "covered the one and
18 stopped the other," which made it impossible to confirm that
19 the IV flow continued or even that it could continue.
20 At approximately 6:30, the physician performed a
21 consciousness check and determined that Lockett was conscious.
22 At approximately 6:33, Lockett was determined to be unconscious
23 and the vecuronium bromide was pushed, followed by a saline
24 flush and the potassium chloride. Shortly after that, Lockett
25 began to move. He raised his head and was heard to say, "man"

1 or "oh, man." By the account of Edith Shoals, which I find to
2 be credible, Lockett said, "This shit is fucking with my mind."
3 That is at page 204 of the transcript. Lockett was heard to
4 mumble "something is wrong," and he moved his shoulders and
5 head forward. By the account of Jeanetta Boyd, which was also
6 credible, Lockett was heard to say, "The drugs aren't working."
7 That is at page 182 of the transcript. After these movements
8 and verbalizations, the blinds were closed at the direction of
9 Warden Trammell.
10 The physician recognized that there was a problem. The
11 physician lifted the sheet and recognized that the IV had
12 infiltrated, meaning that the IV fluid had leaked into the
13 tissue surrounding the IV access point. The physician noted an
14 area of swelling under Lockett's skin. It was smaller than a
15 tennis ball but larger than a golf ball. It is evident from
16 the autopsy photographs and from the testimony that a bulge of
17 that size, unmistakably indicating a serious infiltration
18 problem, could have and should have been noticed at a
19 significantly earlier stage of the execution process.
20 Vecuronium bromide is a potent paralytic agent. The
21 intravenous administration of a massive dose of vecuronium
22 bromide, as was called for by the lethal injection protocol
23 that governed Lockett's execution, would have resulted in
24 complete paralysis. Lockett would have been unable to breathe,
25 speak, or raise his head. During this phase of his execution,

1 Lockett was surely experiencing all of the mental pain that is
2 inevitable in the execution process as well as serious physical
3 discomfort if not serious physical pain.
4 Postmortem toxicology confirmed the presence of midazolam
5 as well as vecuronium and potassium in Lockett's femoral blood
6 at 45 milliequivalents for the potassium and 460 nanograms per
7 milliliter for the vecuronium. The vecuronium bromide was
8 pushed after the midazolam but before the potassium chloride
9 and the vecuronium obviously did not immediately have its
10 intended paralytic effect. Not all of the potassium chloride
11 was pushed, but the potassium chloride was behind the
12 vecuronium bromide and the vecuronium bromide clearly did not
13 flow into Lockett's cardiovascular system in the manner
14 contemplated by the lethal injection protocol. Consequently,
15 it is not possible to determine the extent to which Lockett
16 suffered the searing pain that would result from an injection
17 of potassium chloride into a sensate person.
18 Although I cannot and do not find that Lockett was not in
19 pain during this part of the execution process, I do note that
20 during the time that Lockett moved, vocalized, and raised his
21 head and shoulders, of all of the verbalizations attributed to
22 Lockett, at least two of which were complete sentences, the
23 most specific, emphatic, and intelligible statement was, "This
24 shit is fucking with my mind." Which may or may not be a
25 statement that one would have expected Lockett to make if he

1 was feeling the searing pain that he certainly would have felt
2 if he had been conscious while any substantial amount of sodium
3 chloride was being delivered to his tissues.
4 By all accounts, potassium chloride will cause a sensate
5 individual to feel serious pain. It is clear that patent IV
6 flow of potassium chloride into the cardiovascular system of
7 Clayton Lockett, while conscious and sensate, would have had
8 the extremely painful effect that has been described because
9 patent IV flow would have delivered the substance throughout
10 his body to the most sensitive receptors. What is not clear
11 from the evidence is the extent to which that, in fact,
12 occurred.
13 After the swelling in Lockett's groin was noted, the
14 execution process was halted and the blinds were lowered at
15 about 6:42 p.m., approximately 20 minutes after the midazolam
16 was administered. Administration of the second syringe of
17 potassium chloride was stopped. The paramedic assessed the
18 situation and concluded that the IV catheter was no longer
19 penetrating the vein. The physician attempted IV insertion
20 into the left femoral vein. The needle penetrated the femoral
21 artery rather than the femoral vein. No left femoral IV access
22 was established.
23 At this juncture, Director Patton asked Warden Trammell
24 two questions. First, do you have another viable vein? And,
25 second, do you have any more chemicals to push? Warden

1 Trammell told Director Patton that there was no viable vein.
2 After that, the physician told the warden and the warden
3 relayed to Director Patton that not enough drugs had entered
4 Lockett's body to cause death.
5 The autopsy of Lockett indicated that there were
6 concentrations of midazolam in the tissue near the insertion
7 site in Lockett's right groin area. This indicated that the
8 drugs were not flowing intravenously into Lockett's
9 cardiovascular system and that this problem had existed as
10 early as the stage at which the midazolam was being
11 administered.
12 At 6:56 p.m., after two conversations with Governor
13 Fallin's counsel, Director Patton terminated the execution
14 process, although the administration of the drugs had been
15 stopped at about 14 minutes before that. Witnesses were
16 escorted out of the viewing room. At 7:06 p.m., Lockett was
17 pronounced dead. He died as a result of the lethal injection.
18 The drugs that were intended to be lethal had their intended
19 effect.
20 As to the opportunity for the witnesses to see what was
21 happening, the blinds between the execution chamber and the
22 viewing rooms were raised and lowered once during Lockett's
23 execution. The individuals who viewed the execution room from
24 the viewing room had been seated in the viewing room by 6 p.m.
25 At approximately 6:23 p.m., after Director Patton received

1 approval from the governor's office to proceed with the
2 execution, the blinds were raised. The blinds were still up
3 when the physician inspected the femoral IV insertion site and
4 concluded that there was a problem with IV access. At
5 6:42 p.m., when the administration of the second syringe of
6 potassium chloride was stopped, the blinds were lowered. The
7 blinds remained down from that point until Lockett was
8 pronounced dead.
9 The autopsy disclosed wounds consistent with the IV access
10 attempts that I have described. The autopsy also indicated
11 that both midazolam and vecuronium bromide were found in the
12 psoas muscle indicating that those chemicals had been
13 distributed throughout Lockett's body. The concentration of
14 midazolam found in Lockett's blood was greater than the
15 concentration required to render an average person unconscious.
16 I will now make my findings with respect to the revision
17 of the lethal injection protocol and Department of Corrections
18 practice under that protocol.
19 **THE REVISION TO THE PROTOCOL AND DOC PRACTICE UNDER THAT**
20 **PROTOCOL**
21 As I have noted, the DOC adopted a new protocol entitled
22 "Execution of Offenders Sentenced to Death" with an effective
23 date of September 30, 2014. Including attachments, the revised
24 protocol is 55 pages long.
25 I do not consider it necessary to go into a detailed

1 side-by-side comparison of the revised protocol versus the
2 previous protocol, but it is safe to say that with respect to
3 the matters that are most relevant here, specifically the
4 procedures for establishing IV access to the offender's
5 cardiovascular system, the procedure for administering the
6 chemicals, and the procedures for dealing with mishaps or
7 unexpected contingencies, the new protocol is noticeably more
8 detailed. The revised protocol also includes detailed
9 provisions with respect to training and pre-execution
10 preparation of the members of the execution team.
11 The new protocol is in evidence as Plaintiffs' Exhibit 68.
12 A copy of the new protocol is also in the record at Docket
13 Entry Number 55-1 filed on October 1, 2014.
14 The new protocol provides for several teams to participate
15 in and complete the execution process, including the
16 Intravenous Team, as indicated on page 7. The IV Team consists
17 of a team leader and one or more physicians, physician
18 assistants, nurses, emergency medical technicians, paramedics,
19 or a military corpsman, or other certified or licensed
20 personnel, including those trained in the U.S. Military. The
21 team leader and members shall be "currently certified or
22 licensed within the United States."
23 Practitioners in some of those categories, such as
24 physicians, must be licensed and others, like military
25 corpsman, are credentialed by certification. The new protocol

1 provides that a central femoral venous line shall not be used
2 unless the person placing the line is currently certified or
3 licensed within the United States to place a central femoral
4 line. That is on page 27. That is not a particularly
5 meaningful requirement because there is no licensing or
6 certification specific to that procedure.
7 The team leader and members are selected by the director
8 of the DOC on the basis, among other things, of the proposed
9 team member's qualifications, training, experience, and
10 professional licenses or certification, as indicated on page 7.
11 I'll now address training under the revised protocol.
12 **TRAINING UNDER THE REVISED PROTOCOL**
13 Warden Anita Trammell acknowledged that after the Lockett
14 execution she realized that the training of the execution team
15 had been, in point of time, "up to bringing the offender into
16 the execution chamber." She testified that "the training
17 should have gone beyond that." I agree with that comment.
18 That is at page 158 of the transcript. The new protocol does
19 call for significantly more training.
20 For execution team members, the new protocol requires "ten
21 training scenarios within the 12 months preceding the scheduled
22 execution." That is on pages 9 and 10. The training section
23 of the protocol provides for "multiple training scenarios,"
24 including but not limited to contingency plans for issues with
25 execution equipment or supplies, issues with offender IV

1 access, including alternate IV access sites, issues if the
2 offender is not rendered unconscious after administration of
3 execution chemicals, and unanticipated medical or other issues
4 concerning the offender or an execution team member, all as
5 covered on page 10.

6 Two days prior to the day of execution, the division
7 manager is required to schedule and conduct "on-site scenario
8 training sessions, modifying practices as warranted," as
9 indicated on page 22. The training section of the revised
10 protocol also requires that the IV Team members "shall
11 participate in at least one training session with multiple
12 scenarios within one day prior to the scheduled execution," as
13 indicated on page 10. The H-Unit Section Chief is required to
14 be trained in determining whether there is a problem with IV
15 flow.

16 This fall, the execution team has been training one day a
17 week for five or six hours in each instance. The director is
18 included in these training sessions. They train for a minimum
19 of six scenarios each time and sometimes address seven or eight
20 scenarios. The training scenarios include, for instance,
21 situations in which there is a problem with the IV manifold and
22 drills involving access to the femoral vein.

23 In addition to the training sessions that have been
24 conducted, a training session will be held with the IV Team
25 within 24 hours before the next execution in which the IV Team

1 will address a scenario in which the inmate regains
2 consciousness after having been pronounced unconscious.
3 Thirty-five days prior to the day of execution, the
4 protocol requires that the offender's medical condition "be
5 assessed in order to identify any necessary accommodations or
6 contingencies that may arise from the offender's medical
7 condition or history," as indicated on page 16. This includes
8 examination for "concerns for establishing or maintaining IV
9 lines," as indicated on page 17.
10 The offender's telephone privileges are terminated at
11 9 p.m. on the day prior to the day of execution, except for
12 calls from the offender's attorney of record and others as
13 approved by the division manager. Likewise, visitation is
14 terminated at 9 p.m. on the day before the day of execution,
15 except that two hours of in-person visitation with up to two
16 attorneys of record is permitted as long as that visitation
17 ends two hours prior to the scheduled execution or earlier, if
18 necessary, to begin preparing the offender for the execution,
19 as indicated on page 22.
20 The revised protocol requires that an electrocardiograph
21 and a backup electrocardiograph be on site available for use
22 during the execution.
23 The execution team must prepare a complete set of the
24 required chemicals. In addition, "An additional complete set
25 of the necessary chemicals shall be obtained and kept available

1 in the chemical room," as indicated on page 38.
2 As is set forth on pages 39 through 41 of the revised
3 protocol, the new protocol gives the director four alternatives
4 with respect to the combination of drugs to be used in the
5 lethal injection process. These alternatives are set forth in
6 Chart A, Chart B, Chart C, and Chart D.
7 Chart A calls for the administration of 5,000 milligrams
8 of pentobarbital in a one-drug procedure. Chart B provides for
9 the administration of 5,000 milligrams of sodium pentothal,
10 again, in a one-drug procedure. Chart C provides for the
11 administration of 500 milligrams of midazolam and 500
12 milligrams of hydromorphone. Hydromorphone is a narcotic
13 analgesic. Finally, Chart D provides for the administration of
14 500 milligrams of midazolam, 100 milligrams of vecuronium
15 bromide, and 240 milliequivalents of potassium chloride.
16 Rocuronium bromide will apparently be used in the upcoming
17 executions, but it is not materially different from vecuronium
18 bromide, aside from what Dr. Katz referred to as "a dosing
19 change," which apparently is not in controversy.
20 The protocol provides that the director shall have the
21 sole discretion to determine which chemicals will be used for
22 the scheduled execution. This decision is required to be
23 provided to the offender in writing ten calendar days before
24 the scheduled execution date, as indicated on page 41. If it
25 is necessary to use a compounded drug, the compounded drug

1 "shall be obtained from a certified or licensed compounding
2 pharmacist or compounding pharmacy in good standing with their
3 licensing board." The protocol requires a qualitative analysis
4 of the compounded drug to be performed no more than 30 days
5 before the execution date. The protocol also requires that the
6 decision to use compounded drugs be provided to the offender in
7 writing not less than ten calendar days before the scheduled
8 execution, as indicated on page 41.
9 The new protocol provides for the insertion of a primary
10 IV catheter and a backup IV catheter. The primary line is
11 referred to as the "A line." The secondary line is referred to
12 as the "B line." IV access is established at two points, with
13 the A line and the B line. If all goes as planned, the drugs
14 would be entirely injected through the A line. If there is a
15 problem with the A line or with IV access through the A line,
16 then the B line is a backup. The complete second set of
17 execution drugs is for use in the B line or otherwise, if need
18 be. The preferred site for IV access is the "arm veins near
19 the joint between the upper and lower arm," as indicated on
20 page 26. If the IV Team is unable to establish an IV at a
21 preferred site, the IV Team members are authorized to establish
22 an IV at an alternative site, including a central femoral
23 venous line. The protocol states that the IV Team shall be
24 allowed as much time as necessary to establish viable IV sites,
25 but that after one hour of unsuccessful IV attempts, the

1 director must contact the governor or the governor's designee
2 to advise of the status and "potentially request a postponement
3 of the execution," as indicated at pages 26 and 27.
4 After insertion of the IV needle, the IV Team is required
5 to test the viability of the IV site with a low-pressure saline
6 drip through the IV tubing. If necessary, a Heparin lock may
7 be attached to the IV needle as an alternative to the saline
8 drip as indicated on page 27.
9 The protocol contains detailed provisions for monitoring
10 the condition of the offender during the execution process,
11 including a requirement that a microphone be affixed to the
12 offender's shirt to enable the execution team "to hear any
13 utterances or noises made by the offender throughout the
14 procedure," as indicated on page 43.
15 For the purpose of monitoring the offender's cardiac
16 status, the protocol requires that execution team members
17 "attach the leads from the electrocardiograph to the offender's
18 chest once the offender is secured. The IV Team leader shall
19 confirm that the electrocardiograph is functioning properly. A
20 backup electrocardiograph shall be on site and readily
21 available if necessary. Prior to and on the day of the
22 execution, both electrocardiograph instruments shall be checked
23 to confirm that they are functioning properly," as indicated on
24 page 43.
25 Finally, on the subject of monitoring, the protocol

1 requires that the IV Team leader "monitor the offender's level
2 of consciousness and electrocardiograph readings utilizing
3 direct observation, audio equipment, camera and monitor, as
4 well as any other medically approved methods deemed necessary
5 by the IV Team leader. The IV Team leader shall be responsible
6 for monitoring the offender's level of consciousness," as
7 indicated on page 43.
8 Although the presence of a physician during the execution
9 process is not required under the revised protocol, a physician
10 has been selected as the IV Team leader for the executions of
11 the four plaintiffs who seek a preliminary injunction. The
12 second member of the IV Team will be a paramedic. Warden
13 Trammell testified that the consciousness check will be
14 performed by the physician.
15 The protocol requires that the IV catheter remain visible
16 to the H-Unit Section Team Chief throughout the execution
17 procedure and that the H-Unit Section Team Chief remain in the
18 room with the offender "in a position sufficient to clearly
19 observe the offender and the primary and backup IV sites for
20 any potential problems." The Section Team Chief is required to
21 immediately notify the IV Team leader and the director if any
22 problem is observed, as indicated at page 44.
23 The H-Unit Section Team Chief is required to observe the
24 offender during the injection process "to look for signs of
25 swelling or infiltration at the IV site, blood in the catheter

1 and leakage from the lines, and other unusual signs or
2 symptoms," as indicated on page 27. For that reason, it falls
3 to the H-Unit Section Team Chief to determine whether it is
4 necessary to use an alternative IV site. When an alternative
5 IV site is used, the team members who administer the chemicals
6 are required to administer a full dose of the execution drugs
7 through the alternative site, as indicated on page 27.
8 To facilitate the level of scrutiny required by the new
9 protocol, the operations room adjacent to the execution chamber
10 now has two video monitors with feeds from two cameras. Both
11 cameras have tilt, turn, and zoom capability. One camera is
12 located near the head of the gurney and the other camera is
13 located near the foot of the gurney. With these cameras, the
14 IV Team members can monitor the point of IV access on the
15 offender's body.
16 The lapel microphone on the prisoner provides a continuous
17 audio feed into the operations room where most of the
18 participants in the execution process will be during the
19 execution. This microphone comes on at the beginning of the
20 execution and is not turned off until the offender is
21 pronounced dead. There is a separate microphone over the
22 offender's head. This microphone feeds to the viewing room and
23 to the overflow room. This microphone is turned on when the
24 blinds are raised and is turned off after the offender makes
25 his final statement, if he chooses to make one. It is then

1 turned back on for the doctor to announce the results of the
2 consciousness check and immediately turned off. It is then
3 turned on for the announcement of the time of death.
4 There are three telephones in the operations room: one to
5 maintain contact with the governor's office, one to maintain
6 contact with the Attorney General's Office, and one for the
7 purposes of communications within the Oklahoma State
8 Penitentiary. In addition, there is an intercom between the
9 execution chamber and the operations room.
10 With respect to the actual administration of the lethal
11 injection chemicals, the new protocol has one procedure for
12 administration of the chemicals specified in Charts A, B, and C
13 and a slightly different procedure for administration of the
14 three-drug sequence specified in Chart D, as indicated at pages
15 44 to 46.
16 With respect to all four chemical charts, the IV Team
17 leader is required to enter the room where the offender is
18 located "to physically confirm the offender is unconscious by
19 using all necessary and medically appropriate methods," as
20 indicated on pages 44 and 46.
21 If there is a delay in losing consciousness, the IV Team
22 is required to inform the director so that the director can
23 determine how to proceed or whether to "start the procedure
24 over at a later time or stop," as indicated on pages 45 and 46.
25 The director has the discretion to instruct the execution team

1 to administer additional doses of the chemical, as indicated,
2 again, on pages 45 and 46.
3 The execution facility is now equipped with an
4 electrocardiograph machine to monitor the offender's blood
5 pressure, oxygen saturation, and heart activity during the
6 execution process. A backup machine is available in the event
7 there is a problem with the primary machine. The DOC also
8 purchased an ultrasound machine for use, if need be, in
9 locating a deep vein and the stock of surgical supplies has
10 been improved, to include a newly acquired assortment of IV
11 needles. The newly acquired assortment of IV needles was shown
12 to Captain Holt during his recent tour of the execution
13 facility.
14 The revised protocol calls for an after-action review
15 following the execution. This after-action review includes
16 discussion of "any unique or unusual events," as well as
17 "opportunities for improvement and successful procedures," as
18 indicated on page 31.
19 I will now make my findings with respect to the
20 unavailability of sodium thiopental and pentobarbital.
21 **UNAVAILABILITY OF SODIUM THIOPENTAL AND PENTOBARBITAL**
22 In paragraph 31 of their amended complaint, plaintiffs
23 proffer sodium thiopental used in a single-drug protocol as
24 their alternative to midazolam, as indicated at Docket Entry
25 Number 75 at page 7. At the trial last week, pentobarbital was

1 also mentioned several times.
2 Pentobarbital and sodium thiopental are powerful
3 barbiturates. A massive dose of either of these drugs is
4 lethal. Which is why, as long as they were available, they had
5 a well-established record of successful use in execution by
6 lethal injection, even in drug combinations in which it was not
7 necessary that they have lethal effect.
8 Pentobarbital and sodium thiopental are both unavailable
9 to the Department of Corrections. Attempts to procure
10 pentobarbital and sodium thiopental have been unsuccessful. It
11 is a judicially noticeable fact that the Lockett execution was
12 preceded by a storm of litigation involving the state and
13 federal district courts as well as the Oklahoma Supreme Court
14 and the Oklahoma Court of Criminal Appeals. The litigation
15 included intense efforts to force the disclosure of the sources
16 of the lethal injection drugs as noted in Lockett v. Evans,
17 2014 Westlaw 1584517, a decision from the Oklahoma Supreme
18 Court on April 21, 2014. Former Oklahoma Department of
19 Corrections General Counsel Michael Oakley, who retired shortly
20 before the Lockett execution, testified quite believably that
21 "the vendor, because of pressure in the litigation, decided
22 that he didn't want to sell us the pentobarbital any longer."
23 That is at page 296 of the transcript.
24 Director Patton cannot think of anything he could have
25 done differently in his efforts to get these drugs and the

1 Court credits this testimony. The DOC talked to numerous
2 pharmacies, including compounding pharmacies, in its efforts to
3 procure pentobarbital and sodium thiopental, either
4 commercially manufactured or compounded. These efforts were
5 not successful. Sodium thiopental and pentobarbital are
6 certainly known alternatives, but it is equally clear that
7 they're not available to the DOC.
8 I will now analyze the evidence derived from the execution
9 of Clayton Lockett.
10 **ANALYSIS OF EVIDENCE DERIVED FROM THE EXECUTION OF CLAYTON**
11 **LOCKETT**
12 Dr. Eric D. Katz, a well-qualified emergency physician,
13 had some credible criticisms of the process by which Clayton
14 Lockett was executed. IV access to Clayton Lockett's right
15 femoral vein was established, as I have said, with a
16 one-and-a-quarter-inch 14-gauge angiocatheter. The
17 one-and-a-quarter-inch 14-gauge angiocatheter was not the
18 appropriate equipment to use to accomplish this task. And the
19 use of a catheter of that size substantially increased the risk
20 of serious difficulties in establishing patent intravenous
21 access by way of Clayton Lockett's right femoral vein. It is
22 now common in medical practice to use ultrasound equipment for
23 guidance in establishing intravenous access to the subclavian,
24 internal jugular, or femoral veins.
25 Dr. Katz also commented with respect to the requirement in

1 the revised protocol that the person placing a central femoral
2 line be "currently certified or licensed within the United
3 States to place a central femoral line." As I have previously
4 mentioned, Dr. Katz pointed out that this specific task is not
5 one for which certification or licensure is available.
6 Dr. Katz also commented on the medications and techniques
7 which would be necessary to reverse the effect of midazolam,
8 vecuronium, and potassium. Aside from the medications that
9 would be required to reverse the effects of these drugs,
10 reversal of the effects of vecuronium would require a
11 ventilator and reversal of the effects of a high dose of
12 midazolam would likely require endotracheal intubation, in
13 other words, a breathing tube, with supplies for ventilator
14 assistance. Dr. Katz pointed out that these medications and
15 this equipment necessary for resuscitation of an individual
16 affected by midazolam, vecuronium bromide, and potassium
17 chloride were not available at the time of Clayton Lockett's
18 execution.
19 Dr. Joseph I. Cohen and Dr. Joni McClain, both
20 well-qualified pathologists, testified with respect to their
21 respective autopsy examinations of the body of Clayton Lockett.
22 Dr. Cohen was called by the plaintiffs and Dr. McClain, who
23 performed the independent autopsy at the Southwestern Institute
24 of Forensic Sciences in Dallas, was called by the defendants.
25 Their observations from their actual examinations did not

1 substantially differ.  Dr. Cohen conducted his autopsy in Tulsa
2 on May 14, 2014.  Dr. Cohen's autopsy followed the autopsy
3 performed by the Southwestern Institute of Forensic Sciences
4 and the partial examination that was performed by the Oklahoma
5 State Medical Examiner.
6 Dr. Cohen found numerous punctures and incisions
7 consistent with the several reported attempts to gain IV access
8 at several sites on Clayton Lockett's body, which was
9 consistent with Dr. McClain's findings.  Dr. Cohen found, and
10 this is uncontradicted, that Lockett's veins were in good
11 condition and suitable for establishing IV flow of the lethal
12 injection drugs.  Dr. Cohen concluded that the manner of death
13 was judicial execution and that the mechanism of death was
14 respiratory depression and cardiac dysrhythmias directly
15 resulting from the administration of the lethal injection drugs
16 during the execution process.
17 Commenting on the numerous fresh punctures observable in
18 Clayton Lockett's body, Dr. Cohen stated that his findings, as
19 well as the findings of the Oklahoma state medical examiner and
20 the Dallas medical examiner, support the ineffective
21 application of medical implements.  This is accurate.
22 Dr. Cohen also opined that Clayton Lockett was not
23 dehydrated during the execution and that he likely suffered
24 conscious pain and suffering due to the failed attempts to
25 establish IV access.  I have already commented on the issue of

1 whether Lockett experienced pain beyond that inherent in the
2 execution process. As I have discussed, Lockett may well have
3 experienced significant pain, but any such conclusion is laden
4 with an element of speculation.
5 I will now comment on the nature and characteristics of
6 midazolam and the other drugs at issue.
7 **NATURE AND CHARACTERISTICS OF MIDAZOLAM AND THE OTHER DRUGS AT**
8 **ISSUE**
9 Plaintiffs called two witnesses who addressed the
10 characteristics of midazolam; namely, Dr. Larry D. Sasich, a
11 pharmacist who holds a Bachelor of Science degree in pharmacy
12 and a doctoral degree in pharmacy; and Dr. David A. Lubarsky, a
13 Professor of Anesthesiology at the University of Miami.
14 Dr. Sasich also commented on the characteristics of vecuronium
15 bromide and potassium chloride.
16 The defendants called Dr. Lee R. Evans, the holder of a
17 doctoral degree in pharmacy, principally to testify with
18 respect to the characteristics and effects of midazolam.
19 Now, several days before the hearing, a Daubert motion was
20 filed with respect to the expert testimony of Dr. Lee Evans. I
21 indicated at the pretrial conference that I would address
22 that -- as permitted in a non-jury case, that I would address
23 that after hearing his testimony by way of direct and cross-
24 examination at trial. And I certainly did hear his testimony
25 by way of direct and cross-examination. I reviewed the motion

1 in limine. I made careful note of the extent to which his
2 testimony was challenged in the motion in limine and the
3 subjects on which it was challenged.
4 The Tenth Circuit has made it very clear that once a
5 Daubert challenge is filed, the Court must make its findings on
6 the record indicating its resolution of the Daubert challenge.
7 And I will now do that at this time.
8 **DAUBERT RULING WITH RESPECT TO THE EXPERT TESTIMONY OF DR. LEE**
9 **EVANS**
10 On December 15, as I indicated, plaintiffs filed a motion
11 in limine challenging some specific aspects of the proposed
12 expert testimony of Dr. Lee Evans. That motion is at Docket
13 Entry Number 161. For that reason, before making any findings
14 based on the testimony given by the expert witnesses called by
15 the parties, it is necessary to address the Daubert challenge
16 as to Dr. Evans.
17 The Supreme Court's decisions in Daubert v. Merrell Dow
18 Pharmaceutical, Inc., 509 U.S. 579, and Kumho Tire Company v.
19 Carmichael, 526 U.S. 137, establish a gatekeeper function for
20 trial judges under Rule 702 of the Federal Rules of Evidence.
21 This is commented on at considerable length in the Tenth
22 Circuit's two Goebel decisions, the first one of which is
23 Goebel v. Denver and Rio Grande Western Railroad Company, 215
24 F.3d 1083, with the relevant discussion at page 1087, a
25 decision from the Tenth Circuit in 2000. The gatekeeper

1 function "requires the judge to assess the reasoning and
2 methodology underlying the expert's opinion and determine
3 whether it is scientifically valid and applicable to a
4 particular set of facts," as indicated in the first Goebel
5 decision at page 1087.
6 In Kumho, the Supreme Court elaborated on the Daubert
7 gatekeeping function as applied to proposed expert testimony
8 other than classic scientific testimony. The Court emphasized
9 that even where the proposed expert testimony is not scientific
10 in nature in the classical sense, the trial judge is
11 nevertheless required to ascertain whether the expert "employs
12 in the courtroom the same level of intellectual rigor that
13 characterizes the practice of an expert in the relevant field,"
14 as indicated at page 152 of the Kumho decision.
15 In this case, the plaintiffs' motion in limine challenges
16 both Dr. Evans' qualifications and his methodology, so it is
17 necessary to analyze the matter under both parts of the Daubert
18 and Rule 702 test.
19 The decision in Ralston, 275 F.3d 965, provides a good
20 starting point with respect to evaluation of Dr. Evans'
21 qualifications. The plaintiff in Ralston asserted that the
22 warnings accompanying an implanted orthopedic nail were
23 inadequate. The Court of Appeals affirmed the trial court's
24 exclusion of the testimony of plaintiffs' expert, a board
25 certified orthopedic surgeon, who was also an associate

1 professor of medicine. The expert's general credentials were
2 clearly as good as reasonably could have been expected, but she
3 had done no research specifically looking at the nail in
4 question and had not drafted a warning for a surgical device.
5 Her general credentials, though seemingly impressive as general
6 credentials, were not good enough. "Merely possessing a
7 medical degree is not sufficient to permit a physician to
8 testify concerning any medical-related issue," as the Court
9 discussed at page 970. The board certified orthopedic
10 surgeon's reliance on general principles and concepts, as the
11 Court put it, did not suffice. The controlling Tenth Circuit
12 cases exemplified by Ralston established that the expert's
13 qualifications must be both adequate in a general qualitative
14 sense as required by Rule 702 and specific to the matters he
15 proposes to address as an expert.
16 Plaintiffs also challenge the reliability of Dr. Evans'
17 expert testimony.
18 Under Rule 702, an expert with the necessary
19 qualifications in the relevant field may give expert testimony,
20 one, if the testimony is based on sufficient facts or data;
21 two, if the testimony is the product of reliable principles and
22 methods; and, three, the witness has applied the principles and
23 methods reliably to the facts of the case, as indicated by Rule
24 702. And this is also generally discussed in the second Goebel
25 decision, 346 F.3d 987, with the relevant portion at page 991.

1 Daubert, of course, involved a proffer of expert testimony
2 in a classical scientific discipline, epidemiology. The Court
3 provided a non-exclusive list of five factors which were
4 provided by the Court to guide trial court determinations of
5 reliability. I will not repeat those lists -- those factors
6 here. Counsel are well aware of them.
7 Kumho made it clear that the gatekeeper function applies
8 even where the proposed expert testimony is outside the realm
9 of science in the classical sense, as I have discussed. As
10 noted by the Advisory Committee in commenting on the 2000
11 amendments to Rule 702, courts both before and after Daubert
12 have found other factors relevant in determining whether expert
13 testimony is sufficiently reliable to be considered by the
14 jury. Those additional factors are listed in the comments to
15 Rule 702 and I will not repeat them here.
16 In sum, the Daubert assessment of reliability is a
17 determination of whether the conclusions to be expressed by an
18 expert possessed of the necessary qualifications in the
19 relevant field are the product of application of that expertise
20 using recognized and supportable methodologies on the basis of
21 adequate data which is rationally tied to the opinions which
22 purport to be based on that data.
23 As indicated in the second Goebel decision, 346 F.3d at
24 992, "Under Daubert, any step that renders the analysis
25 unreliable renders the expert's testimony inadmissible. This

1 is true whether the step completely changes a reliable
2 methodology or merely misapplies that methodology." To the
3 same general effect is Mitchell v. Gencorp, 165 F.3d 778, with
4 the relevant discussion at page 782, a Tenth Circuit decision
5 from 1999.
6 I reject plaintiffs' challenge to Dr. Evans'
7 qualifications. Dr. Evans' CV is in evidence as Defendants'
8 Exhibit 35 and I will not repeat that information here. His
9 qualifications go far beyond those of an everyday pharmacist
10 and his clinical experience is an obvious adjunct of his
11 academic attainments, at least as relevant to this case.
12 I might add that Dr. Sasich, called by the plaintiffs,
13 freely went beyond pharmacological topics and expounded on
14 physiology and to some extent clinical medical practice based
15 substantially on his searches of literature he considered to be
16 relevant. Dr. Evans' considerable qualifications satisfy me
17 that he should be accorded the same leeway.
18 It is necessary to evaluate the reliability of Dr. Evans'
19 expert testimony only to the extent that the portions of his
20 testimony that I cite in this ruling have been made explicitly
21 -- have been explicitly challenged by plaintiffs in their
22 motion in limine. For that reason, there is no need to engage
23 in a reliability analysis of all of the matters testified to by
24 Dr. Evans or discussed in his report and there is no need to
25 dwell on the fact that he misplaced a decimal point in one of

1 his observations about the possible lethal effect of midazolam.
2 Those aspects of Dr. Evans' testimony, upon which I
3 principally rely, are his findings with respect to the risk
4 that a 500 milligram dose of midazolam will fail to induce a
5 state of unconsciousness and his criticisms of the contention
6 that there is a ceiling effect that is relevant to the
7 determination of whether the prisoner will experience pain
8 after IV administration of 500 milligrams of midazolam. His
9 commentary in part 7 of his report about brain-dead patients
10 and involuntary movements is of no moment to my ruling. With
11 respect to the issue of whether Lockett's movements were
12 voluntary or involuntary, the fact is that he, in all
13 probability, had far less than 500 milligrams of midazolam in
14 his circulatory system at the time he moved after being
15 pronounced unconscious.
16 I find that Dr. Evans was well-qualified to give the
17 expert testimony that he gave and that to the extent that his
18 testimony was challenged in the motion in limine and relied
19 upon by the Court in this ruling, his testimony was the product
20 of reliable principles and methods reliably applied to the
21 facts of this case. The motion in limine with respect to
22 Dr. Evans, Docket Entry Number 161, is denied.
23 I will now address the nature and characteristics of
24 midazolam.
25 **NATURE AND CHARACTERISTICS OF MIDAZOLAM**

1 With respect to the actual characteristics, effects, and
2 preferred clinical uses of midazolam, the experts on the two
3 sides of this case were in substantial agreement.
4 Midazolam is a short-acting benzodiazepine, which is most
5 commonly used as a pre-anesthetic agent for routine medical
6 procedures. Midazolam is approved by the Food and Drug
7 Administration for sedation and induction of general anesthesia
8 to be used before administration of other anesthetic agents.
9 It can be used to alleviate patient apprehension, to eliminate
10 the patient's memory of a procedure, and to induce anesthesia.
11 It is not intended for use as a pain reliever. It is not an
12 analgesic. In that respect, midazolam does not behave like an
13 opiate or narcotic medications. It does have the effect of
14 depressing the central nervous system at least when
15 administered in a large dose. It begins to take effect quite
16 quickly after introduction into the blood stream. It crosses
17 the blood brain barrier and reaches maximum effects within 20
18 to 60 minutes.
19 The 500 milligram dosage of midazolam, as called for in
20 Charts C and D of the revised protocol, is many times higher
21 than a normal therapeutic dose of midazolam. When midazolam is
22 administered in that quantity, it will result in central
23 nervous system depression as well as respiratory arrest and
24 cardiac rest. In the dosage called for by the revised
25 protocol, midazolam, although not an analgesic, is highly

1 likely to render the person unconscious and insensate during
2 the remainder of the procedure. Consequently, analgesia, from
3 midazolam or otherwise, is not necessary.
4 The proper administration of 500 milligrams of midazolam,
5 as specified in Chart D, would make it a virtual certainty that
6 any individual will be at a sufficient level of unconsciousness
7 to resist the noxious stimuli which could occur from the
8 application of the second and third drugs -- or from the
9 administration of the second and third drugs in Chart D,
10 assuming that proper intravenous access has been established.
11 The administration of a 500 milligram dose alone would be
12 likely to cause death by respiratory arrest within an hour and
13 probably closer to 30 minutes. This is because midazolam is
14 water soluble. And as I have mentioned, it crosses the blood
15 brain barrier very quickly.
16 There were some noteworthy areas of agreement between
17 Dr. Evans and Dr. Lubarsky with respect to the anesthetic
18 effect of midazolam. Dr. Lubarsky testified that an IV dose of
19 500 milligrams of midazolam would produce unconsciousness in
20 "no more than a couple of minutes." That is at page 117 of the
21 transcript. As to the level of unconsciousness needed, for
22 instance, to render a prisoner insensate for purposes of
23 setting a femoral IV line, Dr. Lubarsky testified that
24 "midazolam unconsciousness is actually sufficient." That is at
25 page 133 of the transcript. This is noteworthy not because

1 midazolam was used for that purpose with Lockett but because
2 setting a femoral line entails "digging deeper into the
3 tissue," as described by Dr. Lubarsky, "a couple of inches
4 below the skin's surface," as indicated at page 150 of the
5 transcript.
6 Plaintiffs contend that there is a certain dosage level
7 beyond which incremental increases in midazolam dosage would
8 have no corresponding incremental effect. In pharmacological
9 terms, this is called "the ceiling effect." As described by
10 Dr. Sasich and Dr. Lubarsky, midazolam has a ceiling effect
11 which prevents an increase in dosage from having a
12 corresponding incremental effect on anesthetic depth. However,
13 Dr. Evans testified persuasively, in substance, that whatever
14 the ceiling effect of midazolam may be with respect to
15 anesthesia, which takes effect at the spinal cord level, there
16 is no ceiling effect with respect to the ability of a 500
17 milligram dose of midazolam to effectively paralyze the brain,
18 a phenomenon which is not anesthesia but does have the effect
19 of shutting down respiration and eliminating the individual's
20 awareness of pain. The dosage at which the ceiling effect may
21 occur at the spinal cord level is unknown because no testing to
22 ascertain the level at which the ceiling effect occurs has been
23 documented.
24 The use of midazolam presents a risk of paradoxical
25 reactions or side effects such as agitation, involuntary

1 movements, hyperactivity, and combativeness. According to the
2 product label for midazolam, these reactions may be the result
3 of inadequate or excessive dosing or improper administration of
4 midazolam. The likelihood that a paradoxical reaction will
5 occur in any particular instance is speculative, but it occurs
6 with the highest frequency in low therapeutic doses. Dr. Evans
7 estimated that with a low therapeutic dose of midazolam there
8 would be less than a 1 percent incidence of a paradoxical
9 reaction. Dr. Sasich could not say whether the incidence of a
10 paradoxical reaction in the Oklahoma inmate population would be
11 toward the low end or the high end of the range of incidence of
12 that effect as documented in the literature. No data are
13 available to show what the paradoxical reaction would be or the
14 likelihood of a paradoxical reaction would be with a 500
15 milligram IV dose of midazolam.
16 The evidence falls well short of establishing that the
17 risk of a paradoxical reaction at a 500 milligram IV dosage
18 presents anything more than a mere possibility in any given
19 instance that midazolam will fail to deliver its intended
20 effect.
21 Based on the impressive record of pentobarbital and sodium
22 thiopental, in a long series of executions by lethal injection
23 in Oklahoma and other states, there is little room for doubt
24 that pentobarbital and sodium thiopental would be preferable as
25 the first drug in a three-drug protocol. With midazolam, there

1 may be some incrementally greater risk than with pentobarbital
2 or sodium thiopental that the inmate will sense pain as a
3 result of the injection of vecuronium bromide and the potassium
4 chloride but will not have the ability to express the fact that
5 he senses pain. How much greater that risk is, nobody knows,
6 but some added element of risk of pain may be present with
7 midazolam as opposed to pentobarbital or sodium thiopental.
8 Ironically, the very efficacy of pentobarbital and sodium
9 thiopental for use in lethal injection has resulted in their
10 unavailability for use by the Department of Corrections for
11 lethal injection purposes. If either pentobarbital or sodium
12 thiopental were available, Director Patton would have selected
13 them rather than the midazolam protocols.
14 On this point, I am mindful that the Supreme Court in Baze
15 v. Rees, 553 U.S. 35, a decision from 2008, made it clear that
16 this Court is not to sit as "a board of inquiry charged with
17 determining best practices for executions." That's at page 51
18 of the Baze decision.
19 I'll now comment with respect to the capabilities or
20 properties of vecuronium bromide.
21 **VECURONIUM BROMIDE**
22 Vecuronium bromide is a neuromuscular blocking agent. The
23 accounts of the Lockett execution which indicate that he began
24 to move after the beginning of the administration of vecuronium
25 bromide indicate that at that point he had not been paralyzed

1 by the neuromuscular blocking effect of vecuronium bromide.
2 From all the evidence before the Court, I conclude that
3 the implementation of lethal injection per Chart D does not
4 carry a substantial likelihood of inflicting severe pain.
5 We'll now take a ten-minute recess.
6 (RECESS HAD.)
7 THE COURT: I'll now summarize the claims asserted by
8 the plaintiffs for preliminary injunction purposes.
9 **CLAIMS ASSERTED BY THE PLAINTIFFS FOR PRELIMINARY INJUNCTION**
10 **PURPOSES**
11 The amended complaint filed on October 31, 2014, pleads
12 claims divided into eight counts, some of which, as might be
13 expected, are interrelated. Five of those counts, specifically
14 Counts 2, 4, 5, 7, and 8, are asserted for preliminary
15 injunction purposes as shown by the motion for preliminary
16 injunction at Docket Entry Number 92.
17 In Count 2, the preliminary injunction plaintiffs assert
18 that the use of midazolam would constitute cruel and unusual
19 punishment in violation of the Eighth and Fourteenth
20 Amendments.
21 Count 4 asserts violations of the Eighth and Fourteenth
22 Amendments based on what plaintiffs describe as "unsound
23 procedures and inadequate training," as indicated at page 28 of
24 Docket Entry Number 75. Under this heading, plaintiffs assert
25 that the failure of Defendants Patton and Trammell "to seek out

1 expert assistance has resulted in execution procedures that
2 create a substantial risk of severe pain, needless suffering,
3 and a lingering death," as indicated at paragraph 137.
4 Count 4 also complains that ultimate authority to
5 supervise the execution process and make decisions about the
6 process is vested in the Defendant Patton without "appropriate
7 checks and balances to ensure against severe pain, needless
8 suffering, and a lingering death during the execution process."
9 That is at paragraph 155.
10 Plaintiffs further assert that as a result of these
11 failures, among others, there is "a substantial risk that the
12 procedures will not be administered as written." That's
13 paragraph 156.
14 Referring to the revised protocol, plaintiffs assert in
15 paragraph 160 that "if the attempted executions of plaintiffs
16 are allowed to proceed in accordance with the deficient
17 procedures identified above, plaintiffs will be subjected to
18 cruel and unusual punishment in violation of the Eighth and
19 Fourteenth Amendments to the United States Constitution."
20 In Count 5, under "Notice and Opportunity to be Heard,
21 Right to Counsel and to Petition the Courts," plaintiffs point
22 out that under the revised protocol, the offender will be
23 notified only ten calendar days before the date of execution of
24 the drugs to be used and as to whether they will be compounded.
25 This is paragraph 163.

1 In this count, plaintiffs also assert that the revised
2 protocol allows Defendant Patton "to deviate from any of those
3 procedures at will and without notice, thereby making the
4 written instrument virtually meaningless as a form of notice."
5 That is paragraph 164. On this basis, plaintiffs conclude in
6 Count 5 that by "failing to require and provide meaningful and
7 effective notice of how plaintiffs will be executed,"
8 defendants are depriving the plaintiffs of their right to
9 notice and an opportunity to be heard in violation of the Due
10 Process Clause of the Fourteenth Amendment and are subjecting
11 plaintiffs to cruel and unusual punishment in violation of the
12 Eighth and Fourteenth Amendments, as indicated in paragraph
13 169.
14 Count 7 is an Eighth Amendment claim predicated on
15 "experimentation on captive human subjects." Plaintiffs assert
16 that by "attempting to conduct executions with an ever-changing
17 array of untried drugs of unknown provenance, using untested
18 procedures, defendants are engaging in a program of biological
19 experimentation on captive and unwilling human subjects," as
20 indicated at paragraph 184. In support of this allegation,
21 plaintiffs cite the experience with the execution of Clayton
22 Lockett, which they assert was "a failure that produced severe
23 pain, needless suffering, and a lingering death," at page -- at
24 paragraph 184.
25 Under this heading, plaintiffs further assert that the

1 defendants lack the scientific skills necessary to design an
2 execution procedure that does not inflict severe pain, needless
3 suffering, or a lingering death and that defendants have failed
4 to test their lethal drugs and execution procedures on
5 non-human animals before using them on captive and unwilling
6 human subjects as pleaded at paragraphs 187 and 188. On this
7 basis, plaintiffs assert that if the attempted executions of
8 plaintiffs are allowed to proceed plaintiffs will be subjected
9 to cruel and unusual punishment in violation of the Eighth and
10 Fourteenth Amendments to the United States Constitution.
11 In Count 8, plaintiffs assert a violation of their "right
12 of access to information, to counsel, and to the courts."
13 Under this heading, plaintiffs assert a violation of their
14 rights as a result of the defendants' "deliberate concealment
15 of information that would enable plaintiffs to determine how
16 defendants intend to carry out their death sentences, including
17 by failing to disclose in advance of the execution details
18 about the drugs used, the rationale for the selection of these
19 drugs and their dosages, the qualifications and training of the
20 persons administering them, and defendants' ability to respond
21 and prepare for responding to complications," as pleaded at
22 paragraph 195.
23 They assert a violation of their right to petition the
24 government for redress of their grievances as well as a denial
25 of their right to counsel, which they assert exists "during

1 every stage of any attempt to execute" the plaintiff. That is
2 at paragraph 198. As for violation of the right to counsel,
3 plaintiffs assert, in substance, that plaintiffs' counsel must
4 be permitted to observe all steps of the execution process from
5 the time that the offender is brought into the execution
6 chamber until the offender is pronounced dead. That is at page
7 207.
8 Plaintiffs also assert that their counsel "must be able to
9 communicate with the courts as to any problems or deviations
10 that occur during the execution that impact plaintiffs'
11 substantial rights." That is at paragraph 208. For these
12 reasons, among others, plaintiffs assert in Count 8 that
13 execution under the revised protocol would violate their rights
14 under the First and Fourteenth Amendments to the United States
15 Constitution and under 18 United States Code, Section 3599, as
16 indicated in paragraph 218.
17 I will now address the standards for entry of a
18 preliminary injunction.
19 **STANDARD FOR ENTRY OF A PRELIMINARY INJUNCTION**
20 To establish that preliminary injunctive relief is
21 appropriate, plaintiffs must demonstrate, first, that they will
22 likely succeed on the merits of their claim; second, that
23 without preliminary relief they will suffer irreparable harm;
24 third, that the balance of equities tips in their favor; and,
25 fourth, that entry of an injunction is in the public interest.

1 That is all as discussed by our Court of Appeals in Kikumura v.
2 Hurley, 242 F.3d 950, with the relevant discussion at page 955.
3 That's a decision from the Tenth Circuit in 2001.
4 The injunctive relief the plaintiffs seek here is not in
5 the disfavored category, so there is no basis for the Court to
6 apply the heightened standard that would govern if the
7 injunctive relief sought by plaintiffs were in one of the
8 disfavored categories. As indicated by the Court of Appeals in
9 the Kikumura decision, citing Otero Savings & Loan Association
10 v. Federal Reserve Bank of Kansas City, 665 F.2d 275, with the
11 relevant discussion at page 278, a decision from the Tenth
12 Circuit in 1981. When the other three requirements for a
13 preliminary injunction are satisfied, "it will ordinarily be
14 enough that the plaintiff has raised questions going to the
15 merits so serious, substantial, difficult, and doubtful as to
16 make them a fair ground for litigation." That is at page 955
17 of the Kikumura decision.
18 **CONCLUSIONS OF LAW**
19 I will now state my conclusions of law. I don't think it
20 would be particularly helpful to the parties or to a reviewing
21 court for me to simply declare some abstract principles of law,
22 most of which are well-established. What is decisive in this
23 case is the application of those principles to the facts of
24 this case. That will be my main focus. And that will require
25 some discussion of the facts as I state my conclusions of law.

1 As I have already mentioned, the motion now before the
2 Court involves five of the eight counts in the amended
3 complaint; namely, Counts 2, 4, 5, 7, and 8. I will discuss
4 those in the order in which they appear in the amended
5 complaint.
6 I will first address Count 2, which is the Eighth
7 Amendment claim relating to midazolam.
8 **COUNT 2 - EIGHTH AMENDMENT - MIDAZOLAM**
9 In Count 2, plaintiffs assert that their Eighth Amendment
10 right to be free of cruel and unusual punishment would be
11 violated if, in the execution process, midazolam -- if, in the
12 execution process, midazolam is used as provided in the revised
13 protocol.
14 Other drugs, such as sodium thiopental, have been used as
15 the first drug in the execution sequence with a longer record
16 than midazolam has of reliably producing the desired effect.
17 For that reason, it is not necessary to look past sodium
18 thiopental to say with considerable confidence that if all of
19 the -- if all of the potentially usable anesthetic and sedative
20 agents produced by the pharmaceutical industry were equally
21 available to the DOC, it is not likely that midazolam would be
22 the first choice. Director Patton's testimony makes that
23 clear. This makes it especially important to proceed with a
24 thorough understanding of the standard established by the
25 Supreme Court in Baze v. Rees.

1 Baze v. Rees, 553 U.S. 35, a decision, as I have
2 mentioned, from 2008, came to the Supreme Court from Kentucky
3 where the protocol called for the administration of 3,000
4 milligrams of sodium thiopental, 50 milligrams of pancuronium
5 bromide, and 240 milliequivalents of potassium chloride. The
6 Kentucky protocol before the Supreme Court in Baze v. Rees
7 provided for IV insertion by "qualified personnel having at
8 least one year of professional experience." That is 553 U.S.
9 at page 45. In practice, Kentucky used a certified
10 phlebotomist and an emergency medical technician to perform the
11 venipunctures necessary for the catheters, as indicated at page
12 45. The protocol allowed up to one hour within which to
13 establish both primary and secondary peripheral intravenous
14 sites in the arm, leg, hand, or foot of the inmate, as
15 indicated also on page 45.
16 In Baze, the Court noted as a preliminary matter that "it
17 is uncontested that failing a proper dose of sodium thiopental
18 that would render the prisoner unconscious, there is a
19 substantial constitutionally unacceptable risk of suffocation
20 from the administration of pancuronium bromide and pain from
21 the injection of potassium chloride," as discussed at page 53.
22 In Baze, the prisoner asserted, among other things, that the
23 protocol was deficient because it was "possible that the IV
24 catheters will infiltrate into surrounding tissue causing an
25 inadequate dose to be delivered to the vein because of

1 inadequate facilities and training and because Kentucky has no
2 reliable means of monitoring the anesthetic depth of the
3 prisoner after the sodium thiopental has been administered."
4 And that is at page 54.
5 Under the Kentucky protocol, the warden and deputy warden,
6 who apparently were not subject to any particular training
7 requirements, were charged with the responsibility to "watch
8 for any problems with the IV catheters and tubing," as
9 discussed at pages 45 and 46. In the Kentucky procedure, the
10 physician was prohibited from participating in conducting the
11 execution other than to certify the cause of death, as also
12 discussed on page 46.
13 It also fell to the warden and the deputy warden, "through
14 visual inspection," to determine whether the prisoner had
15 become unconscious within 60 seconds following the delivery of
16 the sodium thiopental to the primary IV site, as discussed on
17 page 45.
18 The plurality opinion in Baze was written by Chief Justice
19 Roberts and was joined by Justices Kennedy and Alito. Justices
20 Stevens, Scalia, Thomas, and Breyer concurred in the judgment.
21 As indicated by the concurring opinion of Justice Thomas, with
22 whom Justice Scalia joined, Justices Scalia and Thomas would
23 find an Eighth Amendment violation only if a method of
24 execution "is deliberately designed to inflict pain," as
25 discussed on page 94. The Supreme Court's decision in Marks v.

1 United States, 430 U.S. 188, from 1977, tells us at page 193
2 that where there is a fractured decision of the Supreme Court,
3 the Court's holding is the position taken by those members of
4 the Court who concurred in the judgment on the narrowest
5 grounds. Since the position taken in Baze by Justices Scalia
6 and Thomas was noticeably less exacting than the position taken
7 by the Chief Justice and Justices Kennedy and Alito in the
8 plurality opinion, the Court's holding in Baze is to be found
9 in the plurality opinion.
10 Before getting into the holdings in Baze, one other aspect
11 of that decision should be noted. In Baze, the petitioner's
12 arguments centered mainly on the asserted risk of improper
13 administration of sodium thiopental, which would potentially
14 leave the prisoner conscious when the second and third
15 chemicals are administered. Counsel for the petitioner in Baze
16 acknowledged at oral argument that proper administration of the
17 first drug, sodium thiopental, would eliminate any meaningful
18 risk that the prisoner would experience pain from the
19 subsequent injections of the second and third drugs, as
20 discussed on page 49.
21 In contrast, in the matter now before this Court,
22 plaintiffs assert both the risk of maladministration of the
23 drugs and that the first drug, midazolam, is, in any event,
24 unreliable as an anesthetic agent. The holdings in Baze are
25 nevertheless instructive and certainly binding on this Court

1 because regardless of the source of the risk, the Baze decision
2 was all about risk and how we evaluate that risk for Eighth
3 Amendment purposes.
4 After a detailed analysis of the Kentucky lethal injection
5 protocol, viewed in light of the Supreme Court's precedence,
6 the plurality in Baze summarized the applicable standard as
7 follows: "A stay of execution may not be granted on grounds
8 such as those asserted here unless the condemned prisoner
9 establishes that the state's lethal injection protocol creates
10 a demonstrated risk of severe pain. He must show that the risk
11 is substantial when compared to the known and available
12 alternatives. A state with a lethal injection protocol
13 substantially similar to the protocol we uphold today would not
14 create a risk that meets this standard," as this Court stated
15 at page 61.
16 In closing argument in this case last Friday, plaintiffs
17 argued that Baze is distinguishable from this case in a way
18 that makes the holding in Baze with respect to "known and
19 available alternatives" inapplicable in this case. I disagree.
20 It is true that this case involves both the risk that the first
21 drug will not have its intended effect even if delivered in a
22 massive IV dose and the risk that, due to a deficient
23 technique, the massive IV dose will not, in fact, be delivered
24 as intended.
25 In the section of the plurality opinion on page 61 in

1 which the Supreme Court made reference to comparison with
2 "known and available alternatives," the Court was speaking
3 broadly in terms of whether the prisoner had established "that
4 the state's lethal injection protocol creates a demonstrated
5 risk of severe pain." In stating that the prisoner "must show
6 that the risk is substantial when compared to the known and
7 available alternatives," the Court did not differentiate
8 between the two types of risks.
9 On this point, I would also note that this reading of Baze
10 is also borne out by common sense. It is extremely unlikely
11 that the Supreme Court would establish a constitutional
12 doctrine that would enable a condemned inmate to block his
13 execution on Eighth Amendment grounds with no consideration by
14 the Court of alternatives which by way of comparison
15 demonstrate the constitutional unacceptability of the risk
16 complained of by the prisoner. Logic tells us that
17 alternatives are relevant in determining whether there is a
18 constitutionally impermissible quantum of risk regardless of
19 the source of the risk.
20 In reaching its conclusions in Baze, the Court made
21 several other observations which are of varying degrees of
22 relevance on the facts of this case.
23 First, it is significant, at least at a high level of
24 generality, that the Court in Baze noted that the Supreme Court
25 had never invalidated a state's chosen procedure for carrying

1 out a sentence of death as the infliction of cruel and unusual
2 punishment, as discussed at page 48. The Court also stated
3 unequivocally that simply because an execution method may
4 result in pain, either by accident or as an inescapable
5 consequence of death, does not establish the sort of
6 objectively intolerable risk of harm that qualifies as cruel
7 and unusual within the meaning of the Eighth Amendment, as
8 discussed at page 50.
9 Elaborating on that point, also on page 50, the Court told
10 us that an isolated mishap alone does not give rise to an
11 Eighth Amendment violation precisely because such an event,
12 while regrettable, does not suggest cruelty or that the
13 procedure gives rise to a substantial risk of serious harm.
14 Because Baze, like the case now before this Court, is really
15 all about risk and how we evaluate and attribute significance
16 to that risk, it is also helpful to bear in mind the risks
17 which individually and collectively were insufficient to
18 support granting relief to the petitioner in Baze.
19 The petitioner in Baze asserted that there was a risk of
20 improper administration of the lethal injection drugs because
21 the doses were difficult to mix into solution and to load into
22 the syringes, the protocol failed to establish a rate of
23 injection, there was a risk of infiltration of drugs into the
24 surrounding tissue, Kentucky's execution facilities and
25 training of the execution team were inadequate, and there was

1 no reliable means of monitoring the anesthetic depth the
2 prisoner had reached, all as discussed on page 54. These
3 risks, individually and collectively, were insufficient to
4 support a grant of relief in Baze.
5 As a necessary corollary to its main holding in Baze, the
6 Court also stated unequivocally that "an inmate cannot succeed
7 on an Eighth Amendment claim simply by showing one more step
8 the state could take as a fail-safe for other independently
9 adequate measures," as discussed on pages 60 and 61. The
10 Supreme Court expressly rejected the notion that federal courts
11 should, in effect, sit as "boards of inquiry charged with
12 determining best practices for executions with each ruling
13 supplanted by another round of litigation, touting a new and
14 improved methodology, as discussed at page 51. The Court
15 expressly noted that the best practices approach "calling for
16 the weighing of relative risks without some measure of
17 deference to a state's choice of execution procedures would
18 involve the courts in debatable matters far exceeding their
19 expertise," as discussed in note 2 on page 51.
20 In her dissenting opinion, Justice Ginsburg lamented that
21 there were several shortcomings in the Kentucky protocol that,
22 in her view, regrettably did not make any difference to the
23 majority. This included the lack of safeguards to determine
24 whether the inmate was unconscious before injection of the
25 second and third drugs, the fact that only the warden and the

1 deputy warden remained in the execution chamber after placement
2 of the catheters, the lack of any medical training on the part
3 of the warden and the deputy warden, the reliance only on
4 visual observation to determine whether the inmate appeared to
5 be unconscious, and the failure to use reflex tests or noxious
6 stimulus to determine whether the prisoner was unconscious.
7 Those matters were discussed by Justice Ginsburg on pages 114
8 and 118.
9 The Tenth Circuit has had more than one opportunity to
10 apply the principles established in Baze. The best example
11 would be the decision in Pavatt v. Jones, 627 F.3d 1336, a
12 Tenth Circuit decision from 2010.
13 In Pavatt, at pages 1338 and 39, the Tenth Circuit said --
14 and here I am leaving out citations and internal quotations.
15 "In Baze, the Court acknowledged that subjecting individuals to
16 a risk of future harm, not simply inflicting pain, can qualify
17 as cruel and unusual punishment. However, the Court emphasized
18 to establish that such exposure violates the Eighth Amendment,
19 the conditions presenting the risk must be sure or very likely
20 to cause serious illness and needless suffering and give rise
21 to sufficiently imminent dangers."
22 In Pavatt, the Tenth Circuit also noted that in Baze the
23 Supreme Court held that simply because an execution method may
24 result in pain, either by accident or as an inescapable
25 consequence of death, does not establish the sort of

1 objectively intolerable risk of harm that qualifies as cruel
2 and unusual. Likewise, the Tenth Circuit noted that in Baze
3 the Supreme Court held that a stay of execution may not be
4 granted "unless the condemned prisoner establishes that the
5 state's lethal injection protocol creates a demonstrated risk
6 of severe pain and that the risk is substantial when compared
7 to the known and available alternatives." That is at page 1339
8 of the Pavatt decision quoting Baze at page 61. On this point,
9 it is noteworthy that in Pavatt the prisoner, Jeffrey Matthews,
10 was asserting a drug-related risk, not a risk of
11 maladministration.
12 One of the things that is clear from the Baze decision,
13 especially as that decision was applied by the Tenth Circuit in
14 Pavatt, is that if the risk asserted by the prisoner is very
15 speculative at all that speculative element will drain away the
16 constitutional significance of the risk. A good example of
17 this is the treatment of an Arizona prisoner's claims by the
18 Arizona District Court, the Ninth Circuit, and the Supreme
19 Court.
20 In Landrigan v. Brewer, 2010 West Law 4269559, from the
21 District of Arizona on October 25th of 2010, the plaintiff
22 asserted that there was an unconstitutional risk of harm
23 flowing from the state's proposed use of drugs from a foreign
24 source that was not approved by the FDA. The plaintiff
25 asserted that the foreign supply of sodium thiopental might be

1 contaminated with toxins that could cause pain and could fail
2 to properly anesthetize the plaintiff resulting in excruciating
3 pain when the second and third drugs are administered.
4 The district court agreed that the prisoner had raised
5 significant issues about the efficacy of the non-FDA-approved
6 sodium thiopental and granted a stay of execution. The stay
7 was affirmed by the Ninth Circuit at 625 F.3d 1144. The
8 Supreme Court promptly vacated the stay in a one-paragraph
9 opinion. Brewer v. Landrigan, 131 Supreme Court 445, from
10 2010. Of note here, the Supreme Court, quoting its decision in
11 Baze, in part, said that "there is no evidence in the record to
12 suggest that the drug obtained from a foreign source is unsafe.
13 The district court granted the restraining order because it was
14 left to speculate as to the risk of harm. But speculation
15 cannot substitute for evidence that the use of the drug is sure
16 or very likely to cause serious illness and needless
17 suffering." Those are the words of the Supreme Court.
18 Thus, the Supreme Court's subsequent treatment of its
19 decision in Baze makes it unmistakably clear that a speculative
20 assertion of a risk of harm cannot substitute for a showing
21 "that the use of the drug is sure or very likely to cause
22 serious illness and needless suffering."
23 I'm also influenced by the Sixth Circuit's opinion in
24 Cooey v. Strickland, 589 F.3d 210, a Sixth Circuit decision
25 from 2009, in part because of the very thoughtful opinion

1 written for the Court by Circuit Judge Julia Smith Gibbons and
2 in part because that case involving an Ohio execution arose
3 against the backdrop of a serious mishap that had occurred in
4 another execution in Ohio.
5 Cooey v. Strickland was decided on December 7, 2009, one
6 day before the plaintiff in that case, Kenneth Biros, was
7 scheduled for execution. On September 15, 2009, slightly less
8 than three months before the Sixth Circuit's decision in Cooey,
9 the state of Ohio unsuccessfully attempted to execute Romell
10 Broom. As explained by the Court of Appeals in Cooey, "The
11 execution team was unable to find a vein on Broom's arm after
12 repeated attempts over two hours. They attempted to insert the
13 IV catheter into the crook of Broom's elbow, his wrists, over
14 the knuckle of his first finger, and near his ankle. Twice the
15 team managed to insert a catheter that was not secured properly
16 and caused bleeding." That's 589 F.3d at page 224, note 3.
17 Citing the unsuccessful attempt to execute Biros, as well
18 as other allegedly unconstitutional revisions to the Ohio
19 protocol, Biros sought a stay of execution. He asserted that
20 there was an undue risk of improper implementation of the Ohio
21 protocol which would lead to severe pain, that Ohio employed
22 untrained and insufficiently competent medical personnel, that
23 there was a lack of supervision of the execution process by a
24 licensed physician, and that there was a lack of a prescribed
25 time limit within which to establish IV access, among other

1 complaints, as indicated on page 223.
2 On the issue of the risk of maladministration, the
3 unfortunate experience in the Broom execution figured heavily
4 into the arguments advanced by Biros. As explained by the
5 Fifth Circuit, "Biros relies heavily on Ohio's halted execution
6 of Broom to distinguish his case from that of Baze," as stated
7 on page 224.
8 The Sixth Circuit concluded that the unfortunate and very
9 recent experience with the Broom execution, which, from the
10 available information, could fairly be called a botched
11 execution, did not take Biros' claim out of the realm of
12 speculation. Citing Clemons v. Crawford, 585 F.3d 1119, an
13 Eighth Circuit decision from 2009, the Sixth Circuit noted that
14 the Eighth Circuit had "rejected the prisoner's claim that
15 there was a substantial risk of pain due to incompetent
16 personnel despite the fact that the Court had previously found
17 that medical personnel administering the protocol, since
18 removed, had been incompetent," as stated at page 225. The
19 Sixth Circuit concluded that "for the same reasons, we cannot
20 assume that the same misfortunes that befell Broom will befall
21 Biros," as stated at page 225.
22 On the basis of the record before it, including the wholly
23 unsuccessful attempt to execute Romell Broom, the Sixth Circuit
24 held that "speculations or even proof of medical negligence in
25 the past or in the future are not sufficient to render a

1 facially constitutionally sound protocol unconstitutional."
2 That is the Cooey decision at page 225.
3 I conclude, as a matter of law, that the revised lethal
4 injection protocol adopted by the Oklahoma Department of
5 Corrections effective September 30, 2014, is facially
6 constitutional when measured by the principles promulgated in
7 Baze v. Rees, as further explained by our Court of Appeals in
8 Pavatt v. Jones.
9 Citing the experience with the execution of Clayton
10 Lockett, these plaintiffs assert, in substance, that there is
11 not a constitutionally sufficient degree of assurance that the
12 revised protocol, even if it is constitutional on its face,
13 will be administered in a way which will avoid the infliction
14 of serious pain. This contention obviously requires the Court
15 to assess probabilities with respect to future events, some of
16 which are within the control of humans, albeit fallible humans,
17 and some of which are decidedly not within the control of
18 anyone.
19 I conclude on the basis of the evidence before me that
20 plaintiffs have failed to establish that proceeding with the
21 execution of these plaintiffs on the basis of the revised
22 protocol presents a risk that is "sure or very likely to cause
23 serious illness and needless suffering," amounting to "an
24 objectively intolerable risk of harm," in the words of the
25 Supreme Court at page 50 of the Baze decision.

1 In reaching this decision, I place considerable reliance,
2 and I'm going to say again considerable reliance, on three
3 aspects of the DOC's lethal injection protocol. The first is
4 the requirement that both primary and backup IV access sites be
5 established. The second is that confirmation of the viability
6 of the IV sites is specifically required. The third is that
7 the offender's level of consciousness must be monitored
8 throughout the procedure.
9 The predominant risk asserted by the plaintiffs in this
10 case is that midazolam will not have its intended effect as the
11 first drug in the series, thus leading to injection of
12 vecuronium bromide or rocuronium bromide and potassium chloride
13 into a sensate person either because of the asserted
14 limitations of midazolam or because it is not effectively
15 administered in a massive IV dose. The three safeguards to
16 which I have referred will reduce the risk of injection of the
17 second and third drugs into a sensate person to well below a
18 level that would establish a right to relief under Baze v.
19 Rees.
20 The conclusions I have reached establish that plaintiffs
21 have failed to show a probability of success on the merits of
22 Count 2. However, wholly apart from that, there is a separate
23 reason for which plaintiffs have failed to establish a
24 probability of success on the merits of Count 2.
25 In proposing that they be executed with a lethal dose of

1 sodium thiopental, as they assert at paragraph 31 of their
2 amended complaint, plaintiffs have failed to provide a
3 comparison with, in the words of the Supreme Court, a "known
4 and available alternative." That is from page 61 of the Baze
5 decision. On this issue, the burden of proof is immaterial.
6 Because aside from plaintiffs' failure to demonstrate a known
7 and available alternative, the defendants have affirmatively
8 shown that sodium thiopental and pentobarbital, the only
9 alternatives to which the plaintiffs have even alluded, are not
10 available to the DOC.
11 In In Re Lombardi, 741 F.3d 888, an Eighth Circuit
12 decision from earlier this year, the plaintiffs asserted that
13 they were "not required to propose an alternative method of
14 execution as an element of their Eighth Amendment claim."
15 That's at page 895. The Eighth Circuit responded, in my view
16 correctly, that this was "a plain misreading of the Supreme
17 Court's decision in Baze v. Rees and the Eighth Amendment,"
18 also at page 895.
19 The Eighth Circuit, after quoting the passage in Baze,
20 which requires comparison "to the known and available
21 alternative," cited cases from the Fifth Circuit, Raby v.
22 Livingston, 600 F.3d 552, with the relevant discussion at pages
23 560 and '61, a Fifth Circuit decision from 2010; and the Sixth
24 Circuit, Cooey v. Strickland, which I have already discussed,
25 for the proposition, with which I agree, that it is incumbent

1 upon a prisoner who challenges an execution protocol under Baze
2 to demonstrate that the risk created by the challenged protocol
3 is substantial when compared to the known and available
4 alternatives. Indeed, in the Raby decision, 600 F.3d at page
5 561, the Fifth Circuit described this as "the second step of
6 the Baze test."
7 The only alternative short-acting barbiturate proposed by
8 the plaintiffs as an alternative to midazolam is sodium
9 thiopental, as alleged in paragraph 31 of the amended
10 complaint. But sodium thiopental became unavailable in the
11 United States long before these plaintiffs proffered it in this
12 case as an alternative to midazolam. In Pavatt v. Jones, which
13 I've already discussed, 627 F.3d at page 1338, the Tenth
14 Circuit noted that "sodium thiopental is now effectively
15 unobtainable anywhere in the United States, thus requiring
16 Oklahoma and other death penalty states to revise their lethal
17 injection protocols."
18 In Sepulvado v. Jindal, 729 F.3d 413, a Fifth Circuit
19 decision from 2013, at page 416, the Fifth Circuit noted that
20 sodium thiopental had been unavailable since 2010. In Chavez
21 v. Florida, 742 F.3d 1267, at page 1274, an Eleventh Circuit
22 decision from earlier this year, Chief Judge Carnes made the
23 same observation in his concurring opinion in which he also
24 noted that in 2013 the European Union threatened to limit the
25 supply of propofol, which caused Missouri authorities to revise

1 Missouri's protocol. Judge Carnes concluded, I believe
2 correctly, that "an alternative drug that its manufacturer or
3 its distributor or the FDA will not allow to be used for lethal
4 injection purposes is no drug at all for Baze purposes," as
5 stated on page 1275.
6 I conclude as a matter of law that the plaintiffs'
7 reliance on sodium thiopental as an alternative to midazolam is
8 altogether unavailing because there has been no showing that
9 sodium thiopental is, in fact, an available alternative.
10 Plaintiffs have failed to establish a probability of
11 success on the Eighth Amendment cruel and unusual punishment
12 claim asserted in Count 2.
13 I will now turn to Count 4, the Eighth Amendment claim
14 asserting unsound procedures and inadequate training.
15 **COUNT 4 - EIGHTH AMENDMENT - UNSOUND PROCEDURES AND INADEQUATE**
16 **TRAINING**
17 With respect to execution procedures and training to
18 prepare the execution team to competently perform an execution
19 by lethal injection, the revised Oklahoma protocol is at least
20 as protective of the prisoner's interests as the protocol which
21 was before the Court in Baze.
22 The following aspects of the protocol which passed muster
23 in Baze are noteworthy. The individuals inserting the IV
24 catheters were only required to have at least one year of
25 professional experience. The prisoner's state of consciousness

1 or unconsciousness is determined by the warden and the deputy
2 warden through visual inspection. The duty to watch for
3 problems with the IV catheters and the tubing fell to the
4 warden and the deputy warden. The list of professional
5 categories approved for IV insertion was identical to
6 Oklahoma's list, specifically a certified medical assistant, a
7 phlebotomist, an EMT, a paramedic, or a military corpsman. The
8 Kentucky protocol called for at least ten practice sessions per
9 year. The Kentucky protocol called for the IV Team to
10 establish primary and backup lines and to prepare two sets of
11 lethal injection drugs.
12 In Baze, the petitioners specifically faulted the Kentucky
13 protocol for lacking a systematic mechanism for monitoring
14 anesthetic depth, as indicated at page 58 of the Baze decision.
15 They maintained that the visual inspection performed by the
16 warden and deputy warden was an inadequate substitute for more
17 sophisticated procedures they proposed, such as the use of
18 various types of monitoring equipment, as discussed at page 59.
19 Moreover, the Supreme Court, citing the Tenth Circuit's
20 decision in Hamilton v. Jones, 472 F.3d 814, with the relevant
21 discussion at page 817, a Tenth Circuit decision from 2007,
22 concluded that "the risks of failing to adopt additional
23 monitoring procedures are thus even more remote and attenuated
24 than the risks proposed by the alleged inadequacies of
25 Kentucky's procedures designed to ensure the delivery of

1 thiopental." That is at page 59.
2 On this point, the plurality opinion rejected the
3 dissent's argument that "rough and ready tests for checking
4 consciousness, calling the inmate's name, brushing his
5 eyelashes, or presenting him with strong noxious odors" was
6 necessary in order to "materially decrease the risk of
7 administering the second and third drugs before the sodium
8 thiopental has taken effect," as discussed by the Court at page
9 60.
10 This led to the Supreme Court's conclusion that "an inmate
11 cannot succeed on an Eighth Amendment claim simply by showing
12 one more step the state could take as a fail-safe for other
13 independently adequate measures. This approach would serve no
14 meaningful purpose and would frustrate the state's legitimate
15 interest in carrying out a sentence of death in a timely
16 manner." That's at pages 60 and 61.
17 In Muhammad v. Crews, 2013 West Law 6844489, a decision
18 from the Middle District of Florida about a year ago, late
19 2013, a decision which was affirmed at 739 F.3d 683 earlier
20 this year, with certiorari denied, 134 Supreme Court 894, which
21 was on January 7th of this year, the district court observed at
22 star page 8 that "the Florida protocol requires that the
23 execution team confirm that the inmate is unconscious after
24 administration of the first drug, midazolam hydrochloride.
25 Thus, if done correctly, there is no substantial risk of harm

1 from administration of the second and third drugs."
2 Although this is not a conclusion of law, an additional
3 comment with respect to Warden Trammell may be appropriate
4 here. My sense of the matter from the evidence, including
5 listening very carefully to the testimony of Warden Trammell,
6 is that the experience of the Lockett execution was in some
7 ways repugnant to Warden Trammell. I am persuaded that Warden
8 Trammell does not want a mishap like this to ever occur again,
9 at least on her watch. Granting that Warden Trammell may, in
10 some ways, be subject to criticism for playing what was
11 arguably an overly passive role in the run-up to the Lockett
12 execution, I quite easily find that her skills as an
13 administrator have already manifested themselves in the
14 training regimen that has been implemented since last September
15 and will be very evident in the preparations for the upcoming
16 executions.
17 Plaintiffs have not satisfied the Court that the lethal
18 injection procedures and training regimen that are now in place
19 present any substantial risk of serious harm within the meaning
20 of the Court's holdings in Baze v. Rees. I accordingly
21 conclude that plaintiffs have failed to establish a probability
22 of success on the Eighth Amendment unsound procedures and
23 inadequate training claim asserted in Count 4.
24 I now proceed to consider the claim asserted in Count 5
25 relating to notice and opportunity to be heard asserted under

1 the Eighth and Fourteenth Amendments.
2 **COUNT 5 - NOTICE AND OPPORTUNITY TO BE HEARD - EIGHTH AND**
3 **FOURTEENTH AMENDMENTS**
4 The heart of this claim is plaintiffs' assertion that ten
5 days is not constitutionally sufficient notice to the prisoner
6 of the DOC's intentions with respect to the specific drug
7 combination to be used. This proposition is essentially moot
8 as to these plaintiffs because they have been given a minimum
9 of several weeks' notice of the combination of drugs that will
10 be administered. In any event, ten days' notice would be
11 sufficient, even if not optimal.
12 This claim is foreclosed by the reasoning of the Fifth
13 Circuit in Sepulvado v. Jindal, 729 F.3d 413, with the relevant
14 discussion at pages 418 through 420, and the Eleventh Circuit
15 in Wellons v. Commissioner, 754 F.3d 1260, with the relevant
16 discussion at page 1267, another decision from earlier this
17 year. I agree with the analysis of the courts in both of those
18 cases and further elaboration is not necessary.
19 I will add, however, that the ten-day provision is not
20 without a sound rationale. Inmates and others have succeeded
21 in a number of instances in securing embargoes to cut off the
22 supply of chemicals used in lethal injection. In some
23 situations, eleventh-hour litigation has virtually become the
24 norm. That eleventh-hour litigation is intended to forestall,
25 after years of litigation on the merits as well as clemency

1 proceedings, the execution of a validly imposed sentence of
2 death, a penalty which itself has repeatedly been held to be
3 constitutional. Those who are charged with the responsibility
4 to carry out a sentence of death by lethal injection need the
5 ability to avail themselves of other options on relatively
6 short notice.
7 I accordingly conclude that plaintiffs have failed to
8 establish a probability of success on the notice and
9 opportunity to be heard claim asserted in Count 5.
10 I now turn to Count 7, the Eighth and Fourteenth Amendment
11 claim asserting experimentation on human subjects.
12 **COUNT 7 - EIGHTH AND FOURTEENTH AMENDMENTS - EXPERIMENTATION ON**
13 **HUMAN SUBJECTS**
14 In this count, plaintiffs complain that the use of untried
15 drugs by way of untested procedures will cause them to
16 experience severe pain, needless suffering, and a lingering
17 death.
18 In the Baze decision, at page 62, the Supreme Court
19 stated, and here I am leaving out an internal citation,
20 "Throughout our history, whenever a method of execution has
21 been challenged in this Court as cruel and unusual, the Court
22 has rejected the challenge. Our society has nonetheless
23 steadily moved to more humane methods of carrying out capital
24 punishment. The firing squad, hanging, the electric chair, and
25 the gas chamber have each, in turn, given way to more humane

1 methods, culminating in today's consensus on lethal injection.
2 The broad framework of the Eighth Amendment has accommodated
3 this process toward more humane methods of execution and our
4 approval of a particular method in the past has not precluded
5 legislatures from taking the steps they deem appropriate in
6 light of new developments to ensure humane capital punishment.
7 There is no reason to suppose that today's decision will be any
8 different." That is from page 62 of the Baze decision.
9 Thus, as the Sixth Circuit pointed out in Cooey, to which
10 I've already referred more than once, 589 F.3d at page 229,
11 "that the procedure has never before been used, does not itself
12 establish that the procedure is cruel and unusual. The Supreme
13 Court has previously considered various modes of execution and
14 has yet to find one violative of the Eighth Amendment." In
15 short, I conclude that the Eighth Amendment does not immunize
16 an individual from being the first person to be subjected to a
17 new method of execution.
18 Count 7 fails as a factual matter and as a matter of law.
19 As a factual matter, by plaintiffs' own count, execution with
20 midazolam as part of a three-drug protocol has been
21 accomplished 12 times. That's the plaintiffs' pleading at
22 Docket Entry Number 159, page 58. This is not a new method, at
23 least in the sense required for the Court to regard its use as
24 human experimentation.
25 As a matter of law, the basic Baze test still controls.

1 These plaintiffs must establish that the state's lethal
2 injection protocol creates a demonstrated risk of severe pain
3 and that the risk is substantial when compared to the known and
4 available alternatives. They have failed to do so.
5 I accordingly conclude that plaintiffs have failed to
6 establish a probability of success on the human experimentation
7 claim asserted in Count 7.
8 I now turn to the Count 8 claim relating to a right of
9 access to information, counsel, and the courts.
10 **COUNT 8 - RIGHT OF ACCESS TO INFORMATION, COUNSEL, AND THE**
11 **COURTS**
12 This claim is based on the First and Fourteenth
13 Amendments. From plaintiffs' motion, Docket Entry Number 92 at
14 page 15, and their preliminary hearing brief, Docket Entry
15 Number 160 at page 7, it appears that plaintiffs assert a right
16 essentially to have counsel physically present as a legal
17 proctor of the IV insertion process. This conjures up an
18 untenable scene in which the prisoner's counsel is standing at
19 the gurney, cell phone in hand, ready to dictate the
20 information necessary to fill in the blanks on an emergency ex
21 parte motion for stay if he or she takes issue with any part of
22 the process as it unfolds.
23 The reality is that as execution by lethal injection is
24 actually carried out, the prisoner's erstwhile right of access
25 to the courts must, of necessity, give way to the execution

1 team's discharge of its duties as long as those who are
2 carrying out the process are operating within the confines of a
3 constitutionally sound lethal injection protocol. And I hasten
4 to add that it would appear from plaintiffs' contention as to
5 the very closeness of the scrutiny that they say is
6 constitutionally required that protection of the identities of
7 the execution team members would likely be impossible.
8 On this claim, I agree with the reasoning of Judge Wake of
9 the District of Arizona in Towery v. Brewer, 2012 Westlaw
10 592749, from the District of Arizona, February 23, 2012, at
11 star page 18, a decision that was affirmed by the Ninth Circuit
12 at 673 F.3d 650, and here I'm leaving out internal citations
13 and quotes. "Prisoners have a constitutional right of access
14 to the courts that is adequate, effective, and meaningful.
15 However, this right guarantees no particular methodology but
16 rather the conferral of a capability. The capability of
17 bringing contemplated challenges to sentences or conditions of
18 confinement before the courts. Consequently, an inmate who
19 brings a Section 1983 claim based on his right of access to the
20 courts must be able to show that the infringing act somehow
21 defeated his ability to pursue a legal claim. That is, a
22 prisoner must show he suffered an actual injury as a result of
23 the defendant's actions." That's at pages 348 and 49. "An
24 actual injury is actual prejudice with respect to contemplated
25 or existing litigation such as the inability to meet a filing

1 deadline or to present a claim. The right of access does not
2 create an abstract freestanding right but exists to vindicate
3 other rights."
4 No court has found a constitutional right for the prisoner
5 to have counsel present to supervise the IV insertion process
6 and I decline to be the first judge to so hold.
7 In Count 8, plaintiffs also assert a First Amendment right
8 of access to information about their planned executions, as
9 indicated in Docket Entry Number 92 at page 15, Docket Entry
10 Number 160 at page 9, and Docket Entry Number 159 at pages 71
11 through 75.
12 I conclude that plaintiffs' reliance on the First
13 Amendment is misplaced. The interests that plaintiffs, as
14 prison inmates facing execution, would protect under this
15 heading are protected to the extent that they are protected at
16 all under the Due Process Clause of the Fourteenth Amendment
17 and perhaps arguably under the Eighth Amendment as made
18 applicable to the states through the Fourteenth Amendment.
19 Measured by these provisions, the plaintiffs' right of access
20 to information about their impending executions is adequately
21 protected by the revised protocol, as I have already discussed.
22 To the extent that plaintiffs seek to avail themselves of
23 the public's right of access to executions in Oklahoma, I
24 conclude that even if they had standing to tie their claims to
25 the general public's right of access, their claim would fail

1 substantially for the reasons articulated last Friday by Judge
2 Heaton in Oklahoma Observer v. Patton, Case Number Civil
3 14-0905, his order being Docket Entry Number 48 in that case.
4 I accordingly conclude that plaintiffs have failed to
5 establish a probability of success on the right of access to
6 information, counsel, and the courts as asserted in Count
7 Number 8.
8 I now reach my conclusion.
9 **CONCLUSION**
10 Plaintiffs have failed to establish any of the
11 prerequisites to a grant of preliminary injunctive relief.
12 They have failed to establish a probability of success on
13 the merits of any of the five claims they assert for
14 preliminary injunction purposes, even under the relaxed
15 standard articulated in Kikumura v. Hurley, 242 F.3d 950, with
16 the relevant discussion at page 955.
17 Plaintiffs have failed to demonstrate that absent a
18 preliminary injunction they would suffer any non-speculative
19 irreparable harm.
20 As to the third factor, the balance of the equities does
21 not tip in plaintiffs' favor. Plaintiffs have been
22 successfully prosecuted, convicted, and sentenced to death in
23 proceedings that have withstood decades of trials, direct
24 review, and collateral review. The equities of the matter
25 strongly favor bringing their cases at long last to a

1 conclusion by carrying out the penalty that the courts have
2 determined to have been constitutionally imposed.
3 Finally, I conclude that entry of a preliminary injunction
4 would not be in the public interest. It is well-settled that
5 as the Supreme Court said in its unanimous decision in Nelson
6 v. Campbell, 541 U.S. 637, with the relevant discussion at page
7 6844, the state has "a significant interest in meting out a
8 sentence of death in a timely fashion."
9 And the Supreme Court also told us in Calderon v.
10 Thompson, 523 U.S. 538, a decision from 1998, at page 556 --
11 and here again I'm omitting some citations and internal quotes.
12 "When lengthy federal proceedings have run their course and a
13 mandate denying relief has issued, finality acquires an added
14 moral dimension. Only with an assurance of real finality can
15 the state execute its moral judgment in a case. Only with real
16 finality can the victims of crime move forward knowing the
17 moral judgment will be carried out. To unsettle these
18 expectations is to inflict a profound injury to the powerful
19 and legitimate interest in punishing the guilty, an interest
20 shared by the state and the victims of crime alike."
21 The motion of Plaintiffs Charles Warner, Richard Glossip,
22 John Grant, and Benjamin Cole for preliminary injunction is
23 without merit. It is in all things denied. A brief written
24 order will be entered to memorialize this ruling.
25 I direct the parties to withdraw their exhibits. That is

1 routine for purposes of facilitating the parties getting the
2 exhibits to the Tenth Circuit for review. So I do direct the
3 parties to withdraw their exhibits. That is entirely separate
4 from any questions about ultimate public access to the
5 exhibits, which I have already addressed and which I hope the
6 Department of Corrections will itself address very quickly.
7 Court will be in recess.
8 (COURT ADJOURNED.)
9 CERTIFICATE OF OFFICIAL REPORTER
10 I, Tracy Washbourne, Federal Official Realtime Court
11 Reporter, in and for the United States District Court for the
12 Western District of Oklahoma, do hereby certify that pursuant
13 to Section 753, Title 28, United States Code that the foregoing
14 is a true and correct transcript of the stenographically
15 reported proceedings held in the above-entitled matter and that
16 the transcript page format is in conformance with the
17 regulations of the Judicial Conference of the United States.
18 Dated this 23rd day of December 2014.
19
20 ***/S/ Tracy Washbourne***
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21 Tracy Washbourne, RDR, CRR
Federal Official Court Reporter
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