IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83796

DONTE JOHNSON,
Petitioner,

v.

STATE OF NEVADA, *et al.*,
Respondent.

Appeal From Clark County District Court
Eighth Judicial District, Clark County
The Honorable Jacqueline M. Bluth, District Judge
(Dist. Ct. No. A-19-789336-W)

APPELLANT'S APPENDIX

Volume 45 of 50

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DOCUMENT	DATE	VOLUME	PAGE(S)
Amended Verification, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/17/2019	47	11613–11615
Amended Verification – Index of Exhibit and Exhibit in Support, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/17/2019	47	11616–11620
Court Minutes, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/13/2019	49	12248
Court Minutes, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	10/28/2021	50	12365
Defendant's (Pro Se) Request for Petition to be Stricken as it is Not Properly Before the Court, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	04/11/2019	46	11606–11608
Defendant's (Pro Se) Request to Strike Petition, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	04/04/2019	46	11603–11605

	DOCUMENT	DATE	VOLUME	PAGE(S)
	Clark County (June 6, 2005)			
21.	Judgment Affirming Death Sentence (45456), *Johnson v.* State, Case No. 45456, In Supreme Court of the State of Nevada (Dec. 28, 2006)	02/13/2019	26	6304–6330
22.	Notice of filing of writ of certiorari, *Johnson v. State*, Case No. 45456, In Supreme Court of the State of Nevada (Apr. 5, 2007)	02/13/2019	26	6331–6332
24.	Petition for Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (Feb. 11, 2008)	02/13/2019	26	6333–6343
25.	Pro Per Petition, *Johnson v. State*, Case No. 51306, In the Supreme Court of the State of Nevada (Mar. 24, 2008)	02/13/2019	26	6344–6364
26.	Response to Petition Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (Apr. 29, 2008)	02/13/2019	26	6365–6369
27.	Order denying Pro Per Petition, *Johnson v. State,* Case No. 51306, In the Supreme Court of the State of Nevada (May 6, 2008)	02/13/2019	26	6370–6372
28.	Supplemental Brief in Support of Petition for Writ of Habeas Corpus, *State v. Johnson*, Case No.	02/13/2019	26	6373–6441

	DOCUMENT	DATE	VOLUME	PAGE(S)
	153154, District Court, Clark County (Oct. 12, 2009)			
29.	Second Supplemental Brief in Support of Petition for Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (July 14, 2010)	02/13/2019	26	6442–6495
30.	Response to Petition Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (Jan. 28, 2011)	02/13/2019	26–27	6496–6591
31.	Reply to Response to Petition Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (June 1, 2011)	02/13/2019	27	6592–6627
32.	Reply Brief on Initial Trial Issues, *State v.* Johnson, Case No. 153154, District Court, Clark County (Aug. 22, 2011)	02/13/2019	27–28	6628–6785
33.	Findings of Fact and Conclusions of Law, *State v. Johnson*, Case No. 153154, District Court, Clark County (Mar. 17, 2014)	02/13/2019	28	6786–6793
34.	Petition for Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (Oct. 8, 2014)	02/13/2019	28	6794–6808

	DOCUMENT	DATE	VOLUME	PAGE(S)
35.	Response to Second Petition for Writ of Habeas Corpus (Post-Conviction), *State v. Johnson*, Case No. 153154, District Court, Clark County (Dec. 15, 2014)	02/13/2019	28	6809–6814
36.	Reply to Response to Second Petition for Habeas Corpus (Post-Conviction), *State v. Johnson*, Case No. 153154, District Court, Clark County (Jan. 2, 2015)	02/13/2019	28	6815–6821
37.	Appellant's Opening Brief, No. 65168, Nev. Sup. Ct., Jan. 9, 2015	02/13/2019	28	6822–6973
38.	Findings of Fact and Conclusions of Law), *State v. Johnson*, Case No. 153154, District Court, Clark County (Feb. 4, 2015)	02/13/2019	28	6974–6979
40.	Appellant's Reply Brief, No. 65168, Nev. Sup. Ct., Nov. 18, 2015	02/13/2019	28–29	6980–7078
45.	Autopsy Report for Peter Talamantez (Aug. 15, 1998)	02/13/2019	29	7079–7091
46.	Las Vegas Metropolitan Police Dept. Voluntary Statement of Ace Rayburn Hart_Redacted (Aug. 17, 1998)	02/13/2019	29	7092–7121
47.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Brian	02/13/2019	29	7122–7138

	DOCUMENT	DATE	VOLUME	PAGE(S)
	Johnson_Redacted (Aug. 17, 1998)			
48.	Indictment, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154 (Sep. 2, 1998)	02/13/2019	29	7139–7149
49.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Terrell Young_Redacted (Sep. 2, 1998)	02/13/2019	29	7150–7205
50.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Charla Severs _Redacted (Sep. 3, 1998)	02/13/2019	29	7206–7239
51.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Sikia Smith_Redacted (Sep. 8, 1998)	02/13/2019	29–30	7240–7269
52.	Superseding Indictment, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Sep. 15, 1998)	02/13/2019	30	7270–7284
53.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Todd Armstrong_Redacted (Sep. 17, 1998)	02/13/2019	30	7285–7338
54.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Ace Hart_Redacted (Sep. 22, 1998)	02/13/2019	30	7339–7358

DOCUMENT	DATE	VOLUME	PAGE(S)
55. Testimony of Todd Armstrong, *State of Nevada v. Celis*, Justice Court, Clark County, Nevada Case No. 1699-98FM (Jan. 21, 1999)	02/13/2019	30–31	7359–7544
56. Trial Transcript (Volume VIII), *State v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 17, 1999)	02/13/2019	31	7545–7675
57. Trial Transcript (Volume XVI-AM), *State v. Smith*, District Court, Clark County, Nevada Case No. 153624 (June 24, 1999)	02/13/2019	31–32	7676–7824
58. Motion to Permit DNA Testing of Cigarette Butt (Aug. 17, 1998)	02/13/2019	32	7825–7835
59. Trial Transcript (Volume VI), *State v. Young,* District Court, Clark County, Nevada, Case No. C153154 (Sep. 7, 1999)	02/13/2019	32	7836–7958
60. Interview of Charla Severs (Sep. 27, 1999)	02/13/2019	32	7959–7980
61. Motion to Videotape Deposition of Charla Severs, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Sep. 29, 1999)	02/13/2019	32–33	7981–8004
62. Opposition to Videotape Deposition of Charla Severs, *State v. Johnson*, District Court, Clark	02/13/2019	33	8005–8050

	DOCUMENT	DATE	VOLUME	PAGE(S)
	County, Nevada Case No. C153154 (Oct. 6, 1999)			
63.	Transcript of Video Deposition of Charla Severs (Filed Under Seal), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Oct. 6, 1999)	02/13/2019 **SEALED**	33	8051–8160
64.	Cellmark Report of Laboratory Examination (Nov. 17, 1999)	02/13/2019	33	8161–8165
65.	Motion for Change of Venue, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Nov. 29, 1999)	02/13/2019	33	8166–8291
66.	Records from the California Youth Authority_Redacted	02/13/2019	33–34	8292–8429
67.	Jury Instructions (Guilt Phase), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 8, 2000)	02/13/2019	34	8430–8496
68.	Verdict Forms (Guilt Phase), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 9, 2000)	02/13/2019	34	8497–8503
69.	Special Verdict, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154 (June 15, 2000)	02/13/2019	34	8504–8506
70.	Affidavit of Kristina Wildeveld (June 23, 2000)	02/13/2019	34	8507–8509

DOCUMENT		DATE	VOLUME	PAGE(S)
71.	Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Mar. 17, 2004)	02/13/2019	34	8510–8518
72.	Second Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 6, 2004)	02/13/2019	34	8519–8527
73.	Opposition to Second Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 20, 2004)	02/13/2019	34	8528–8592
74.	Reply to Opposition to Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 26, 2004)	02/13/2019	34–35	8593–8621
75.	Jury Instructions (Penalty Phase 3), *State v.* Johnson, District Court, Clark	02/13/2019	35	8622–8639

	DOCUMENT	DATE	VOLUME	PAGE(S)
	County, Nevada Case No. C153154 (Apr. 28, 2005)			
76.	Petition for rehearing, Johnson *v. State*, Nevada Supreme Court, Case No. 45456 (Mar. 27, 2007)	02/13/2019	35	8640–8652
77.	John L. Smith, *Mabey takes* heat *for attending his patients* instead *of the inauguration*, Las Vegas Review-Journal (Jan. 5, 2007)	02/13/2019	35	8653–8656
78.	Sam Skolnik, *Judge out of order, ethics claims say*, Las Vegas Sun (Apr. 27, 2007)	02/13/2019	35	8657–8660
79.	EM 110 - Execution Procedure_Redacted (Nov. 7, 2017)	02/13/2019	35	8661–8667
80.	*Nevada v. Baldonado*, Justice Court, Clark County, Nevada Case No. 04FH2573X (Mar. 30, 2004)	02/13/2019	35	8668–8698
81.	Birth Certificate John White Jr_Redacted	02/13/2019	35	8699–8700
82.	Declaration of Eloise Kline (Nov. 19, 2016)	02/13/2019	35	8701–8704
83.	Jury Questionnaire 2000_Barbara Fuller_Redacted (May 24, 2000)	02/13/2019	35	8705–8727
84.	Media Jury Questionnaire 2000	02/13/2019	35–36	8728–8900
85.	Media Jury Questionnaire 2005	02/13/2019	36	8901–9025
86.	News Articles	02/13/2019	36–37	9026–9296

DOCUMENT	DATE	VOLUME	PAGE(S)
87. State's Exhibit 63 – Photo	02/13/2019	37	9297–9299
88. State's Exhibit 64 – Photo	02/13/2019	37	9300–9302
89. State's Exhibit 65 – Photo	02/13/2019	37	9303–9305
90. State's Exhibit 66 – Photo	02/13/2019	37	9306–9308
91. State's Exhibit 67 – Photo	02/13/2019	37	9309–9311
92. State's Exhibit 69 – Photo	02/13/2019	37	9312–9314
93. State's Exhibit 70 – Photo	02/13/2019	37	9315–9317
94. State's Exhibit 74 – Photo	02/13/2019	37	9318–9320
95. State's Exhibit 75 – Photo	02/13/2019	37	9321–9323
96. State's Exhibit 76 – Photo	02/13/2019	37	9324–9326
97. State's Exhibit 79 – Photo	02/13/2019	37	9327–9329
98. State's Exhibit 80 – Photo	02/13/2019	37	9330–9332
99. State's Exhibit 81 – Photo	02/13/2019	37	9333–9335
100. State's Exhibit 82 – Photo	02/13/2019	37	9336–9338
101. State's Exhibit 86 – Photo	02/13/2019	37	9339–9341
102. State's Exhibit 89 – Photo	02/13/2019	37	9342–9344
103. State's Exhibit 92 – Photo	02/13/2019	37	9345–9347
104. State's Exhibit 113 – Photo	02/13/2019	37	9348–9350
105. State's Exhibit 116 – Photo	02/13/2019	37	9351–9353
106. State's Exhibit 120 – Photo	02/13/2019	37	9354–9356
107. State's Exhibit 125 – Photo	02/13/2019	37	9357–9359
108. State's Exhibit 130 – Photo	02/13/2019	38	9360–9362
109. State's Exhibit 134 – Photo	02/13/2019	38	9363–9365
110. State's Exhibit 137 – Photo	02/13/2019	38	9366–9368
111. State's Exhibit 145 – Photo	02/13/2019	38	9369–9371
112. State's Exhibit 146 – Photo	02/13/2019	38	9372–9374
113. State's Exhibit 148 – Photo	02/13/2019	38	9375–9377
114. State's Exhibit 151 – Photo	02/13/2019	38	9378–9380
115. State's Exhibit 180 – Photo	02/13/2019	38	9381–9384
116. State's Exhibit 181 – Photo	02/13/2019	38	9385–9388
117. State's Exhibit 216 - Probation Officer's Report - Juvenile_Redacted	02/13/2019	38	9389–9403
118. State's Exhibit 217 - Probation Officer's Report_Redacted	02/13/2019	38	9404–9420

DOCUMENT	DATE	VOLUME	PAGE(S)
119. State's Exhibit 221 – Photo	02/13/2019	38	9421–9423
120. State's Exhibit 222 – Photo	02/13/2019	38	9424–9426
121. State's Exhibit 256	02/13/2019	38	9427–9490
122. Las Vegas Metropolitan Police Dept. Crime Scene Report (Aug. 14, 1998)	02/13/2019	38	9491–9499
123. VCR at Terra Linda	02/13/2019	38	9500–9501
124. VCR Remote Control Buying Guide	02/13/2019	38	9502–9505
125. Jury Instructions (Penalty Phase 3), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (May 4, 2005)	02/13/2019	38	9506–9519
126. Motion to Bifurcate Penalty Phase, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154 (Apr. 27, 2004)	02/13/2019	38	9520–9525
127. Motion to Reconsider Request to Bifurcate Penalty Phase, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 11, 2005)	02/13/2019	38	9526–9532
128. Special Verdicts (Penalty Phase 3), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 28, 2005)	02/13/2019	38	9533–9544
129. Verdict (Penalty Phase 3), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (May 5, 2005)	02/13/2019	38	9545–9549

DOCUMENT	DATE	VOLUME	PAGE(S)
130. Declaration of Arthur Cain (Oct. 29, 2018)	02/13/2019	38	9550–9552
131. Declaration of Deborah White (Oct. 27, 2018)	02/13/2019	38	9553–9555
132. Declaration of Douglas McGhee (Oct. 28, 2018)	02/13/2019	38	9556–9558
133. Declaration of Elizabeth Blanding (Oct. 29, 2018)	02/13/2019	38	9559–9560
134. Declaration of Jesse Drumgole (Oct. 27, 2018)	02/13/2019	38	9561–9562
135. Declaration of Johnnisha Zamora (Oct. 28, 2018)	02/13/2019	38	9563–9566
136. Declaration of Johnny White (Oct. 26, 2018)	02/13/2019	38	9567–9570
137. Declaration of Keonna Bryant (Oct. 30, 2018)	02/13/2019	38	9571–9573
138. Declaration of Lolita Edwards (Oct. 30, 2018)	02/13/2019	38	9574–9576
139. Declaration of Loma White (Oct. 31, 2018)	02/13/2019	38	9577–9579
140. Declaration of Moises Zamora (Oct. 28, 2018)	02/13/2019	38	9580–9582
141. Declaration of Vonjelique Johnson (Oct. 28, 2018)	02/13/2019	38	9583–9585
142. Los Angeles Dept. of Child & Family Services_Redacted	02/13/2019	38–39	9586–9831
143. Psychological Evaluation of Donte Johnson by Myla H. Young, Ph.D. (June 6, 2000)	02/13/2019	39	9832–9841
144. Psychological Evaluation of Eunice Cain (Apr. 25, 1988)	02/13/2019	39	9842–9845

DOCUMENT	DATE	VOLUME	PAGE(S)
145. Psychological Evaluation of John White by Harold Kates (Dec. 28, 1993)	02/13/2019	39–40	9846–9862
146. Student Report for John White	02/13/2019	40	9863–9867
147. School Records for Eunnisha White_Redated	02/13/2019	40	9868–9872
148. High School Transcript for John White_Redacted	02/13/2019	40	9873–9874
149. School Record for John White_Redacted	02/13/2019	40	9875–9878
150. Certified Copy SSA Records_Eunice Cain_Redacted	02/13/2019	40	9879–9957
151. Declaration of Robin Pierce (Dec. 16, 2018)	02/13/2019	40	9958–9961
152. California Department of Corrections Records_Redacted (Apr. 25, 2000)	02/13/2019	40	9962–10060
153. Letter from Maxine Miller to Lisa Calandro re forensic lab report (Apr. 13, 1999)	02/13/2019	40	10061–10077
154. Letter from Lisa Calandro Forensic Analytical to Maxine Miller (Apr. 20, 1994)	02/13/2019	40	10078–10080
155. Memorandum re call with Richard Good (Apr. 29, 1999)	02/13/2019	40	10081–10082
156. Letter from Maxine Miller to Berch Henry at Metro DNA Lab (May 7, 1999)	02/13/2019	40	10083–10086
157. Letter from Maxine Miller to Richard Good (May 10, 1999)	02/13/2019	40	10087–10092

DOCUMENT	DATE	VOLUME	PAGE(S)
158. Letter from Maxine Miller to Tom Wahl (May 26, 1999)	02/13/2019	40	10093–10098
159. Stipulation and Order, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 8, 1999)	02/13/2019	40	10099–10101
160. Stipulation and Order, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154, (June 14, 1999)	02/13/2019	40	10102–10105
161. Letter from Maxine Miller to Larry Simms (July 12, 1999)	02/13/2019	40–41	10106–10110
162. Stipulation and Order, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154 (Dec. 22, 1999)	02/13/2019	41	10111–10113
163. Letter from Maxine Miller to Nadine LNU re bullet fragments (Mar. 20, 2000)	02/13/2019	41	10114–10118
164. Memorandum (Dec. 10, 1999)	02/13/2019	41	10119–10121
165. Forensic Analytical Bloodstain Pattern Interpretation (June 1, 2000)	02/13/2019	41	10122–10136
166. Trial Transcript (Volume III), State *v. Young*, District Court, Clark County, Nevada, Case No. C153461 (Sep. 7, 1999)	02/13/2019	41	10137–10215
167. Trial Transcript (Volume VII), *State v. Young*,	02/13/2019	41	10216–10332

DOCUMENT	DATE	VOLUME	PAGE(S)
District Court, Clark County, Nevada, Case No. C153461 (Sep. 13, 1999)			
168. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Washington, D.C.: The National Academies Press (2009)	02/13/2019	41	10333–10340
169. Las Vegas Metropolitan Police Dept. Forensic Lab Report of Examination (Sep. 26, 1998)	02/13/2019	41	10341–10343
170. Todd Armstrong juvenile records_Redacted	02/13/2019	41–42	10344–10366
171. Handwritten notes on Pants	02/13/2019	42	10367–10368
172. Declaration of Cassondrus Ragsdale (Dec. 16, 2018)	02/13/2019	42	10369–10371
173. Report of Dr. Kate Glywasky (Dec. 19, 2018)	02/13/2019	42	10372–10375
174. Curriculum Vitae of Dr. Kate Glywasky	02/13/2019	42	10376–10384
175. Report of Deborah Davis, Ph.D. (Dec. 18, 2018)	02/13/2019	42	10385–10435
176. Curriculum Vitae of Deborah Davis, Ph.D.	02/13/2019	42	10436–10462
177. Report of T. Paulette Sutton, Associate Professor, Clinical Laboratory Sciences (Dec. 18, 2018)	02/13/2019	42	10463–10472
178. Curriculum Vitae of T. Paulette Sutton	02/13/2019	42	10473–10486

DOCUMENT	DATE	VOLUME	PAGE(S)
179. Report of Matthew Marvin, Certified Latent Print Examiner (Dec. 18, 2018)	02/13/2019	42	10487–10494
180. Curriculum Vitae of Matthew Marvin	02/13/2019	42	10495–10501
181. Trial Transcript (Volume V), *State v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 16, 1999)	02/13/2019	42–43	10502–10614
182. Trial Transcript (Volume VI), *State v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 16, 1999)	02/13/2019	43	10615–10785
183. Las Vegas Metropolitan Police Dept. Interview of Tod Armstrong_Redacted (Aug. 17, 1998)	02/13/2019	43	10786–10820
184. Las Vegas Metropolitan Police Dept. Interview of Tod Armstrong _Redacted (Aug. 18, 1998)	02/13/2019	43	10821–10839
185. Las Vegas Metropolitan Police Dept. Interview of Charla Severs_Redacted (Aug. 18, 1998)	02/13/2019	43–44	10840–10863
186. Las Vegas Metropolitan Police Dept. Interview of Sikia Smith_Redacted (Aug. 17, 1998)	02/13/2019	44	10864–10882
187. Las Vegas Metropolitan Police Dept. Interview of Terrell Young_Redacted (Sep. 2, 1998)	02/13/2019	44	10883–10911
188. Declaration of Ashley Warren (Dec. 17, 2018)	02/13/2019	44	10912–10915

DOCUMENT	DATE	VOLUME	PAGE(S)
189. Declaration of John Young (Dec. 10, 2018)	02/13/2019	44	10916–10918
190. Brief of Plaintiffs-Appellants, *Abdur'rahman v.* Parker, Tennessee Supreme Court, Nashville Division, Case No. M2018-10385-SC-RDO-CV	02/13/2019	44–45	10919–11321
191. Sandoz' Inc.'s Motion for Leave Pursuant to NRAP 29 to Participate as Amicus Curiae in Support of Real Parties in Interest, *Nevada v. The Eighth Judicial Disrict Court of the State of Nevada*, Nevada Supreme Court, Case No. 76485	02/13/2019	45	11322–11329
192. Notice of Entry of Order, *Dozier v. State of Nevada*, District Court, Clark County, Nevada, Case No. 05C215039	02/13/2019	45	11330–11350
193. Declaration of Cassondrus Ragsdale (2018.12.18)	02/13/2019	45	11351–11353
194. Affidavit of David B. Waisel, *State of Nevada*, District Court, Clark County, Case No. 05C215039 (Oct. 4, 2018)	02/13/2019	45–46	11354–11371
195. Declaration of Hans Weding (Dec. 18, 2018)	02/13/2019	46	11372–11375
196. Trial Transcript (Volume IX), *State v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 18, 1999)	02/13/2019	46	11376–11505

DOCUMENT	DATE	VOLUME	PAGE(S)
197. Voluntary Statement of Luis Cabrera (August 14, 1998)	02/13/2019	46	11506–11507
198. Voluntary Statement of Jeff Bates (handwritten)_Redacted (Aug. 14, 1998)	02/13/2019	46	11508–11510
199. Voluntary Statement of Jeff Bates_Redacted (Aug. 14, 1998)	02/13/2019	46	11511–11517
200. Presentence Investigation Report, State's Exhibit 236, *State v. Young*, District Court, Clark County, Nevada Case No. C153461_Redacted (Sep. 15, 1999)	02/13/2019	46	11518–11531
201. Presentence Investigation Report, State's Exhibit 184, *State v. Smith*, District Court, Clark County, Nevada Case No. C153624_Redacted (Sep. 18, 1998)	02/13/2019	46	11532–11540
202. School Record of Sikia Smith, Defendant's Exhibit J, *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11541–11542
203. School Record of Sikia Smith, Defendant's Exhibit K, *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11543–11544

DOCUMENT	DATE	VOLUME	PAGE(S)
204. School Record of Sikia Smith, Defendant's Exhibit L, *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11545–11546
205. Competency Evaluation of Terrell Young by Greg Harder, Psy.D., Court's Exhibit 2, *State v. Young*, District Court, Clark County, Nevada Case No. C153461 (May 3, 2006)	02/13/2019	46	11547–11550
206. Competency Evaluation of Terrell Young by C. Philip Colosimo, Ph.D., Court's Exhibit 3, *State v. Young*, District Court, Clark County, Nevada Case No. C153461 (May 3, 2006)	02/13/2019	46	11551–11555
207. Motion and Notice of Motion in Limine to Preclude Evidence of Other Guns Weapons and Ammunition Not Used in the Crime, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Oct. 19, 1999)	02/13/2019	46	11556–11570
208. Declaration of Cassondrus Ragsdale (Dec. 19, 2018)	02/13/2019	46	11571–11575
209. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit A: Affidavit of Theresa Knight, *State v. Johnson*,	02/13/2019	46	11576–11577

DOCUMENT	DATE	VOLUME	PAGE(S)
District Court, Clark County, Nevada Case No. C153154, June 5, 2005			
210. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit B: Affidavit of Wilfredo Mercado, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154, June 22, 2005	02/13/2019	46	11578–11579
211. Genogram of Johnson Family Tree	02/13/2019	46	11580–11581
212. Motion in Limine Regarding Referring to Victims as "Boys", *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154	02/13/2019	46	11582–11585
213. Declaration of Schaumetta Minor, (Dec. 18, 2018)	02/13/2019	46	11586–11589
214. Declaration of Alzora Jackson (Feb. 11, 2019)	02/13/2019	46	11590–11593
Exhibits in Support of Petitioner's Motion for Leave to Conduct Discovery	12/13/2019	49	12197–12199
1. *Holloway v. Baldonado*, No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, Nevada, filed Aug. 1, 2007	12/13/2019	49	12200–12227
2. Handwritten letter from Charla Severs, dated Sep. 27, 1998	12/13/2019	49	12228–12229

DOCUMENT	DATE	VOLUME	PAGE(S)
Exhibits in Support of Reply to State's Response to Petition for Writ of Habeas Corpus	12/13/2019	47	11837–11839
215. *Holloway v. Baldonado*, No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, Aug. 1, 2007	12/13/2019	47–48	11840–11867
216. *Holloway v. Baldonado*, No. A498609, Opposition to Motion for Summary Judgment Filed by Defendants Stewart Bell, David Roger, and Clark County, District Court of Clark County, filed Jan. 16, 2008	12/13/2019	48–49	11868–12111
217. Letter from Charla Severs, dated Sep. 27, 1998	12/13/2019	49	12112–12113
218. Decision and Order, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed Apr. 18, 2000	12/13/2019	49	12114–12120
219. State's Motion to Disqualify the Honorable Lee Gates, State *of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed Apr. 4, 2005	12/13/2019	49	12121–12135
220. Affidavit of the Honorable Lee A. Gates, *State of Nevada v. Johnson*, Case No. C153154, District	12/13/2019	49	12136–12138

DOCUMENT	DATE	VOLUME	PAGE(S)
Court of Clark County, filed Apr. 5, 2005			
221. Motion for a New Trial (Request for Evidentiary Hearing), *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed June 23, 2000	12/13/2019	49	12139–12163
222. Juror Questionnaire of John Young, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, dated May 24, 2000	12/13/2019	49	16124–12186
Findings of Fact, Conclusions of Law and Order, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	10/08/2021	49	12352–12357
Minute Order (denying Petitioner's Post–Conviction Writ of Habeas Corpus, Motion for Discovery and Evidentiary Hearing), *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/15/2019	49	12264–12266
Minutes of Motion to Vacate Briefing Schedule and Strike Habeas Petition	07/09/2019	47	11710
Motion and Notice of Motion for Evidentiary Hearing, *Johnson v.*	12/13/2019	49	12231–12241

DOCUMENT	DATE	VOLUME	PAGE(S)
Gittere, et al., Case No. A–19–789336–W, Clark County District Court, Nevada			
Motion and Notice to Conduct Discovery, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	12/13/2019	49	12187–12196
Motion for Leave to File Under Seal and Notice of Motion	02/15/2019		11600–11602
Motion in Limine to Prohibit Any References to the First Phase as the "Guilt Phase"	11/29/1999	2	302–304
Motion to Vacate Briefing Schedule and Strike Habeas Petition, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/16/2019	46–47	11609–11612
Motion to Vacate Briefing Schedule and Strike Habeas Petition, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/23/2019	47	11621–11624
Motion to Withdraw Request to Strike Petition and to Withdraw Request for Petition to be Stricken as Not Properly Before the Court), *Johnson v. Gittere, et al.*, Case No. A–19–789336–	06/26/2019	47	11708–11709

DOCUMENT	DATE	VOLUME	PAGE(S)
W, Clark County District Court, Nevada			
Notice of Appeal, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	11/10/2021	50	12366–12368
Notice of Entry of Findings of Fact, Conclusions of Law and Order, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	10/11/2021	49–50	12358–12364
Notice of Hearing (on Discovery Motion), *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	12/13/2019	49	12330
Notice of Objections to Proposed Order, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/02/2021	49	12267–12351
Notice of Supplemental Exhibit 223, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/11/2019	49	11242–12244
223. Declaration of Dayvid J. Figler, dated Feb. 10, 2020	02/11/2019	49	12245–12247
Opposition to Defendants' Motion in Limine to Prohibit	12/02/1999	2	305–306

DOCUMENT	DATE	VOLUME	PAGE(S)
Any References to the First Phase as the "Guilt Phase"			
Opposition to Motion in Limine to Preclude Evidence of Other Guns, Weapons and Ammunition Not Used in the Crime	11/04/1999	2	283–292
Opposition to Motion to Vacate Briefing Schedule and Strike Habeas Petition, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/28/2019	47	11625–11628
Petition for Writ of Habeas Corpus, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/13/2019	24–25	5752–6129
Post–Evidentiary Hearing Supplemental Points and Authorities	06/22/2005	22	5472–5491
Reply to Opposition to Motion to Vacate Briefing Schedule and Strike Habeas Petition	06/20/2019	47	11705–11707
Reply to State's Response to Petition for Writ of Habeas Corpus	12/13/2019	47	11718–11836
State's Response to Defendant's Petition for Writ of Habeas Corpus (Post–Conviction),	05/29/2019	47	11629–11704

DOCUMENT	DATE	VOLUME	PAGE(S)
Johnson v. Gittere, et al., Case No. A–19–789336–W, Clark County District Court, Nevada			
Stipulation and Order to Modify Briefing Schedule, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	09/30/2019	47	11711–11714
Stipulation and Order to Modify Briefing Schedule, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	11/22/2019	47	11715–11717
Transcript of All Defendant's Pending Motions	03/02/2000	2	416–430
Transcript of Argument to Admit Evidence of Aggravating Circumstances	05/03/2004	12	2904–2958
Transcript of Argument: Petition for Writ of Habeas Corpus (All Issues Raised in the Petition and Supplement)	12/01/2011	22–23	5498–5569
Transcript of Arguments	04/28/2004	12	2870–2903
Transcript of Decision: Procedural Bar and Argument: Petition for Writ of Habeas Corpus	07/20/2011	22	5492–5497
Transcript of Defendant's Motion for Leave to File Under	02/25/2019	46	11594–11599

DOCUMENT	DATE	VOLUME	PAGE(S)
Seal, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada			
Transcript of Defendant's Motion to Reveal the Identity of Informants and Reveal Any Benefits, Deals, Promises or Inducements; Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution; Defendant's Motion to Compel the Production of Any and All Statements of Defendant; Defendant's Reply to Opposition to Motion in Limine to Preclude Evidence of Other Guns, Weapons, Ammunition; Defendant's Motion in Limine to Preclude Evidence of Witness Intimidation	11/18/1999	2	293–301
Transcript of Evidentiary Hearing	05/17/2004	12	2959–2989
Transcript of Evidentiary Hearing	06/14/2005	22	5396–5471
Transcript of Evidentiary Hearing	04/04/2013	23	5570–5673
Transcript of Evidentiary Hearing	04/11/2013	23	5674–5677

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript of Evidentiary Hearing	06/21/2013	23	5678–5748
Transcript of Evidentiary Hearing	09/18/2013	23–24	5749–5751
Transcript of Excerpted Testimony of Termaine Anthony Lytle	05/17/2004	12	2990–2992
Transcript of Jury Trial – Day 1 (Volume I)	06/05/2000	2–4	431–809
Transcript of Jury Trial – Day 2 (Volume II)	06/06/2000	4–5	810–1116
Transcript of Jury Trial – Day 3 (Volume III)	06/07/2000	5–7	1117–1513
Transcript of Jury Trial – Day 4 (Volume IV)	06/08/2000	7–8	1514–1770
Transcript of Jury Trial – Day 5 (Volume V)	06/09/2000	8	1771–1179
Transcript of Jury Trial – Penalty – Day 1 (Volume I) AM	04/19/2005	12–13	2993–3018
Transcript of Jury Trial – Penalty – Day 1 (Volume I) PM	4/19/2005[1]	13	3019–3176
Transcript of Jury Trial – Penalty – Day 10 (Volume X)	05/02/2005	20–21	4791–5065

[1] This transcript was not filed with the District Court nor is it under seal.

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript of Jury Trial – Penalty – Day 10 (Volume X) – Exhibits	05/02/2005	21	5066–5069
Transcript of Jury Trial – Penalty – Day 11 (Volume XI)	05/03/2005	21–22	5070–5266
Transcript of Jury Trial – Penalty – Day 12 (Volume XII)	05/04/2005	22	5267–5379
Transcript of Jury Trial – Penalty – Day 12 (Volume XII) – Deliberations	05/04/2005	22	5380–5383
Transcript of Jury Trial – Penalty – Day 13 (Volume XIII)	05/05/2005	22	5384–5395
Transcript of Jury Trial – Penalty – Day 2 (Volume I) AM	04/20/2005	13	3177–3201
Transcript of Jury Trial – Penalty – Day 2 (Volume II) PM	04/20/2005	13–14	3202–3281
Transcript of Jury Trial – Penalty – Day 3 (Volume III) PM	04/21/2005	14–15	3349–3673
Transcript of Jury Trial – Penalty – Day 3 (Volume III–A) AM	04/21/2005	14	3282–3348
Transcript of Jury Trial – Penalty – Day 4 (Volume IV) AM – Amended Cover Page	04/22/2005	16	3790–3791
Transcript of Jury Trial – Penalty – Day 4 (Volume IV) PM	04/22/2005	15–16	3674–3789

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript of Jury Trial – Penalty – Day 4 (Volume IV–B)	04/22/2005	16	3792–3818
Transcript of Jury Trial – Penalty – Day 5 (Volume V) PM	04/25/2005	16	3859–3981
Transcript of Jury Trial – Penalty – Day 5 (Volume V–A)	04/25/2005	16	3819–3858
Transcript of Jury Trial – Penalty – Day 6 (Volume VI) PM	04/26/2005	17–18	4103–4304
Transcript of Jury Trial – Penalty – Day 6 (Volume VI–A) PM	04/26/2005	16–17	3982–4102
Transcript of Jury Trial – Penalty – Day 7 (Volume VII–PM)	04/27/2005	18	4382–4477
Transcript of Jury Trial – Penalty – Day 7 (Volume VII–A)	04/27/2005	18	4305–4381
Transcript of Jury Trial – Penalty – Day 8 (Volume VIII–C)	04/28/2005	18–19	4478–4543
Transcript of Jury Trial – Penalty – Day 9 (Volume IX)	04/29/2005	19–20	4544–4790
Transcript of Jury Trial – Penalty Phase – Day 1 (Volume I) AM	06/13/2000	8	1780–1908
Transcript of Jury Trial – Penalty Phase – Day 1 (Volume II) PM	06/13/2000	8–9	1909–2068

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript of Jury Trial – Penalty Phase – Day 2 (Volume III)	06/14/2000	9–10	2069-2379
Transcript of Jury Trial – Penalty Phase – Day 3 (Volume IV)	06/16/2000	10	2380–2470
Transcript of Material Witness Charla Severs' Motion for Own Recognizance Release	01/18/2000	2	414–415
Transcript of Motion for a New Trial	07/13/2000	10	2471–2475
Transcript of Petition for Writ of Habeas Corpus and Setting of 1. Motion for Leave and 2. Motion for Evidentiary Hearing, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/13/2020	49	12249–12263
Transcript of Preliminary Hearing	10/12/1999	2	260–273
Transcript of State's Motion to Permit DNA Testing	09/02/1999	2	252 – 254
Transcript of State's Motion to Videotape the Deposition of Charla Severs	10/11/1999	2	255–259
Transcript of Status Check: Filing of All Motions (Defendant's Motion to Reveal	10/21/1999	2	274–282

DOCUMENT	DATE	VOLUME	PAGE(S)
the Identity of Informants and Reveal Any Benefits, Deals, Promises or Inducements; Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution; Defendant's Motion to Compel the Production of Any and All Statements of Defendant; State's Motion to Videotape the Deposition of Charla Severs; Defendant's Motion in Limine to Preclude Evidence of Other Crimes; Defendant's Motion to Reveal the Identity of Informants and Reveal any Benefits, Deals' Defendant's Motion to Compel the Production of any and all Statements of the Defendant			
Transcript of the Grand Jury, *State v. Johnson*, Case No. 98C153154, Clark County District Court, Nevada	09/01/1998	1–2	001–251
Transcript of Three Judge Panel – Penalty Phase – Day 1 (Volume I)	07/24/2000	10–11	2476–2713
Transcript of Three Judge Panel – Penalty Phase – Day 2 and Verdict (Volume II)	07/26/2000	11–12	2714–2853

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript Re: Defendant's Motions	01/06/2000	2	307–413
Verdict Forms – Three Judge Panel	7/26/2000	12	2854–2869

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically filed the foregoing Appendix with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

Alexander G. Chen
Chief Deputy District Attorney
Clark County District Attorney's Office

/s/ Celina Moore
Celina Moore
An employee of the Federal
Public Defender's Office

A commission was convened to study lethal injection from scratch, and Inglis was a member. The group consulted with, among others, anesthesiologists and a physician. XL 1570. Based on its research, the group put forward the idea for a 1-drug protocol using a barbiturate (eg., sodium thiopental or pentobarbital), as Plaintiffs urged here. In the course of the group's deliberations, Inglis, herself, provided an article that discussed

> the risk under the three drug protocol if the inmate is not totally unconscious when the second drug is administered:
>
> ". . . when potassium chloride is used as an additional third chemical, pancuronium bromide serves no real purpose other than to keep the inmate still while potassium chloride kills. Therefore, pancuronium bromide creates the serene appearance that witnesses often describe [] because the inmate is totally paralyzed. The calm scene that this paralysis ensures despite the fact that the inmate may be conscious and suffering is, is only one of the many controversial aspects of this drug combination."

Ex. 108, *Harbison v. Little, 411 F.Supp.2d 872*, at Vol. 11, p. 1537 (brackets added).

Hence, Inglis was personally aware since 2007 that (1) potassium chloride is a painfully torturous chemical; (2) a person being executed will experience and suffer that painful torture if he is not rendered fully unconscious and insensate; and (3) that a paralytic gives an appearance of serenity that masks the torture that is actually occurring. TE XL, p. 1580 (Inglis acknowledges that a person has to be unconscious before proceeding with the paralytic and potassium chloride components of a 3-drug execution); p. 1585 (Inglis recalls testifying in *Harbison* that "the second and third drugs, without adequate anesthesia would result in a horrible, painful and terrifying death.").

Inglis was not only aware of the risk of pain inherent in a 3-drug lethal injection protocol from having participated in the 2007 execution working group. In her capacity as attorney for TDOC, she was also aware that Tennessee's lethal injection protocol was found unconstitutional by both a federal court in *Harbison v. Little*, 411 F.Supp.2d 872 (M.D.TN. 2007), and a Tennessee Chancery Court in *West v. Ray*, No. 10-1675-I (Davidson Cty. Chancery Ct., Nov. 22, 2010). Ex. 108, *Harbison v. Little,* at Vol. 11, p. 1534; Ex. 109, *West v. Ray*, No. 10-1675-I, at Vol. 11, p. 1567. In both instances, the courts ruled that the protocol created a risk that a person being executed would not be adequately anesthetized not to experience the suffocation caused by the paralytic or the chemical burn caused by the potassium chloride.

So when the pharmacy with which TDOC contracted with to provide chemicals for killing inmates advised TDOC that "[b]eing a benzodiazepine, [Midazolam] does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs," Inglis already knew the actual and legal risks that were implicated. Ex. 114, *Email dated September 7, 2017*, at Vol. 11, p. 1628. And yet, she did nothing.

She did not contact the pharmacy. She did not contact any medical professionals to get further information or insight. There were no meetings. TE, Vol. XL, pp. 1627, 1631-32. From her perspective as general counsel and deputy commissioner for administration, it was "in the commissioner's court." She had delegated the matter or identifying and working a chemical supplier for lethal

injection to a member of her staff, and saw herself as "in the middle" – between that staff-member and the commissioner. TE, Vol. XL, pp. 1627, 1631-32. So Inglis left the matter of the risk of unconstitutional pain and suffering there, between those two. TE, Vol. XL, p. 1635.

b. When the pharmacy that Commissioner Parker retained to find chemicals for executions informed him that TDOC's choice of chemicals risked severe pain to persons killed, Parker skipped over scientists and medical professionals to consult with prison administrators who had used Midazolam.

Tony Parker was appointed commissioner of TDOC in 2016. XXXIV 1101. He has spent 35 years – his entire professional career – as a TDOC employee. XXXIV 1102. In that time he has served as a warden, regional administrator, assistant commissioner of prisons. XXXIV 1103-05. He never held a position at Riverbend Maximum Security Institution, where death row is housed and executions are carried out, nor did he participate in or receive training to conduct an execution. XXXIV 1104.

It is the Commissioner's responsibility to decide what the Tennessee lethal injection protocol will be. XXXVI 1159. He testified that he wants to know enough information to "satisfy [himself] that the [Tennessee] protocol is adequate and constitutional." XXXVI 1161. This includes knowing judgments courts have made about previous protocols. To this end Debbie Inglis, and her staff play a big part in the protocol process, Parker relies on her. XXXVI 1152, 1162. Indeed, he testified that Ms. Inglis "has been part of an execution where Midazolam was used." XXXVI 1172.

The proof tended to suggest that Ms. Inglis does not know that the Commissioner relies on her to keep him informed. Despite whatever efforts she has made to bring the Commissioner up to speed, the proof demonstrated that he knows very little of the history of judicial review of Tennessee's execution protocols. He did not know that a federal court had found the 3-drug protocol unconstitutional because of the risk of inadequate anesthetization. XXXVI 1190. He did not know that Governor Bredesen had issued execution date reprieves and rescinded the Tennessee execution protocol because of incoherencies and errors. XXXVI 1180. He did not know that the Davidson County Chancery Court found the 3-drug protocol to be unconstitutional in 2010, after it had been used to execute two people. XXXVI 1204. Parker did not know any of the risks of suffering that had been attributed to using a paralytic throughout Tennessee lethal injection litigation. Parker was similarly unaware of that same issue in this litigation. He did not know that, or why, Defendants' answer to the amended complaint denied that vecuronium bromide and potassium chloride, without adequate anesthetization, would cause severe pain and suffering. XXXVI 1196-97.

Nevertheless, Parker knew that the pharmacy with which he eventually signed a contract and obligated the State of Tennessee to pay, believed that the protocol that he chose, which incorporated Midazolam, posed a risk of pain and suffering to the people TDOC puts to death. Parker saw the email from the pharmacy and understood its implications for Tennessee executions. XXXVI 1227-28; Ex. 114, *Email dated September 7, 2017*, at Vol. 11, p. 1628.

Parker testified that he did not discuss the content of the email with the pharmacy that sent it because he did not know him. XXXVI 1228. Parker's own staff recommended that pharmacy, and Parker trusted it, as a source for lethal injection chemicals, information about their availability, and eventually their knowledge of how to specially compound the chemicals. It is inconceivable why Parker did not trust their assessment of the risks presented by the chemical combination that he chose, or even their recommendation of how to mitigate those risks.

Instead, Parker relied on the word of other corrections officials who had experience in executions that incorporated Midazolam. XXXVI 1230, 32. These were people with no professional biochemical knowledge of Midazolam and its physiological effects in an execution. Presumably, they were able to assure Commissioner Parker that in executions where they had seen Midazolam used, the person ended up dead. However, almost every jurisdiction that uses Midazolam with which Parker could have consulted also uses a paralytic. Parker acknowledged that a paralytic, like vecuronium bromide or pavulon, would block any indications of distress or suffering from a person being executed. Therefore, it was extremely unlikely that any of the corrections administrators whom Parker consulted could have seen any problems in a Midazolam execution.

Parker got the information he wanted from those other corrections officials. Based on his consultations with them, he believes that Midazolam will render a person unable to feel pain and unaware of the suffocation and chemical burn caused

by vecuronium bromide and potassium chloride in the Tennessee lethal injection protocol. XXXVI 1235-36. Though Plaintiffs were able to produce a pharmacologist, a medical doctor and clinical pharmacologist with 35 years of experience researching Midazolam, and the head of a department of anesthesiology for a university hospital who unanimously agreed that medical science demonstrates that Midazolam is incapable of rendering a person insensate to that degree of noxious stimulus, Commissioner Parker's prison administrator colleagues convinced him that it can. XXXVI 123.

This is the chain of authority for the means by which Tennessee puts people to death: Commissioner Parker relied on Deputy Commissioner Inglis in selecting a lethal injection protocol. Deputy Commissioner Inglis delegated the task to one of her staff. The staff person worked with a pharmacy that Commissioner Parker eventually contracted. The pharmacy that Commissioner Parker contracted told Deputy Commissioner Inglis's delegee that a Midazolam protocol made it likely that executed persons would suffer. The staff person gave that information to Commissioner Parker, who in turn asked corrections administrators from other states their opinions.

Defendants' cannot evade the reality of the substantial risk of severe pain that the Tennessee protocol creates by dumping that knowledge on someone else's desk – a subordinate or a delegee or a contracted agent – any more than they can negate the science that proves that risk with reports that inmates injected with a

paralytic exhibited no signs of suffering after they were sedated with Midazolam. Defendants know the risk. It is real, and it is unconstitutional.

c Where TDOC passed up opportunities to obtain the active pharmaceutical ingredient for pentobarbital, that it may be "unavailable" for purposes of this litigation is a circumstance of their own making.

That Defendants do not have pentobarbital is a circumstance of their own making. In 2014, TDOC signed a contract with a pharmacy that could and did obtain the active pharmaceutical ingredient for pentobarbital. XL 1601. That API was available to use in executions when this Court upheld the previous 1-drug protocol that called for pentobarbital. As well, TDOC could have stockpiled the API at its pharmacy at the DeBerry special needs facility. Both Commissioner Parker and Deputy Commissioner Inglis testified to this. XXXVI 1211; XL 1615.

Once the API that TDOC acquired during the course of the *West v. Schofield* litigation expired, Defendants renewed their search for pentobarbital. They found 10 pharmacies that had pentobarbital available; the only issue was the sufficiency of the amount that those pharmacies could provide. XXXVI 1348-49. Ex. 105, *PowerPoint Presentation*, at Vol. 11, p. 1477. TDOC's own research found access to pentobarbital.

Defendants' claim that pentobarbital is not available is based on their own manipulation of resources and should not be credited by this Court.

d. Testimony of Warden Tony Mays

Tony Mays is Warden of Riverbend Maximum Security Institution. The Tennessee Lethal Injection Manual makes it his responsibility, among others, to

select execution team members, select a person to serve as Executioner, to order the Executioner to proceed with the execution, and to perform the "consciousness check" on an inmate during the course of an execution. Ex. 2, *7/5/18 Lethal Injection Procedures Manual*, at Vol. 1, p. 119; Vol. 2, p. 172. Mays characterized the lethal injection manual as a document that "gets into every part that is involved in the lethal execution stemming from certain individuals that play a part in it from day one until the final moment." XXIII 942. Mays testified that the Manual is the only instruction that he has for overseeing and carrying out an execution by lethal injection. XXXIII 942.

However, Mays's testimony demonstrates that there are critical parts of executions that the manual does not "get into." Furthermore, Mays's testimony reveals that Defendants – and TDOC – rather than deliberately developing a protocol that would comport with the Eighth Amendment and protect inmates from torturous execution, worked on the fly to cobble together a protocol. Defendants relied on Plaintiffs' litigation to identify constitutional infirmities and continued to nip and tuck up to and after the hearing in this case began. The Lethal Injection Manual might as well be a stack of sticky-notes.

Mays first received the July 5, 2018, version of the Manual on the morning of the same day that it was issued. XXXIII 994. He did not receive advance notice of any of the changes – reassigning responsibility for acquiring the lethal injection chemical from him to the commissioner, elimination of the 1-drug protocol, storage and preparation of compounded lethal injection chemicals, adding the trapezius

pinch to the "consciousness assessment," – nor was he consulted on any of them. XXXIII 988, 995. Neither was the reasoning for any of these changes explained to him. XXXIII 988.

1 Mays is responsible for selecting and training execution staff and supervising executions.

The Manual charges Warden Mays to hold a class annually where the Manual is "reviewed and clearly understood" by all execution team members. It is also the Warden's responsibility to supervise the Execution Team's simulation of an execution day including all execution procedures for at least 1 hour per month. Ex. 2, *7/5/18 Manual*, at Vol. 2, p. 138. The Manual requires that "All training that occurs is documented. The documentation includes the times and dates of the training, the participants, and the training content." Ex. 2, *7/5/18 Manual*, at Vol. 2, p. 138. Mays testified that the lethal injection manual is the only source of instruction that he has available for training those TDOC staff who carry out executions by lethal injection. XXXIII 942-43.

Failure to abide by these requirements constitutes a deviation from the Manual. TDOC's failure to adhere to the requirements of the Manual is evidence that the Protocol creates a substantial risk of serious harm for the very reason that there can be no presumption that its procedures will be carried out.

2. The Manual is Mays's only source of instruction for executions, so where it does not say what to do if an inmate shows signs of suffering, and Mays has no training for such a scenario, his plan for that situation is simple: keep going with the execution.

Mays testified that the lethal injection manual "gets into every part that is involved in the lethal execution." XXIII 942. This may be true, as long as an execution proceeds exactly according to the Manual. There is no provision, and hence no training (because the Manual is the guide for all training), for what actions should be taken if an inmate appears to be suffering as has occurred in other jurisdictions that use Midazolam as a sedative for executions.

The Manual anticipates four problems occurring in an execution: that the IV line cannot be inserted into a vein; that the IV apparatus by which the lethal injection chemical is delivered into a person does not work; that the person being put to death responds to the "consciousness assessment" that the Warden performs after the Midazolam has been injected; or that the person is not dead when the physician checks at the conclusion of all of the injections. Ex. 2, *7/5/18 Manual*, at Vol. 3, p. 175. If a person being put to death responds to the "consciousness assessment" measures, the warden will instruct the Executioner to administer a second set of syringes full of Midazolam.

Plaintiffs' experts were unanimous that a second set will render an inmate any more insensate than the first set precisely because Midazolam is biochemically incapable of rendering a person insensate to noxious stimuli such as burning or suffocation. Plaintiffs' experts also agreed that any additional sedative – versus anesthetic – effect from a second round of Midazolam injections would be delayed because of the pharmacokinetics of the drug which would require multiple

circulations through the circulatory system in order to buffer the pH to a level where the drug's molecular structure would become operative.

When the warden was asked if he had heard of any of the Midazolam executions where the person being executed writhed, coughed, opened his eyes, and strained against the gurney restraints like the ones in Arkansas, Florida, and Alabama of which Plaintiffs presented evidence, Mays stated that he had not. XXXIV 1069-72. He testified that the only instruction he had for if such circumstances occurred in a Tennessee execution was what is in the Manual.

There are no instructions in the Manual for what to do if a person being put to death exhibits signs of suffering or painful reaction to the lethal drugs. Thus, the warden would be left to figure out what to do. Mays testified that if he saw such signs of suffering or torture after he had performed the consciousness check and instructed the Executioner to proceed, he would simply let the execution go forward without regard for signs of the inmate's suffering. XXXIV 1074-75, 1079. Commissioner Parker and Deputy Commissioner Inglis affirmed that what to do in such a situation is the warden's decision. XXXVI 1248-49; Vol. XL, p. 1646.

For this reason, the bare terms of the Protocol, by the <u>omission</u> of information – what the warden should do if an a person being executed shows signs that he is sensate and responding to noxious effects of the second and third chemicals – create a risk that a person being executed will endure that pain. The warden does not have any instruction on what to do, and so his plan is simply to watch an inmate suffer as he dies.

3. Mays contradicted his testimony that everything regarding lethal injection executions proceeds according to the protocol.

Mays testified that the Protocol is the only instruction he has for carrying out executions and that he follows it to the letter. His testimony, however, revealed multiple instances where he – or more senior officials in TDOC – deviate from or violate the procedures set forth in the Manual.

4. Mays and TDOC violated the Manual's requirements regarding documentation of training, forcing Plaintiffs and the public to just "take their word for it" that the people carry out killings on behalf of the State have been trained.

The Manual requires that "All training that occurs is documented. The documentation includes the times and dates of the training, the participants, and the training content." Ex. 2, *7/5/18 Manual*, at Vol. 2, p. 138. TDOC Deputy Commissioner and General Counsel Debbie Inglis also testified that all of the training that occurs in connection with executions is to be documented. X 1574. Yet Defendants either have not followed that requirement or failed to produce documentation of several critical trainings that they asserted occurred, which would have been responsive to Plaintiff's discovery requests.

A. There is no documentation of Mays's alleged last-minute training on how to assess a person being executed for consciousness before the lethal chemicals are injected.

In his deposition on June 4, 2018, Mays indicated that he had not received any training on how to perform the consciousness assessment in the then-current manual. That assessment consisted of shaking the person being executed and calling his name. The July 5, 2018, Manual added a requirement that the warden

assess the consciousness of the person being put to death by "grabbing the trapezius muscle of the shoulder with the thumb and two fingers and twisting." Ex. 2, *7/5/18 Manual*, at Vol. 2, p. 172. This is a specialized procedure that requires instruction to know what to look for on the body as responsive movement to indicate that a person is sensate, and would be interfered with by the lethal injection gurney straps. XLIII 1922-24. Mays testified at trial that on July 5, the same day that he was given the new Protocol with no warning or explanation for its changes and one month before Billy Irick was to be executed, a physician trained him how to perform the trapezius pinch. May could not provide any documentation of the training, which is required by the Manual. The Chancellor would not allow Plaintiffs' counsel to inquire into the qualifications of the person.

Mays thus testified falsely when he said that his only instruction for carrying out an execution was what is written in the manual, and he failed to follow the requirement that his training be documented.

B. Mays does not know whether the executioner has been trained as the Protocol requires.

The Executioner is responsible for injecting the chemicals into the IV apparatus that will deliver them into the body of a person being put to death. Ex. 2, *7/5/18 Lethal Injection Manual*, at Vol. 2, p. 172. If it is not done properly, it can cause infiltration or dislodge the IV catheter, as occurred in the horribly flawed execution of Clayton Lockett. Ex. 47, *Oklahoma Department of Public Safety Executive Summary Case No. 14--18951*, at Vol. 7, p. 830 *et seq.* Thus, this training is critical to an execution. Presumably for this reason, the Manual requires

that "The Executioner receives initial and periodic instruction from a qualified medical professional." Ex. 2, *7/5/18 Lethal Injection Manual*, at Vol. 1. p. 138.

Warden Mays testified that he did not know whether either of the people whom he had selected to fill the role of executioner had received any such training. Mays, who is not a qualified medical professional, had not trained them. XXXIV 1054. He had not seen any documentation of their receiving such training. He only knew that they had participated in practice executions using saline solution.

But even Defendants' counsel acknowledged that there is a difference between practicing with saline and knowing how to properly inject lethal injection chemicals. When Plaintiffs' counsel questioned Warden Mays about how long it takes to actually inject a syringe of lethal injection solution into the IV apparatus, Defendants' counsel objected saying the practice was with saline and therefore the Warden's answer was not probative. XXXIV 1052. The distinction in solutions – their flow through the IV apparatus and the catheter into a person's vein – is critical. The attorney general recognized this, but Defendants' do not.

They have failed to provide the training to the executioner that is required by the Manual. Their failure to do so is proof that the Manual does not provide for an execution that comports with the Eighth Amendment.

C. Mays does not have the instructions from the pharmacy on how to handle, store, prepare, and administer the lethal injection chemicals that are essential to practicing an execution.

Warden Mays testified that he instructs the execution team to practice according to the terms of the Manual, and that it is the only guide they have for

carrying out an execution. XXXIII 943, 967. But the Manual is incomplete and where it has gaps in information, the execution team cannot practice what they will be expected to do when putting a person to death.

The Manual requires members of the execution team to prepare the lethal injection chemicals "in accordance with the directions of the Pharmacy with which the Department has a Pharmacy Services Agreement." Ex. 2, *7/5/18 Lethal Injection Manual*, at Vol. 1, p. 145. But Mays testified he had not seen these instructions and did not have any information that anyone on the execution team had seen them. XXXIII 1020-21, 1023; XXXIV 1040-42. Thus, the execution team practiced without full instructions on how to prepare the lethal injection chemical. By the warden's testimony, executions go the way practice goes.

The omissions from the Manual prove its inadequacy to provide for an execution that comports with the protections of the Eighth Amendment. Defendants' failure to comply with the terms of the Protocol that they themselves developed is proof that they cannot be presumed to carry out an execution according to its terms, and therefore those terms should not be credited.

5. The Manual does not instruct, and Mays cannot explain why, the timing of the syringe injections changed after the 7/5/18 Manual was issued.

On multiple occasions in the spring of this year, after the January 2018 protocol was issued, Mays supervised practice execution sessions with the execution team. The team practiced the electrocution protocol and both lethal injection protocols. The last practice of the 1-drug pentobarbital protocol for which TDOC

provided records occurred in January 2018, two weeks after the 2-protocol manual was issued. Ex. 96, Vol. 9, p. 1218.

When the team practiced the three-drug lethal injection execution protocol, each syringe was injected 1 minute apart. Ex. 96, *RMSI execution practice records,* at Vol. 9, p. 1232; Ex. 97, *RMSI execution practice records,* at Vol. 9, pp. 1301, 1303; Ex. 98, *RMSI execution practice records,* at Vol. 9, p. 1320. XXXIII 967, 971-72. This order was not instructed in the January 2018 Manual.

Mays testified that he and a second person led a class for the execution team to review the manual as required by the protocol on July 5, 2018, the same day that the general counsel delivered the new Manual to him. TE, Vol XXXIII, p. 993; Ex. 2, *Tennessee Lethal Injection Manual*, p. 138. The execution team also practiced a lethal injection execution on that day. Ex.99, *7/5/18 Lethal Injection Chemical Administration Record*, p. 1329. However, Mays testified that he, himself, did not instruct the practice execution. TE, Vol XXXIII, p. 1015. At that training, additional time was added between the injections. What had been an 8-minute process became a 14 minute process. A minute was added between syringes two and three (Midazolam #2 and saline #1); between syringes four and five (vecuronium bromide #1 and #2); between syringes six and seven (saline #2 and potassium chloride #1); and between syringes eight and nine (potassium chloride #2 and saline #3). Ex. 99, *RMSI 7/5/18 execution practice records*, at Vol. 9, p. 1329. Warden Mays testified that he did not know why the extra time was added, and that it is not instructed in the lethal injection manual. TE, Vol. XXXIII, p. 1014.

Warden Mays was not involved in, apprised of the reason for, and could not explain the alteration in the injection schedule. He did not even supervise the training under the new manual. The reason is that his TDOC superiors had concerns and doubts about what an execution with their protocol would look like. So they took control of the training. This altered injection schedule occurred after Defendants' counsel had taken the depositions of all three of Plaintiffs' experts – Drs. Stevens, Greenblatt, and Lubarsky – each of whom explained the scientific reasons that Midazolam cannot and will not protect an inmate from the torturous feelings of suffocation and burning that vecuronium bromide and potassium chloride will cause. Plainly, TDOC officials were attempting to alter the timing of the effects of the chemicals. The Midazolam was given an extra minute before the injection of saline to take effect in addition to the 2-minute wait added to the Manual – three extra minutes to get closer to peak sedative effect, which is still insufficient to protect a person being put to death. The paralytic was also given two extra minutes to work – increasing the likelihood that the person executed would be completely immobilized and any signs of suffering would be repressed.

TDOC made critical revisions to the Manual and the manner in which executions are carried out just five weeks before Billy Irick was scheduled to be killed. These efforts to tweak "on-the-fly" and create a shadow Protocol for lethal injection reflects Defendants' awareness that the written Protocol's reliance on Midazolam creates a substantial risk of severe pain and suffering to inmates who will be killed.

6. Mays acknowledged that he has not followed the procedures set forth in the Manual by failing to dispose of expired lethal injection chemicals and document training.

The lethal injection manual requires that "as [lethal injection] chemmicals reach their expriation dates, they are disposed of by hazardous waste pcik-up." Ex. 2, *7/5/2018 Lethal Injection Manual*, at Vol. 1, p. 143. Warden Mays testified that he had not abided by this instruction because at the time of the hearing in this case, July 2018, he still had lethal injection chemicals on hand at RMSI that had expired in May 2018. He admitted that this was a violation of the procedures in the manual and contrary to his testimony that he follows the manual to the letter. XXXIII 984-85.

Warden Mays testified that he did not know whether either of the people whom he had selected to fill the role of executioner had received any such training. Mays, who is not a qualified medical professional, had not trained them. XXXIV 1054. He had not seen any documentation of their receiving such training. He only knew that they had participated in practice executions using saline solution.

The Warden's failure to abide by the procedures in the manual demonstrates that those procedures will not assure Plaintiff's execution that is without a substantial risk of severe pain and suffering.

e. The protocol contains the same kind of errors that caused Governor Bredesen to halt executions and order a protocol review.

Mays testified that the Manual is his only instruction for training his employees and carrying out an execution. Yet by his own testimony, it is replete with omissions and inconsistencies that of the kind that caused Governor Bredesen

to issue reprieves to inmates scheduled to be executed so that the Manual could be made revised into a coherent document.

On page 35 of the Manual, there are instructions for the "Procurement, Storage, Accountability, and Transfer" of compounded lethal injection chemicals ("LIC"). Ex. 2, *7/5/15 Lethal Injection Manual*, at Vol. 1, p. 141. The manual instructs that, "When the LIC is received . . . [it] is placed in an unmovable heavy gauge steel container" in the RMSI armory. Warden Mays testified that there is such a container for storage purposes. XXXIII 1028.

On the very next page, the manual instructs that after an execution, any LIC that is "unused and not compromised in any way" should be returned to the armory "and secured in the refrigerator." Ex. 2, *7/5/15 Lethal Injection Manual*, at Vol. 1, p. 142. The warden did not know where the LIC should be stored.

The manual also states that "Compounded preparations shall be transferred, stored, and maintained in accordance with the directions of the Pharmacy with which the Department has a Pharmacy Services Agreement." Ex. 2, *7/5/15 Lethal Injection Manual*, at Vol. 1, p. 141. But the warden did not have those directions and thus did not know how to manage the LIC. XXXIII 1037. The Warden also testified that his staff who were on the execution team had not received instructions from anyone else. XXXIII 1041-42.

Deputy Commissioner Inglis testified that the instruction from the pharmacy had been verbally relayed to staff who participate in executions. XL 1667-68. This conflicts with Commissioner Parker's testimony that there are no protocols that are

not written down. XXXVI 1185-86. Inglis had previously testified in 2007 in *Harbison v. Little* that it was especially important to write everything down in the manual because those procedures are not part of the TDOC staff's routine responsibilities and they do not have the vocational background to make independent judgments. XL 1571.

Defendants' testimony and accounts for the state of the manual indicate that it cannot provide instructions, or serve as a basis for training, to carry out an execution that does not create a substantial risk of severe pain and suffering. The Commisioner believes that everything that is needed is written down. The Deputy Commissioner believes some things can be relayed verbally to specific members of the execution team. The Warden does not know how to handle the lethal injection chemicals, does not know which – if any – of his staff have received instructions that he is unaware of, and does not know when he will receive instructions from the pharmacy.

f. Documentation received by Plaintiffs' counsel subsequent to this Court's order indicates a further conflict between TDOC actions and the manual.

On September 3, 2018, Plaintiff's counsel received from TDOC documents requested pursuant to the Tennessee Public Records Act. See Attachment A to Motion to Expand the Record. These documents contain records of actions by TDOC personnel in connection with the execution of Billy Ray Irick on August 9, 2018. Mr. Irick was a plaintiff in this litigation. These documents reveal additional omissions and inconsistencies in the manual, as well as deviations from the procedures prescribed in the manual.

One document appears to be instructions from the pharmacy for storing and preparing the Midazolam for injection. The first instruction on this document is "Remove 4 vials of Midazolam from the freezer and place in refrigerator 24 hours prior to use as to allow to thaw." It is unclear whether TDOC or RMSI personnel could or did store the chemical in the proper manner because there is no indication in the manual that a freezer is available at RMSI to store frozen lethal injection chemical. Any assurance by Defendants that they will follow the storage instructions from the pharmacist is meaningless if there are not physical facilities to adhere to those instructions. This is a source of risk of severe pain and suffering on the face of the protocol.

Amongst those documents there is also a "Chemical Preparation Time Sheet." This is one of the records that the manual requires to be filled out as part of the process of documenting the completion of procedures in carrying out an execution. Ex. 2, *7/5/2018 Lethal Injection Manual*, at Vol. 1, p. 121 (The Lethal Injection Recorder's duties include completing the Lethal Injection Checklist). The Chemical Preparation Time Sheet for the day of Mr. Irick's execution produced by TDOC indicates that the primary set of syringes of Midazolam was prepared at 7:28, one minute before Irick's execution began. The rest of the syringes – vecuronium bromide, potassium chloride, and saline – were prepared between 5 and 5:30 pm, earlier that day. This is the proper procedure in the manual. Ex. 2, *7/5/2018 Lethal Injection Manual*, at Vol. 1, p. 145. To have prepared the Midazolam syringes just seconds before the execution was to begin violated the manual and contradicted the

Warden's testimony that his staff adhere to the manual and would carry out an execution the very same way they practice. The unreliability of the warden and plain falsity of his testimony indicates that the text of the protocol in meaningless when it is actually time to put a person to death, and therefore it creates a substantial risk of severe pain and suffering.

Also included in the documents produced to Plaintiffs' counsel by TDOC is the chemical preparation sheet for the second, back-up set of syringes. This set of syringes is in place in case there is a problem with the injection of the first set into the IV apparatus or an inmate responds to the consciousness assessment after the first injection of Midazolam. Ex. 2, *7/5/2018 Lethal Injection Manual*, at Vol. 2, p. 175 ("Contingency Issues"). The record produced by TDOC indicates that the Midazolam syringes for the second, back-up set were never prepared. If Mr. Irick had responded to the consciousness assessment or there had been problems with the IV apparatus, the execution team would not have been prepared to carry out the contingency procedures in the manual. Defendants' failure to follow the procedures in the manual indicates that the protocol is meaningless for purposes of Defendants' carrying out an execution and therefore creates a substantial risk of severe pain and suffering for Plaintiffs.

These circumstances are virtually identical to those that were cause for a reprieve from the governor in 2007. There are critical instructions missing from the current lethal injection manual. There is no indication that RMSI has adequate facilities for storage of the LIC according to the instructions provided by the

pharmacy with which TDOC has a pharmacy services contract. Records from Mr. Irick's execution indicate that the words on the face of the manual are irrelevant when it is time for Tennessee to put a person to death.

The Tennessee lethal injection protocol, by content, omission, and failed application creates a substantial risk of severe pain and suffering for Plaintiffs.

ARGUMENT

I. Plaintiffs' proof establishes that the July 5, 2018 three-drug lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 16 of the Tennessee Constitution.

a. Binding precedent establishes that if the first drug in a three-drug protocol fails to protect the inmate from the severe pain caused by the second and third drugs, then that protocol is unconstitutional. Plaintiffs have proven that Midazolam fails to protect inmates from pain.

1. The holdings in *Baze*, *West*, and *Abdur'Rahman*

In 2008, Chief Justice John Roberts, writing for the plurality in *Baze v. Rees*, 553 U.S. 35 (2008), held: "It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, **constitutionally unacceptable** risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.* at 53 (emphasis added)

In 2010, this Court held, "Proper administration of an adequate amount of sodium thiopental is **essential to the constitutionality** of Tennessee's three-drug protocol." *State v. West,* No. M1987-000130-SC-DPE-DD 2010, Order, p. 2. (Tenn.

November 29, 2010) (emphasis added) (Attach.1).[47] Five years earlier in an as-applied challenge to the use of a paralytic in the lethal injection protocol, this Court observed:

> [I]t was undisputed that the injection of Pavulon and potassium chloride would alone cause extreme pain and suffering, all of the medical experts who testified before the Chancellor agreed that a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death. Dr. Levy testified that such a dose would cause an inmate to be unconscious in about five seconds and that the inmate would never regain consciousness and would feel no pain prior to dying. Dr. Heath similarly testified that a lesser dosage of two grams of sodium Pentothal would cause unconsciousness in all but "very rare" cases and that a dosage of five grams would "almost certainly cause death."

Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 307–08 (Tenn. 2005).

As a result of the three mechanisms of action of barbiturates, a properly delivered dose of sodium thiopental will render an inmate completely insensate to pain, and unarousable by noxious stimuli. *Dr. Stevens testimony re; barbiturates*, XXIV 104-111; Ex. 14, *Mechanism of Action at the GABA receptor*, at Vol. 3, 358. Unlike Midazolam, barbiturates do not have any ceiling effect, and with increasing doses will bring a person to the plane of general anesthesia, and, ultimately, stop breathing and cause death. *Id.* at 115 and 125. Thus, the barbiturate sodium

[47] The chancery court in the 2010 *West* decision held that Tennessee's lethal injection protocol (which utilized sodium thiopental as the first drug) "was unconstitutional because it 'allows … death by suffocation while the prisoner is conscious.'" *West*, 2010 Chancery Court Order, Ex. 106, p. 2. At the time, Tennessee performed no consciousness checks. Subsequently, TDOC adopted consciousness checks sufficient for a protocol using sodium thiopental, but insufficient for Midazolam as discussed in detail below. *See* testimony of Dr. Lubarsky, discussed *supra*.

thiopental could meet the requirements of *Baze* and *West,* because it could prevent the inmate from experiencing the "constitutionally unacceptable" effects of the paralytic and potassium chloride.[48] *Glossip* did not alter, abandon, or change that analysis.

2. Expert testimony establishes that Midazolam cannot and will not render inmates insensate to pain; they will experience severe pain and suffering produced by the second two drugs; this scientific truth is ratified by eye-witness observations.

The chancery court found

> The inmates presented the testimony of four well-qualified and [eminent] experts. The Court finds that these experts established that Midazolam does not elicit strong analgesic effects and the inmates being executed may be able to feel pain from the administration of the second and third drugs.

XVI 2251. The Court also found that the defendants' two proffered expert witnesses "did not have the research knowledge or [eminent] publications that Plaintiffs' experts did." XVI 2251, n.7.

The Court found that Plaintiffs' eleven (11) eye-witnesses testified that in the Midazolam-based executions they observed, "there were signs such as grimaces, clenched fists, furrowed brows, and moans **indicative that the inmates were feeling pain** after the Midazolam had been injected and when the vecuronium bromide was injected." XVI 2258 (emphasis added). Defendants did not present a single witness to dispute this evidence. *Established by omission from the record.* The eye-witnesses' powerful and descriptive testimony, which has been recited at length in

[48] Previous challenges to sodium thiopental focused on the ability of prison guards to properly deliver sodium thiopental so that it would perform as intended.

the Statement of Facts, is un-contradicted and accepted. *See also* XXV 279-300; XXVI 301-09; XXVII 321-428, 439-462; XXVIII 463-68; XXX 657-755; XXXI 756-870. Their testimony makes this case different from *Glossip*.[49]

Unlike *Glossip*, the Chancery Court did not reject a single aspect of Plaintiffs' expert or eye-witness testimony. Unlike *Glossip,*[50] the Chancery Court did not credit (or meaningfully acknowledge) the defense witnesses, Dr. Li[51] or Dr. Evans, and their limited claims regarding the efficacy of Midazolam.[52]

A. Mechanism of action, and the fundamental science that establishes why Midazolam cannot protect an inmate from pain and suffering.

Midazolam's effect on the body is limited by its single mechanism of action. *Dr. Stevens testimony*, XXIV 106-10, 113-14; *Dr. Greenblatt testimony*, XXVIII 511-

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[49] The petitioners in *Glossip"* provided little probative evidence … and the speculative evidence that they did present to the District Court does not come close to establishing that its factual findings were clearly erroneous." *Glossip*, 135 S. Ct. at 2743. In stark contrast, here Plaintiffs presented the testimony of world-class experts, including the man who did the research on Midazolam in order for it to obtain FDA approval. In further contrast to *Glossip,* **Dr. Evans endorsed the testimony and credibility of Plaintiffs' experts, XLV 2070,** whereas in *Glossip* his since-disavowed (and now-discredited) opinions provided the scientific basis for the Court's conclusions.

[50] *Glossip* found that the district court did not commit clear error in finding Dr. Evans "well-qualified." In the years since *Glossip*, Dr. Evans has been subject to closer examination. It appears that "the emperor has no clothes."

[51] An OCR search of the Chancellor's order for "Dr. Li" "Feng" and "medical examiner" which produced zero hits, conclusively establishes that Dr. Li's testimony was discounted entirely.

[52] The Chancery Court did credit Dr. Evans' testimony regarding Plaintiffs' facial challenge to compounding, which is a separate issue, and, uniquely, one where the views of a qualified pharmacist could be helpful.

12; Ex. 14. An understanding of a drug's mechanism of action is foundational to understanding its properties, including any ability to render an inmate insensate to pain. *Stevens*, XXIV 80-81, 84, 86, 161, 164.

Midazolam's mechanism of action only acts on certain neuroreceptor sites where GABA binds.[53][54] XXIV, 106-110; Ex. 13, *GABA Receptor*, at Vol. 3, 355; Ex. 14. It does not and cannot act on opioid receptors, which regulate pain.[55] XXIV 81, 84, 86. Midazolam does not and cannot act on, or block, excitatory neurotransmitters.[56] XXIV 110, 156, 161; Ex. 10, *Neurotransmitters, Receptors and Effects on Neurons*, at Vol. 3, 354. Excitatory neurotransmitters overcome the inhibitory effect of Midazolam when activated by noxious stimuli. *Id.*

As a result of this limited mechanism of action, Midazolam has a "ceiling effect," and regardless of the dose administered will never bring an inmate to the plane of general anesthesia or render them insensate to pain. *Stevens,* XXIV 123-25, 130-35, 161, 164; *Greenblatt*, XXVIII 496-98, 513; *Lubarksy*, XLII 1796-99; Ex. 16(a); *Ceiling effect of Midazolam*, at Vol. 3, p. 360.

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[53] See Ex. 4, Ex. Vol. 3, for a helpful glossary of terms.

[54] Barbiturates effectively become GABA and are therefore much more powerful than benzodiazepines.

[55] Opiods have an inhibitory effect on neurons, and thus have a powerful analgesic (pain reducing) effect. In sufficient quantity opioids (such as fentanyl reduce respiration and lead to death. Ex. 4, at Vol. 3 350.

[56] Barbiturates can.

The testimony of Plaintiffs' experts was ratified by the Defendants' pharmacy expert, Dr. Evans:

> Q. Would you describe for the Court how Midazolam works and how it affects the human body?
>
> A. Sure. It's been described by experts for the Plaintiffs very well….

XLV 2070.

What all of the experts agree upon establishes the crucial fault of Midazolam. It is a sedative-hypnotic, a drug designed to put someone to sleep (hypnosis). XXIV 83, 112-13. An inmate given Midazolam should fall asleep (and appear unconscious), but once noxious stimuli (pain or suffering) activate the excitatory system, this will overcome the inhibitory effect of Midazolam and rouse the inmate, who will then awaken to experience unfathomable pain and suffering (and in many cases, they will awaken at the same time that vecuronium is paralyzing their face, arms, body, and lungs). *Stevens,* XXIV 161-64, 218; *Greenblatt*, XXVIII 510-12, 515.

B. The second two drugs will cause an inmate to feel as if they are buried alive, and then set afire; Midazolam will not protect them from this severe pain and suffering.

The expert proof was uncontested that the second two drugs would cause severe pain, mental anguish and needless suffering, if an inmate was not rendered insensate and unaware. XXV 161-62; XXVIII 508-10; XLII 1774-77. The suffering inflicted by vecuronium on someone who is aware was described as "[i]t's as if you're locked in a box and someone has now covered your mouth and you can't breathe and

your lungs and brain are screaming." XLII 1774. However, as vecuronium's primary role is to paralyze the inmate, starting at the face, an inmate will lose all ability to communicate the pain and terror that they experience. XXV 153-56. Meanwhile, potassium chloride causes a person to feel as if they are "being burnt alive." XLII 1776.

This is not hyperbole, unfortunately. Real world anesthesiologists have seen what happens to patients when those two drugs are used and anesthesia fails. In the former they can only report their sensations later (as they are paralyzed and feel that they are "dead"), but with even with small doses of potassium, "they scream out in pain." *Id.* at 1774-76.

Midazolam's sole intended purpose in the July 5, 2018 protocol is to render an inmate insensate and unaware of the pain and suffering otherwise caused by the second and third drugs. The proof in the record—established by every expert who testified on this issue —is that Midazolam is not an analgesic and *cannot* protect an inmate from this pain. *Stevens*, XXIV 161-64; *Greenblatt*, XXVIII 510-12; *Testimony of Dr. Lubarsky*, XLII 1810; *Testimony of Defendant Expert Dr. Evans* XLV 2070, 2148, 2157. As already explained above, it cannot bring an inmate to the plane of general anesthesia, so they will be roused by the pain they experience. XXIV 123-25, 130-35, 161, 164; XXVIII 496-98, 513; XLII 1796-99.

Dr. David Greenblatt, who participated in the research that later led to FDA approval for Midazolam's use as a sedative-hypnotic established that Midazolam's absence of analgesic properties is not seriously debated within the scientific/medical

community. XXVIII 512-13. In fact, as the expert witnesses for both sides testified, the leading textbook in this area, *Miller's Anesthesia* states clearly that drugs like Midazolam "lack analgesic properties and must be used with other anesthetic drugs to provide sufficient analgesia." Miller, R., *et al.* eds., *Miller's Anesthesia*, Vol. 1, p. 842 (8th ed. 2015); *Evans,* XLV 2157.[57] Dr. Lubarsky plainly stated, "there simply is no debate" about Midazolam's limitations. XLII 1742. Instead, the real-world use of Midazolam in pain-producing procedures is *always* accompanied with a pain-relieving opioid such as fentanyl. XLII 1810.

Thus, it is clear, Midazolam will not bring an inmate to the plane of general anesthesia, it will not render an inmate insensate to pain, and an inmate who is executed with Tennessee's three-drug protocol will experience severe pain, mental anguish and needless suffering. They will experience the suffocation of vecuronium and the burning alive of potassium chloride. The basis of these truths is not simply expert "opinion" but solid science based on fundamental scientific principles, corroborated by real world observations.

3. Plaintiffs presented new, never before heard proof, that Midazolam, alone, causes severe pain and suffering as the inmate drowns in his own blood and bodily fluids.

Plaintiffs established, by a preponderance of the evidence, that the administration of 500 mg of Midazolam, alone, causes severe pain and needless

[57] Plaintiffs' expert Dr. David Lubarsky co-wrote the chapter on the use of intravenous anesthetics for a number of years. His work is acknowledged in the most current edition.

suffering. Autopsies reveal that no less than 23 out of 27 inmates executed using a Midazolam-based lethal injection protocol suffered pulmonary edema.[58] *Testimony of Dr. Edgar*, XXXIX 1395-98; Ex. 118, *Dr. Edgar's Chart*, at Vol. 12, pp. 1658-63. A person who suffers pulmonary edema has fluid and blood leaking into the airspaces of their lungs, ultimately filling the airspaces with liquid. XXXIX 1468; *Greenblatt*, XXVIII 541-42; *Lubarsky*, XLII 1813. The sensation of drowning in blood and fluid is a noxious stimuli which will of rouse inmates sedated with Midazolam. *Stevens* XXV 161-62; *Lubarsky*, XLII 1822. The finding of pulmonary edema is similar to findings with persons who have drowned or suffered poison gas attacks. *Edgar*, XXXIX 1394.

Dr. Stevens explained that Midazolam will not dissolve in neutral solution; rather, to be used in injections it must be dissolved in a strong acid, with a pH of close to 3.0 – while human blood is slightly more neutral with a pH of 7.4.[59] XXIV 136-40. Dr. Greenblatt testified that the most probable cause of the pulmonary edema is the acidic quality of the two (or four) massive doses of Midazolam that will not be buffered until after they have passed through the lungs. XXVIII 541-42. As a result, the lining of the lungs break down and the airspaces will fill with fluid and

[58] Plaintiffs' expert Dr. Edgar reviewed the autopsies conducted by other pathologists. What those doctors missed, failed to record, or did not even look for, cannot be known. Nonetheless, 23 out of 27 autopsy reports established that the inmate had acute pulmonary edema.

[59] The pH scale is logarithmic, with each "step" away from 7.0 representing a 10-fold increase in acidity. Thus, a pH of 3, which is 4 steps from neutral, indicates a 10,000 fold increase in acidity.

blood, and the inmate will feel as if he is being drowned. *Edgar,* XXXIX 1394-95; *Lubarsky*, XLII 1813, 1822.

The eye-witnesses to the underlying executions provided strong corroboration that the pulmonary edema was caused by Midazolam, and not due to some pre-existing health condition. They collectively described the inmates they watched die as being healthy prior to the administration of Midazolam, without any prior respiratory distress. XXV 232-33 (Woods), XXX 683 (Phillips), XXX 691 (Otte), XXXI 762, 769, 785 (all five Alabama inmates), XXXI 798 (Howell), XXXI 820 (Williams), XXXI 837 (Gray); *see also* Ex. 36, *Execution Logs of Clayton Lockett*, at Vol. 4, p. 572; Ex. 47, *Execution of Clayton Lockett,* at Vol. 6, pp. 830-68.

The eye-witnesses also described barking, gasping for breath, coughing, heaving and labored breathing after the injection of the Midazolam (and prior to paralysis), consistent with the inmates suffering respiratory distress. XXV 265-66 and XXVII 391-93, 404-412 (Woods, gasping and gulping for nearly two hours), XXX 688 (Phillips, gulping like a fish), XXX 698 (Otte, stomach violently moving up and down); XXX 722 (Brooks, rapid breathing, chest heaving); XXX 738-39 (Melson, labored breathing, exaggerated chest movements); XXX 759 (McNabb, breathing like a fish); XXXI 776-77 (Smith, barking cough like a seal, labored and deep breathing); XXXI 790 (Moody, very heavy breathing, noticeably different than prior to injection); XXXI 824-25 (Williams, chest was pumping, choking, coughing and heaving); XXXI 841-41 (Gray, heavier breathing and snoring sound).

Thus the unchallenged expert testimony was corroborated by eye-witness observations. This proof established by a preponderance of the evidence that inmates who are injected with 100 ml of acid, containing 500 mg of Midazolam, will suffer severe pain and mental anguish as blood and bodily fluids fill their lungs due to pulmonary edema. It was clearly established that the only possible cause of the pulmonary edema was the acidic Midazolam.

The Chancellor's order failed to address this additional cause of severe pain and needless suffering, which no court—including the Supreme Court in *Glossip*—has ever heard before. [60] No findings of fact or conclusions of law were reached on this issue. XVI 2229-2288, *established by omission.*

b. *Glossip*, which was decided in a preliminary injunction posture, is not binding here.

1. Preliminary Injunction rulings are not binding precedent and have limited persuasive value.

The Court in *Glossip* was careful to highlight the procedural posture of the case, the denial of preliminary injunction. "[W]e review the District Court's factual findings under the deferential 'clear error' standard. This standard does not entitle us to overturn a finding 'simply because [we are] convinced that [we] would have decided the case differently.'" *Glossip*, 135 S. Ct. at 2739 (quoting *Anderson v.*

[60] Distinguishing this case from *Glossip* for the first time we have a dataset of results from real world human experiments with Midazolam. At the time of *Glossip* there simply had not been enough Midazolam-based executions to create this dataset. Nor had any pathologist examined the data of the Midazolam-based executions until Dr. Mark Edgar did so in this case.

Bessemer City, 470 U.S. 564, 573 (1985)). That is, *Glossip* involved a highly deferential standard of review.

2. Each and every premise on which *Glossip's* observations about Midazolam were based have now been discredited.

The evidence presented in the chancery court challenging Tennessee's method of execution is directly contrary to the record that supported the Supreme Court's decision in *Glossip*. The record in *Glossip* was from an evidentiary hearing on a motion for preliminary injunction (in contrast to the full trial here) and contained a finding, based upon pharmacist Lee Evans' testimony that Midazolam "would make it a virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." *Glossip*, 135 S. Ct. at 2736. Dr. Evans no longer takes such an extreme position, XLV 2148-50, 2162,[61] and the record in the chancery court is diametrically to the contrary.

The proof now establishes (and Dr. Evans now concedes) what the chancery court concluded here: "[M]idazolam does not elicit strong analgesic effects and plaintiffs may feel pain from the administration of the second and third drugs." XVI 2251 (7/26/18 final order). The testimony of Drs. Stevens, Greenblatt, and Lubarsky, detailed above, makes this truth abundantly clear. Indeed, as shown above, their

[61] Q. Dr. Evans, you have testified that Midazolam is not capable of rendering plaintiffs in a state of surgical anesthesia, correct?

A. Correct.

XLV 2162.

testimony establishes beyond any doubt that inmates will suffer severe pain, mental anguish and needless suffering under the three-drug protocol.

Further, in addition to the finding based on Dr. Evans' now-discredited testimony, the *Glossip* court cited to 12 other Midazolam executions that "**appear[ed]** to have been conducted without any significant problems." *Glossip*, 135 S. Ct. at 2745-46 (emphasis added). The Tennessee plaintiffs presented testimony from eleven witnesses to a dozen Midazolam-based executions—at least one from every jurisdiction that has used Midazolam—who uniformly observed indications that inmates were sensate, aware and responsive during the administration of the second two drugs. XXV 279-300; XXVI 301-09; XXVII 321-428, 439-462; XXVIII 463-68; XXX 657-755; XXXI 756-870. Crucially, 24 of the 27 autopsied inmates executed with Midazolam showed clear signs of pulmonary edema, a fact that the *Glossip* court could not have been aware of (as the vast majority of those executions had yet to take place). The "appearance of no significant problems" in *Glossip* has been dispelled, in large part because we now have the "experimental data" from a large dataset of flawed executions.[62]

3. The Chancellor placed undue weight on the factual findings of other courts, while failing to engage in fulsome factual analysis of the record before her.

[62] It is also apparent from the record that the official reports of executions such as the Court relied upon in *Glossip* "substantially minimize what I saw." XXXI 827 (Motylinski testimony).

The Chancery Court recognized that Plaintiffs presented the testimony of four "well-qualified and [eminent] experts." XVI 2251. Their qualifications were described in detail and contrasted with the lesser qualifications of the Defendants' experts. *Id.* The Chancellor broadly accepted their conclusion that Midazolam does not "elicit strong analgesic effects and the inmate may be able to feel pain from the administration of the second and third drugs." *Id.* Whether this pain was "severe" was not addressed. *Id.* Yet, as is clear from the Statement of Facts, and throughout this Brief, Plaintiffs' experts testified to significantly more than what the Chancellor summarized, and their conclusions were significantly more direct: inmates will suffer torturous deaths if killed using the three-drug protocol (and have suffered such deaths all around the country, while dying under the veil of paralytic drugs such as vecuronium).

The crucial substance of this expert testimony was conspicuously omitted from the chancer court's *Memorandum of Findings of Fact and Conclusions of Law*, XVI 2229-79. Rather, immediately after acknowledging Plaintiffs' experts' credentials and eminence, and giving a mild characterization of their proof, XVI 2251, the Chancellor abandoned any further discussion of their scientific opinions and the bases therefor. Instead, the Chancellor moved on to discuss other courts' holdings regarding the constitutionality of Midazolam-centered lethal injection protocols; *e.g.* "Midazolam's use in executions has never been held by the United States Supreme Court to be unconstitutional or pose an unacceptable risk of pain." XVI 2253. The court cited to *Gray v. McAuliffe*, No. 3:16CV982-HEH, 2017 WL

102970, at *11 (E.D. Va., Jan. 10, 2017) for the proposition that the "Supreme Court and 'numerous other courts' have concluded that Midazolam is an adequate substitute for Pentobarbital in a three-drug protocol."

As has been discussed at length throughout this brief, the proof that was presented at THIS trial (unlike in those "other courts") was overwhelming: Midazolam's one-limited mechanism of action does not enable it to adequately substitute for the three much more potent mechanisms possessed by Pentobarbital; executions reliant on Midazolam will cause severe pain and mental anguish. Thus, the Chancellor's dependence on the factual findings of 'numerous courts' was a somewhat frightening abdication of her responsibilities to address the proof presented in this critical case (one that this Honorable Court had most clearly indicated needed a full trial and developed factual findings).

4. The undeveloped record from preliminary injunction hearings should not be given precedence over the in-depth testimony presented over a two plus week trial.

Tennessee's two-plus-week trial was the first in the nation. All prior Midazolam litigation has been resolved at the preliminary injunction stage. *Glossip*, 135 S. Ct. at 2731 (application for preliminary injunction); *In re Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017), *cert. denied sub nom. Otte v. Morgan*, 137 S. Ct. 2238 (2017) (preliminary injunction vacated); *Grayson v. Warden*, 672 F. App'x 956, 962 (11th Cir. 2016) (preliminary injunction); *Gray v. McAuliffe,* No. 3:16CV982-HEH, 2017 WL 102970, at *1 (E.D. Va., Jan. 10, 2017) (preliminary injunction).

It should go without saying that preliminary injunction cases inevitably involve "limited development of the record" and are "not guided by focused presentation of legal arguments." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 802 fn. 10 (1980) (Blackmun, J. concurring). The Sixth Circuit has observed that applying the law of the case doctrine is "tricky" when examining decisions involving preliminary injunctions, because such rulings "are generally tentative decisions.'" *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) (citing *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) and *Bieneman v. City of Chi.*, 838 F.2d 962, 964 (7th Cir. 1988). According to the Sixth Circuit, deference to prior decisions should only apply when the ruling was '"based on a fully developed factual record and a decisionmaking process that included full briefing and argument without unusual time constraints.'" *Howe*, 801 F.3d at 740 (quoting *Sherley v. Sebelius*, 689 F.3d 776, 782 (D.C. Cir. 2012)). Although "law of the case doctrine" has no application to our situation, the Sixth Circuit's concerns highlight why the decisions of other courts made on more limited records, under greater time pressures,[63] in injunction proceedings should be of no significance.

For instance, in *In re Ohio Execution Protocol*, the Plaintiffs were able to present two experts, but they did not have the advantage of the nation's leading researcher on Midazolam, Dr. David Greenblatt, nor the pathologist perspective

[63] Plaintiffs' counsel do not want to minimize the time pressures from this case. However, it is clear that, despite the urgency of the schedule, there was sufficient time to develop the expert proof and eye-witness testimony in a manner that has never been done anywhere else in the country.

provided by Dr. Edgar. Moreover, respectfully, counsel for plaintiffs in *in re Ohio* simply did not have the time to prepare or present the type of high-level science that Dr. Stevens and Dr. Lubarsky provided in this case. *E.g. In re Ohio*, 860 F.3d at 887-88 (summarizing Dr. Stevens' limited testimony in that case, and comparing it to the testimony of the defense experts, as if they were simply two equally valid competing opinions of equally credentialed experts). Crucially, at the time of *In re Ohio*, there had only been nine prior Midazolam executions, and, according to the plaintiff's second expert, Dr. Bergese, at that time "the quality of the data is not there." *Id.* at 888. Plainly, as has been set-forth throughout this brief, the "quality of the data" is now present, and it unequivocally establishes that Midazolam cannot render an inmate insensate and that an execution relying on Midazolam will inflict severe pain, mental anguish and needless suffering.

5. Throughout modern history, Courts have reached incorrect scientific conclusions based on scientific opinions that were subsequently shown to be unreliable junk.

The scientific process can be messy, and errors are committed along the way to finding the truth. Our law is full of examples where older, and incorrect, scientific paradigms were ultimately overturned by superior science. But, along the way, for periods of time, the Courts relied on bad science to the prejudice of litigants. Some examples of this include our State's evolutionary understanding of eye-witness identifications, and the recent history of Dr. Andrew Wakefield and his now-debunked hypothesis that vaccines cause autism.

For most of Tennessee's jurisprudential history, it was accepted that eyewitness testimony "has no scientific or technical underpinnings which would be outside the common understanding of the jury," and thus expert testimony was not permitted. *State v. Coley*, 32 S.W.3d 831, 833-34 (Tenn. 2000). The dissent in *Coley* observed that the court was "foreclose[ing] judicial recognition of future scientific advances." *Coley*, 32 S.W.3d at 839 (Holder, J., dissenting). Indeed, by 2007, this Honorable Court recognized that there "have been advances in the field of eyewitness identification," and *Coley* was overruled. *State v. Copeland*, 226 S.W.3d 287, 299-300 (Tenn. 2007). Today, the validity of such expert testimony is fully accepted. *Id.*[64]

Similarly, science and the law now recognize that there is no plausible connection between the MMR (measles, mumps and rubella) vaccine and autism-spectrum disorders. *E.g. Hazlehurst ex rel. Hazlehurst v. Sec'y, Dep't of Health & Human Servs.*, 88 Fed. Cl. 473, 478 (2009), *aff'd sub nom. Hazlehurst v. Sec'y of Health & Human Servs.,* 604 F.3d 1343 (Fed. Cir. 2010) (upholding finding that Dr. Wakefield, the proponent of the autism-MMR linkage hypothesis had been "widely discredited by the scientific community" and that the underlying studies were "scientifically flawed and unreliable"); *Cedillo v. Sec'y of Health & Human Servs.,*

[64] Other examples of evolving scientific standards in the law that come to mind, but that counsel does not have time to fully brief include: recovered memories (and the Wenatchee Satanic Witch Trials in Washington State), shaken baby syndrome, and the (in)fallibility of fingerprint and/or tool mark identification.

617 F.3d 1328, 1349 (Fed. Cir. 2010) (upholding finding of special master that there was no "persuasive evidence" that vaccine caused autism).

However, this was not always the case, and for well-over a decade there were "qualified and well-respected individuals" who testified in court that MMR would cause autism. *E.g. Dixon v. Sec'y of Dep't of Health & Human Servs.,* No. 01-605V, 2003 WL 23218020, at *4 (Fed. Cl. Nov. 25, 2003), *aff'd*, 61 Fed. Cl. 1 (2004). Indeed, Andrew Wakefield, now recognized as a charlatan, was originally cited approvingly by the courts. *Dixon*, at *10.

The evolution of judicial understandings of both eyewitness identification and vaccines illuminates why the Chancellor erred in relying on the factual findings of other courts, instead of engaging with the evidence that was presented in her courtroom.[65]

6. It should go without saying that litigation involving parties with no privity has no preclusive effect under the applicable doctrines of *res judicata* and collateral estoppel.

The Chancellor did not conclusively state whether an inmate would suffer severe pain or mental anguish. XVI 2229-2259 *established by omission*. Rather, her sole conclusion on this essential factual determination was: "The Court finds that these experts established that Midazolam does not elicit strong analgesic effects

[65] More tritely, counsel could point to the ills that would have befallen civilization had scientific certitudes about the origins of disease (caused by "miasmas"), the efficacy of blood-letting (which killed George Washington), or Aristotelian physics (overturned by Newton, Einstein, Bohr and Hawkings—and under which, we would not have satellites, nuclear energy or cell phones) not been rejected by later generations.

and the inmate being executed may be able to feel pain from the administration of the second and third drugs." *Id.* at 2251. She then moved on to discuss the conclusions of the "numerous other courts" that Midazolam-based executions are not unconstitutional. To the extent that she was attempting to import either factual findings or legal conclusions from those other cases, such was gross error under Tennessee law.

Any attempt to import findings of fact from other courts would be governed by the doctrine of collateral estoppel, or issue preclusion. *Mullins v. State*, 294 S.W.3d 529, 534-35 (Tenn. 2009). Tennessee uses a five-part test to see whether collateral estoppel applies, and for no less than three reasons it could not apply, here. *Bowen ex rel. Doe v. Arnold*, 502 S.W.3d 102, 107 (Tenn. 2016); *Beaty v. McGraw*, 15 S.W.3d 819, 824 (Tenn. Ct. App. 1998). The three fatal flaws are (1) the judgments upon which the Chancellor relied have not become final (they were all in preliminary injunction stage), (2) present Plaintiffs are not in privity with the plaintiffs in those other states, and (3) present Plaintiffs did not have "a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded." *Bowen*, 502 S.W.3d at 107; *Beaty*, 15 S.W.3d at 824. Moreover, the other two concerns, whether the (a) issues are identical, and (b) whether they were decided on the merits will not apply to many if not all of the "numerous other cases."[66] Ultimately, for the Chancellor to apply collateral estoppel, she would have to find,

[66] To the extent that a decision was based on different alternatives than Tennessee, and to the extent that the relevant court did not substantively address "severe pain and mental anguish" then the other two considerations would also not be met.

above and beyond all five-factors, that "the same issue was, in fact, determined in a prior suit between the same parties and that the issue's determination was necessary to the judgment." *State v. Scarbrough*, 181 S.W.3d 650, 655 (Tenn. 2005). As we have different parties and different issues, it was legally improper for the Chancellor to rely on factual findings from "numerous other courts."

Similarly, to the extent that the Chancellor was attempting to import the legal conclusion that Midazolam-based protocols are not cruel and unusual, this would be governed by *res judicata* or "claim preclusion," which also is completely inapplicable. *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012). "*Res judicata* bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the former suit. *Jackson,* 387 S.W.3d at 491. Again, the parties must be the same, the claims must be the same, and the judgment must be final; none of which is true, here. *Id.*

Thus, for all of these reasons, it was terribly inappropriate for the Chancellor to ground her factual determination in the decisions of "numerous other courts" instead of based on the well-developed record before her.

7. *Glossip* emphasized the numerous safeguards in place in Oklahoma, including continuous monitoring of the inmate using an EEG. Those safeguards are not present here. In fact, Tennessee's protocol contains additional risks to the inmate apparently not present in Oklahoma.

Important to the District Court's decision in *Glossip*, upon which the Court relied, is the fact that Oklahoma implemented numerous procedural safeguards.

> The protocol also includes procedural safeguards to help ensure that an inmate remains insensate to any pain caused by the administration of

> the paralytic agent and potassium chloride. Those safeguards include … numerous procedures for monitoring the offender's consciousness, including the use of an electrocardiograph and direct observation, and … detailed provisions with respect to the training and preparation of the execution team.

Glossip, 135 S. Ct. at 2735.[67] Later in the Court's opinion, it stressed, that Oklahoma's protocol included safeguards including that staff "must continuously monitor the offender's level of consciousness." *Glossip*, 135 S. Ct. at 2742.

Critically, these safeguards are absent in Tennessee. Moreover, the TDOC protocol knowingly and affirmatively prevents the Warden and Executioner from observing signs that the inmate is aware and feeling the effects of the drug because the straps prevent the inmate from moving,[68] the inmates hands are taped to prevent movement,[69]the prison does not use an EEG, EKG, or BIS monitor.[70]

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[67] Oklahoma has only executed one inmate with these safeguards allegedly in place. That inmate cried out in pain. http://www.dailymail.co.uk/news/article-2536976/I-feel-body-burning-Man-executed-lethal-injection-Oklahoma-beating-convenience-store-worker-death-1995.html (last checked September 5, 2018.) No inmate has been executed in Oklahoma since the *Glossip* decision. The original case remains pending in the district court. Moreover, since *Glossip,* Arizona has agreed to never again use Midazolam or a paralytic in an execution. Exs. 30-33, Ex. Vol. 4 505-528. Florida has abandoned the use of Midazolam, as well.

[68] Billy Irick did, nonetheless, move his head after being declared unconscious – a clear sign that he was feeling the drugs. *See* September 2, 2018 declaration of Dr. David Lubarsky.

[69] See, *supra*, discussion of Dr. Lubarsky's trial testimony regarding the importance of observing hand and finger movement as a critical sign that the inmate is trying to signal that he is in pain.

[70] XXXVI 1255, Testimony of Warden Mays.

Warden Mays testified that there is not any way of maintaining or measuring brain activity in the lethal injection protocol. XXXVI 1255. Further, a physician does not provide training as to how to conduct a consciousness check. XXXVI 1254.

With these critical safeguards missing and Tennessee's willful action to inhibit observation of sensation and awareness, Tennessee's protocol is readily distinguishable from the Oklahoma protocol in *Glossip.*

c. The Chancery Court's finding that up to 18 minutes of suffering is not constitutionally intolerable has no basis in law, and is contrary to *Baze, West* and *Abdur'Rahman.*

Having found that Plaintiffs established that Midazolam will not protect the inmates from pain and that Plaintiffs presented proof that individuals who have been executed with Midazolam have experienced pain, the Chancellor rested her opinion on her belief that 10-18 minutes of suffering is not constitutionally intolerable. XVI 2254-57. There is no basis in the law for this proposition, and no case was cited in support. Indeed, neither this Honorable Court, nor the United States Supreme Court have ever issued an opinion suggesting that 10-18 minutes of suffering is constitutional.

It is true that the United States Supreme Court has found that inmates are not entitled to a pain-free execution. But it is also true that the Supreme Court and this Court have found that if the first drug in a three-drug protocol fails to protect an inmate from the pain and suffering of the second and third drugs, then the protocol is constitutionally intolerable. The Chancellor ignored *Baze, West, and Abdur'Rahman* and relied on a temporal standard that has no legal origin.

Plaintiffs proved that the use of Midazolam in the Tennessee protocol violates the Eighth Amendment in that "there is a substantial, constitutionally unacceptable risk of suffocation from the administration of [the paralytic] and pain from the injection of potassium chloride." *Baze*, 535 U.S. at 53. In addition, Midazolam alone will cause pulmonary edema and cause severe, unnecessary pain. Finally, Dr. Lubarsky's unrebutted testimony is that the protocol's consciousness check is (a) inadequate and (b) impossible to carry out given the way the inmate is strapped to the gurney. Moreover, the way that the inmate is restrained to the gurney prevents the warden and others from observing signs of awareness and sensation.

Where this Court's review of the Chancellor's application of law to the fact is *de novo*, her decision should be reversed.[71]

d. Plaintiffs met their burden under *Glossip* to identify a known, feasible, and readily available alternative method of lethal injection in spite of the peculiarities of Tennessee law.[72]

1. The uncontroverted proof is that Pentobarbital was available to the State of Tennessee at the time Commissioner Parker chose to adopt the three-drug Midazolam protocol; the uncontroverted proof is that the Pentobarbital that was available for purchase

[71] The Chancellor's conclusions regarding the acceptability of 10-18 minutes of human suffering will be returned to, when discussing the U.S. Supreme Court's prohibition on torture, below.

[72] It should be noted that Tennessee law does not allow consideration of other constitutional means of execution until lethal injection is declared unavailable or unconstitutional AND electrocution is also declared unconstitutional. T.C.A. § 40-23-114(e) (Supp. 2014). Plaintiffs are prohibited by case law from challenging the constitutionality of electrocution until lethal injection is found to be unconstitutional or unavailable. *West v. Schofield*, 468 S.W. 3d (Tenn. 2015).

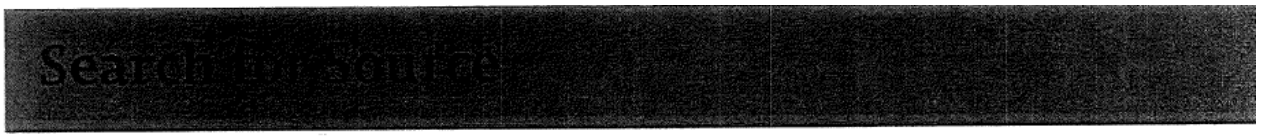
in 2017 would still be good for use in executions in 2019 and into 2020; the uncontroverted proof is that a single-drug Pentobarbital protocol was feasible and readily available and that the State of Tennessee chose not to utilize it.

This Honorable Court issued *West v. Schofield* on March 28, 2017, which permitted the State of Tennessee to carry out executions using one-drug Pentobarbital. *West v. Schofield,* 519 S.W.3d 550 (Tenn. 2017). With Pentobarbital permitted, the responsibility for securing this drug was delegated down two tiers (or more) of responsibility, from Commissioner Parker, past Deputy Commissioner Inglis, to an anonymous individual known as the "Drug Procurer." XXXVI 1145; XXXVII 1336; XL 1605. The sole responsibility to secure the lethal injection chemicals (LICs) was vested in this "Drug Procurer," and no one else in the department worked on that project. XL 1608-9. All communications with potential suppliers were made by the "Drug Procurer." XL 1619-20. Commissioner Parker did not communicate with a single pharmacist or drug supplier. XXXVII 1313. Whereas, Deputy Commissioner Inglis only claimed to have spoken with the original (*circa* 2014), supplier of Pentobarbital, "Source A." XL 1614-15.

All records related to the "Drug Procurer's" search for Pentobarbital were produced by the Tennessee Department of Corrections; in total these heavily redacted documents totaled 48 pages (including a 17 page PowerPoint summary of the search). XL 1617-18; Ex. 105, *Documents Produced by Department of Correction*, at Vol. 10, p. 1468; Ex. 126, *June 20, 2018 email from Drug Procurer to Potential Pentobarbital Seller*, at Vol. 14, pp. 1969.

Based on these records, over the spring and summer of 2017, the "Drug Procurer" found approximately ten pharmacies that were willing and able to sell Pentobarbital but they (individually) did not have "sufficient quantities of the needed form of Pentobarbital and no source to obtain sufficient quantities;" additionally there were roughly seventy suppliers who were willing, but did not have any supply on hand. XXXVII 1338-39; Ex. 105, *Documents Produced by Department of Correction*, at Vol. 10, p. 1477. This proof that there were willing and able sellers was originally offered as substantive proof, paradoxically, not by Plaintiffs, but by Defendants after a heated debate on its admissibility. XXXVII 1323-38.

The crucial portion of the relevant exhibit appears as follows:



Collectively, contact was made with close to 100 potential sources, including the 3 major U.S. chemical wholesalers. None of these worked for one or more of the following reasons:

- Company did not have an inventory of Pentobarbital - apprx. 70%
- Company did not have sufficient quantities of the needed form of Pentobarbital and no source to obtain sufficient quantities – apprx. 10%
- Company unwilling to supply Pentobarbital if it was to be used in lethal injection – apprx. 20%

TN Department of Correction

10

Ex. 105, *Documents Produced by Department of Correction*, at Vol. 10, p. 1477.

As the "Drug Procurer" was protected from deposition, testimony, or identification, *e.g. Under Seal Order of June 13, 2018 at 3:25 p.m.,* the exact procedures he undertook to contact approximately 100 drug suppliers cannot be known, nor could Plaintiffs learn the identities of the ten willing and able sellers of small quantities of Pentobarbital. Crucially, the exact amount that the ten-suppliers had individually and/or collectively available was not disclosed (and not known by Parker or Inglis). Why contacts with 100 suppliers only generated 30 pages of notes (17 pages of Exhibit 105 were the PowerPoint) was also not explained.

However, the remaining records found in Exhibits 105 and 126, reflect minimal contact by text and email, and handwritten notes of other forms of communication (presumably telephonic, but in theory possibly face-to-face). Ex. 105, at Vol. 10, pp. 1486-1494, and at Vol. 11, pp. 1495-1514; Ex. 126, at Vol. 14, p. 1969. Those records reveal that on April 6, 2017, the "Drug Procurer" sent a request for "at least 100 grams" of Pentobarbital (which would be sufficient for no less than ten (10) executions, if each execution required both 5mg doses, and up to twenty (20) if the first dose proved sufficient). Ex. 105, at Vol. 11, p. 1497.[73] At 11:00 a.m., that same day, a supplier indicated they had some amount of Pentobarbital for sale, but not "the quantity you need." *Id.* at 1496. No dated records, whether email, texts or handwritten notes, reflect what came of the April 6, 2017 offer to sell some lesser amount of Pentobarbital, nor do they reflect how many executions this lesser quantity would have permitted. *Established by omission from Ex. 105 and the record as a whole.*

Then on an unidentified date (due to redactions) a supplier made a specific offer to the "Drug Procurer;" Pentobarbital would be sold for the price of $24k for 10 grams, with an additional fee of $35k[74] to compound per 10 grams. Ex. 105, at

[73] Note, Exhibit 105 is found in two volumes, the end of Vol. 10 and the beginning of Vol. 11.

[74] Arguably, a decimal point might have been between the 3 and the 5, making this $3,500 per 10 grams, and not $35,000 per 10 grams. Alternatively, the supplier may have indicated that they would sell manufactured Pentobarbital for $24,000 per 10 grams, but if they had to compound it, it would cost $35,000 total. Absent the "Drug Procurer's" testimony such details are unknown.

Vol.11, p. 1503. A "time till avail" was listed, but the date/time was redacted by the State (as was the majority of this note, like all notes). *Id.* Once the account was approved a "bulk $" option was indicated. *Id.* Again, Commissioner Parker and Deputy Commissioner Inglis were ignorant of the details of this offer, and did not shed any light on when it was made, and why it was not accepted. *E.g.* XL 1611-12.

To this day, and since 2014, the Tennessee Department of Corrections has had a contract with a drug supplier to provide Pentobarbital; this contract requires Tennessee to pay $5,000 per year to keep this source of supply open. XL 1612-13. Albeit, according to Deputy Commissioner Inglis, that supplier does not presently have any Pentobarbital. *Id.* at 1614.

The records reflecting attempts to secure Pentobarbital, found in Exhibit 105, that have dates (and/or where the dates were not redacted) reflect the last recorded contact as July 20, 2017. Ex. 105, at Vol. 11, p. 1501. The PowerPoint presentation detailing the roughly 100 suppliers is dated August 31, 2017. Ex. 105, at Vol. 10, p. 1468. Then, the next effort to obtain Pentobarbital (for which any record exists) was an email sent the day before Deputy Commissioner Inglis' deposition, on June 20, 2018. XL 1617; Ex. 126. Thus, it appears that some effort was made in April of 2017,[75] that was worthy of being recorded. Ex. 105, at Vol. 10, pp. 1486-1494, and Vol. 11, pp. 1495-98. A single email was sent in July of 2017. Ex. 105, at Vol. 11, p.

[75] Below, appellees' will address the remarkable effort to fail that was made by the "Drug Procurer" prior to engaging in any efforts to succeed.

1499. Then no further actions were worthy of being memorialized by the "Drug Procurer" until the single June 20, 2018 email. Ex. 126.

Had Tennessee purchased the Pentobarbital from the willing sellers it would have lasted for approximately two to three years. XL 1599-1600.

Thus, the proof presented at trial unequivocally established that there had been multiple willing sellers, including at least one who could furnish enough for an execution (10 grams). That supplier was willing to conduct bulk sales, which, clearly indicated the capacity for multiple executions. Had that Pentobarbital been purchased when offered for sale, it would be viable for use, today.

2. Having proven that there were over ten willing and able sellers of Pentobarbital, the State was bound by their own proof.

"It is fundamental that when the State calls a party as a witness it vouches for his or her credibility." *State v. Silva*, 477 S.W.2d 517, 619 (Tenn. 1972). However, under our Rules of Evidence, and case authority, a party may impeach their own witness, or present contrary proof. *State v. Jones*, 15 S.W.3d 880, 891-92 (Tenn. Crim. App. 1999) perm. app. denied February 14, 2000; Tenn. R. Evid. 607.

Rather than impeach or contradict the PowerPoint presentation that they had just introduced through the lead Defendant, Commissioner Tony Parker, counsel for Defendants had the Commissioner ratify it as true and correct:

> Q. Commissioner Parker, does this PowerPoint summarize, to the best of your knowledge, does it summarize the Department's efforts to obtain Pentobarbital for lethal injection executions?
>
> A. Yes.
>
> Q. Up through the time it was made?

A. Yes.

Q. Does it include on Page 10 an entry that says collectively contact was made with close to a hundred potential sources including three major U.S. chemical wholesalers and none of these worked for a number of reasons?[76]

A. That's correct.

XXXVII 1338.

Defense counsel then ratified the accuracy of the PowerPoint a second time, via Defendant Deputy Commissioner Inglis. XL 1670, XLI 1671-72. Ms. Inglis further verified that, while she had no personal knowledge of the contents of the notes and emails found in Exhibit 105, they were produced by the "Drug Procurer." XL 1612.

No witness disputed that the "Drug Procurer" for the State of Tennessee identified ten (10) willing and able suppliers of Pentobarbital. *Established by omission from the record; see also* XL 1612. Similarly, none could discuss, explain, or dispute the notes reflecting a willing seller of at least 10 grams of Pentobarbital.[77] Pursuant to *Silva* and in the absence of any contrary proof—from a

[76] Obviously, the definition of "none of these worked" is crucial. As has been shown, previously, none of the suppliers were able to sell enough Pentobarbital for 10 to 20 executions. Thus, under TDOC's requirement that a supplier provide 100 grams they did not "work." However, for purposes of an alternative for Billy Ray Irick (deceased) or future inmates, the issue is not whether the State can get enough Pentobarbital for a dozen executions, but whether they can secure enough for that inmate's execution.

[77] Perhaps, appellees will claim that this particular note is taken out of context, and if only we could see the redacted portions then we would know it is not what it seems. That is the problem with hiding behind walls of secrecy, and it is a problem entirely of appellees' creation.

person with personal knowledge[78]—the Defendants should be bound by the proof they presented. *Silva*, 477 S.W.2d at 519.

3. This honorable Court should infer that the "Drug Procurer's" testimony would have been adverse to the Defendants and would have established that there were multiple drug suppliers who would have made Pentobarbital feasible and readily available.

Defendants made a choice to belatedly shield the identity of the "Drug Procurer"—despite having originally identified this individual to counsel for the Plaintiffs in pre-litigation responses to TPRA requests. *See Under Seal TR,* I 110-11. Nothing suggested the "Drug Procurer" was intellectually or emotionally unable to withstand the examination and public scrutiny[79] that was placed on Commissioner Parker, Deputy Commissioner Inglis, and/or Warden Mays. Rather, the Defendants relied on their "legal privilege" to prevent examination of the "Drug Procurer." *Under Seal TR* III 357-365. In a separate section of this brief, appellants have explained why such a "legal privilege" should not have extended to the one witness with first-hand knowledge of the State's efforts (or lack thereof) to

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[78] Obviously, Commissioner Parker and Deputy Commissioner Inglis both testified that the "Drug Procurer" could not procure any Pentobarbital. However, as they had to concede, they do not know what he did, when he did it, or with who. Their testimony regarding unavailability, being devoid of personal knowledge, is of no significance.

[79] Plaintiffs are not suggesting that Parker, Inglis, or Mays have suffered any ill effects from public scrutiny. Media reports have been evenhanded, and, to the best of counsel's knowledge, none have singled out any of those individuals for scorn, ridicule, or public opprobrium.

secure Pentobarbital. For purposes of this section, appellants will simply observe that the Defendants made a choice to hide the testimony of the one witness who knew what was going on.

Tennessee has long followed the "missing witness rule." *Sweeney v. State*, 768 S.W.2d 253, 259 (Tenn. 1989).

> Normally, the failure of a party to produce an available witness who is in a position to know the facts, and who is apparently favorable to him, gives rise to a presumption or inference, permissive and rebuttable in nature, that the testimony of such witness would not sustain the contention of such party.

Raines v. Shelby Williams Indus., Inc., 814 S.W.2d 346, 349 (Tenn. 1991) (quoting *Delk v. State*, 590 S.W.2d 435, 448 (Tenn. 1979) (dissenting opinion)); *see also National Life & Accident Ins. Co. v. Eddings*, 221 S.W.2d 695 (Tenn. 1949).

Moreover, Tennessee applies this rule against defendants who fail to offer proof to rebut a *prima facie* case against them. *In re Estate of Nichols*, 856 S.W.2d 397, 402 (Tenn. 1993). In *Runnells v. Rogers*, this Court held that when a *prima facie* case is made, and a defendant fails to offer available witness proof in response, an unfavorable inference should be taken against them. *Runnells v. Rogers*, 596 S.W.2d 87, 90 (Tenn. 1980). *Runnells* quoted from the venerable decision in *Western Union Telegraph* to explain this rule:

> [W]here the evidence tends to fix liability on the defendant, and if he has it in his power to offer evidence to rebut the unfavorable inferences which the proof tends to establish, and neglects or refuses to offer such proof, it may be inferred from the facts shown that the fully developed evidence would establish liability upon his part.

Runnells, 596 S.W.2d at 90 (quoting *Western Union Telegraph Co. v. Lamb,* 203 S.W. 752, 753 (Tenn. 1918)).

The PowerPoint presented by Defendants as substantive evidence, as well as the notes regarding the offer to sell 10 grams for $24,000, created a *prima facie* case that Tennessee could secure Pentobarbital, and that their failure to possess any was due to choice and not unavailability. Thus, under the "missing witness rule" we must presume that if the "Drug Procurer" had been made available to testify, his testimony would have been hurtful to Defendants, and would have contradicted the unsubstantiated claims of Commissioner Parker that the "Drug Procurer" could not find any Pentobarbital. We should presume the *prima facie* case is true and correct, and that the "Drug Procurer" would testify that Pentobarbital was (and is) available from ten or more suppliers.

4. Factually, the record is clear: Pentobarbital was a feasible and readily available alternative, and the State of Tennessee chose not to purchase it; the record is also clear, the "Drug Procurer" and *only* the "Drug Procurer" knows the identity of the roughly 80 willing drug suppliers.

Tennessee could have purchased small quantities of Pentobarbital from ten (10) or more willing suppliers in 2017. At some point a single supplier had at least 10 grams available (enough for a single execution), and was willing to discuss bulk sales (indicating a much larger supply). The only person who knows who these suppliers are, and who has communicated with them, is the "Drug Procurer." For reasons that were not explained, Tennessee chose not to purchase ten small quantities, and/or the 10+ grams that were offered, and instead insisted on only

buying 100 grams at a time. To this day, there are close to 80 drug suppliers who would sell to Tennessee should they have Pentobarbital for sale, but only the "Drug Procurer" knows who they are.

Respectfully, this means that Pentobarbital was a feasible and readily available alternative (and, as has been set-forth elsewhere, it would clearly substantially reduce a significant risk of severe pain and mental anguish). The only reason it is not possessed is due to the inscrutable actions of the "Drug Procurer." Moreover, in light of Defendant's choice to introduce substantive proof that there were 10+ willing sellers of Pentobarbital, the missing witness inference, and under the low preponderance of the evidence standard, Plaintiffs easily carried their burden of proof.

5. This honorable Court has never defined the temporal dimension of "feasible and readily implemented," however, federal courts of appeal make clear it does not mean that the executioner must presently possess the drugs, only that with reasonable transactional effort they can be obtained.

In *West v. Schofield* this Honorable Court adopted the *Glossip* feasible and readily available alternative requirement, when addressing claims that a form of execution created a risk of severe pain.[80] *West*, 519 S.W.3d at 564. In *West* the specific parameters of the feasible alternative requirement were not delineated. *Id.*

[80] As has been argued elsewhere, this Honorable Court did not bind itself to *Glossip* in all cases, and this Honorable Court has never endorsed the proposition that torture would be constitutional, or that an alternative must be proven in cases where the issue is not risk but a certainty of extreme suffering.

The Sixth Circuit makes clear, however, that such a requirement does not mandate that a state "already have the drugs on hand." *In re Ohio Execution Protocol*, 860 F.3d 881, 891 (6th Cir.), cert. denied sub nom. *Otte v. Morgan*, 137 S. Ct. 2238, (2017). Instead, "the State should be able to obtain the drugs with ordinary transactional effort." *Id.*

Had the State of Tennessee used ordinary transactional effort in April and May of 2017, Defendants would possess sufficient Pentobarbital for multiple executions.[81] The failure of Defendants to make such an efforts is not the fault of Plaintiffs.

Recently, the Eighth Circuit in *Johnson v. Precythe* found that the plaintiff had pled nitrogen gas as a feasible and readily available alternative to lethal injection, despite the facts that (a) "further study will be necessary to determine the best delivery system" and (b) Missouri was unwilling to undertake this method of execution. *Johnson v. Precythe*, No. 17-2222, 2018 WL 4055908, at *4 (8th Cir. Aug. 27, 2018). Clearly, it would take some tangible amount of time for Missouri to develop a nitrogen protocol (including deciding on whether delivery should be through mask or gas bag), and secure the appropriate equipment. *Id.* The Eighth Circuit did not find that this would create an "undue delay." *Id.*

6. Other Departments of Correction are able to obtain Pentobarbital.

[81] But for the "Drug Procurer's" cloak of secrecy, and the relevant Defendants' voluntary ignorance, we could better define how many executions. Nonetheless, it seems clear it would be more than one.

The undisputed proof at trial is that Texas and Georgia continue to obtain Pentobarbital for use in carrying out executions. Texas executed Christopher Young using Pentobarbital during the trial. Ex. 140, Ex. Vol. 16-17 2229-2266. "Surely, our TDOC should be as resourceful and able as correction officials in Texas and Georgia in obtaining Pentobarbital." *State v. Irick*, No. M1987-00131-SC-DPE-DD, Sharon G. Lee, J, dissenting from denial of motion to vacate execution, p. 6 (Aug. 6, 2018).

7. The "Drug Procurer" tried to fail; this is constitutionally intolerable.

Glossip requires the State to engage in good faith efforts to obtain lethal injection drugs. *Glossip*, 135 S. Ct. at 2738. That did not happen here.[82] Of the 47-pages of records detailing all of the State of Tennessee's "efforts" to secure Pentobarbital, the most amazing is a text sent by the "Drug Procurer" on April 5, 2017:

> I'm running around today so not sure when I'll be open for a call but in the meantime can u send me a list of all companies etc u reached out to about sourcing so I can have it for when we have to show it's unavailable? Thanks

Ex. 105, at Vol. 10, p. 1486.

That is, before sending out any requests for 100 grams of Pentobarbital (which happened April 6 and 7), or otherwise recording any effort to secure

[82] The testimony of Inglis and Parker on this point is irrelevant. They have no personal knowledge. Their testimony is complete hearsay and it is not reliable. The Drug Procurer is only unavailable because Defendants refuse to produce the witness. They rely on the Drug Procurer's self-serving hearsay statements that have not been subjected to cross-examination. Far more reliable are the Drug Procurer's written notes – at least those that have not been redacted.

Pentobarbital, the "Drug Procurer" was actively trying to gather proof that his future efforts would fail.

The presumption "that public officials in Tennessee… discharge their duties in good faith and in accordance with the law" has been rebutted. *West v. Schofield*, 460 S.W.3d 113, 131 (Tenn. 2015); *Reeder v. Holt*, 418 S.W.2d 249, 252 (Tenn. 1967). The dignity of this State, this Honorable Court, the Office of the Governor and the Department of Corrections are all sullied by the debased conduct of the "Drug Procurer." It is sad that such an important task was delegated down to the lowest-common denominator, so that we are left with a meager record of minimal efforts that display an active intent to fail.

It would be "absurd…and destructive of the good" should this Court tolerate the arbitrary indolence of the "Drug Procurer." Tenn. Con. Art. I, § 2.[83] Due process of law, and the Law of our Land, require better. The "Drug Procurer's" failure to secure Pentobarbital does not establish unavailability, it merely demonstrates bad faith. Thus, the PowerPoint and the relevant notes stand alone as evidence of availability. And, the *Glossip* lack of good-faith requirement has been satisfied. 135 S. Ct. at 2738

[83] In an ideal world, there is not case law on this particular point. We presume our government acts competently and conscientiously. There should not be other examples of such low conduct by those vested with the public trust.

As it is, this very important argument (which is not a "throw-away" but is made in sincere good faith) must rely on the bedrock of the Tennessee Constitution for its support; if this Honorable Court has previously chastised members of the government for intentionally failing to fulfill their duties, counsel has failed to find that relevant case law.

e. The Chancery Court committed error by failing to consider Plaintiffs' proposed two-drug alternative, which would have substantially reduced—in fact entirely removed—the risk of severe pain and mental anguish produced by vecuronium bromide, and which would have reduced the inmate's time of suffering by three minutes.

Plaintiffs put on proof from Drs. Stevens, Greenblatt and Lubarsky that a two-drug protocol involving just Midazolam and potassium chloride would substantially reduce (indeed eliminate) the risk of severe pain and mental anguish caused by vecuronium bromide. XXV 162-63, 218; XXVIII 542-43; XLII 1818-21. Defendants did not object to this line of questioning. *Id.* Commissioner Tony Parker agreed that the Department of Corrections could carry out an execution using a two-drug protocol, using just Midazolam and potassium chloride. XXXVII 1315-16. Again, Defendants did not object. *Id.*

Plaintiffs made clear, on the record, at trial, that a two-drug alternative relying on Midazolam and potassium chloride, that removed vecuronium bromide was a feasible and readily available alternative that must be considered under *Glossip* and *West.* XLIII 1933-36, XLV 1966. Plaintiffs submitted that such a protocol "is not only reducing a risk. It's removing a risk. It's removing something that will cause severe pain….It removes that noxious stimuli. It would speed up death by three minutes. Especially in light of pulmonary edema, those are three minutes that are already torturous." XLIII 1936.

However, in denying relief, the Chancery Court only considered a single possible alternative, a single-drug protocol using Pentobarbital. *Order,* XVI 2239-49, 2264. The failure of the Chancery Court to consider the two-drug protocol was

error, and it was further error to fail to find that such a protocol was feasible and readily available, and that it would substantially reduce (indeed eliminate) the risk of severe pain and mental anguish produced by vecuronium. *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015); *West v. Schofield,* 519 S.W.3d 550, 564 (Tenn. 2017). Had the Chancery Court engaged in the proper analysis, and reached the proper factual conclusion, then Tennessee's current three-drug protocol would have been found to violate the Eighth Amendment to the United States Constitution, and Article I, § 16 of Tennessee's Constitution.

1. Plaintiffs, working under incredible time constraints, pled the two-drug protocol as a feasible and readily available alternative that would substantially reduce a significant risk of severe pain and mental anguish.

On January 8, 2018, Defendants approved an earlier version of the three-drug, Midazolam-based protocol that is the subject to this litigation. I 96. The original complaint was filed on February 20, 2018. I 1. Trial commenced on July 9, 2018. XXIV 1. Thus, in four and one-half months, counsel for thirty-three different Plaintiffs[84] had to complete all discovery[85], address multiple motions, and file three Complaints. After the Second Amended Complaint was filed on July 3, 2018, and

[84] At trial, fully ten attorneys directly participated and sat at counsel table. These attorneys came from five different offices: three private each representing a single plaintiff, plus the two Federal Public Defender offices, which represented twenty-six (Middle) and four (East) plaintiffs.

[85] Depositions were conducted in Boston, MA, Miami, FL, Auburn, AL, Cherokee, NC, Atlanta, GA, and Tulsa, OK, as well as four in Nashville, Tennessee.

concurrent with the filing of Plaintiffs' Trial Brief on July 5, 2018, a mere four days before trial, Defendants published a new protocol, which for the first time removed the option of single-drug Pentobarbital. XII 1589-1690.

Until defendants affirmatively withdrew the one-drug Pentobarbital alternative from the July 5, 2018 protocol, their counsel had been notably unwilling to take a position on the availability of Pentobarbital. At case management conference on April 11, 2018, defense counsel refused to say whether Pentobarbital would be available for the scheduled August 9, 2018 execution, despite vigorous questioning by the Chancellor:

> COURT: Are you able to provide the Court information on the State's position concerning paragraphs 431 and 433[86] and the availability of the drug for Protocol A [single-drug Pentobarbital]?
>
> MR. SUTHERLAND: Well, I think what we have told the Tennessee Supreme Court in the motions to set execution dates that there has been difficulty obtaining the drugs for Protocol A. You know –
>
> COURT: Well, you can understand –
>
> MR. SUTHERLAND: Obviously the Department –
>
> COURT: Excuse me for interrupting. But you can understand how that puts us, then, in an untenable position here in the trial court and all of the litigants, including the State. Under Glossip, that is a fact that we need to

[86] The first complaint:

¶ 431: "The Tennessee Attorney General made no mention of unavailability of drugs in his January 11, 2018 notice to the court."

¶ 433: "The current proof in the record is that Defendants have a source for compounded Pentobarbital. To the extent that Defendants dispute this allegation, the proper forum to adjudicate this factual disagreement is through trial and discovery." I, 90.

know. So we've got to have a position on that. Either it's unavailable or it's not.

MR. SUTHERLAND: I think – I guess I would say today, Judge, that I think it would be somewhat premature because unavailability certainly –

COURT: It's not premature because we have an August execution date. We need to know whether it will be available for that execution for the plaintiffs to be able to fulfill the condition of Glossip and for you to be able to argue to me they have not fulfilled their position under Glossip. So we need to know that. That is essential for the case –

COURT: What will be used for the August 9th – will it [Pentobarbital] be available for the August 9th execution? That's the question.

MR. SUTHERLAND: I can't answer that question, Your Honor.

COURT: Well, if you can't answer it then our proceedings here are really meaningless. We've got to have the answer to that because then they can't allege – know what alternative to allege.

COURT: Are you going to have enough [Pentobarbital] for August 9th or not?

MR. SUTHERLAND: Respectfully, Your Honor –

COURT: Yes, sir.

MR. SUTHERLAND: -- The Glossip decision says that they must identify it. They must identify it. They must tell – they must say if B doesn't work, that here's one that is available.

COURT: Yes.

MR. SUTHERLAND: It's not out – it's not our responsibility to tell them what we have. It's their responsibility to identify something that is available.

COURT: I guess we just will have to respectfully disagree…

> COURT: …how can they pled Protocol A as an alternative if we have facts in here that say it's not going to be available for the August 9th execution? And you won't tell us one way or the other whether it's going to be available or not.
>
> That would eliminate – if we knew that, then they could say, okay, we can't use A but we can this and then we can have a trial about that.

Tr. April 11, 2018, XX 11-30 (excerpts, above).

For obvious reasons, the State's single-drug Pentobarbital protocol had been Plaintiffs' preferred alternative under *Glossip* and *West*.[87] So long as Defendants expressed an intent to employ single-drug Pentobarbital, it had to be Plaintiffs' chosen alternative. However, despite this being the first choice, Plaintiffs had always maintained that other methodologies would reduce pain and suffering.

In the three Complaints that were filed, among other explicit averments, Plaintiffs' repeatedly pled that "vecuronium bromide is not necessary (or is unnecessary) to execute Plaintiffs," and that "[t[he use of vecuronium bromide in Protocol B increases the risk of unnecessary and serious pain and suffering." *January 8, 2018 Complaint,* I 31, ¶¶ 96-97, 37, Heading, 39, ¶ 177; *April 13, 2018*

[87] (1) One-drug Pentobarbital is painless if done properly, other alternatives reduce suffering but do not eliminate suffering; (2) it had been upheld by the Courts, (3) until July 5, 2018, Defendants maintained that they were continuing to try to secure drugs to perform this protocol, and (4) Defendants had a supplier under contract to provide Pentobarbital. Thus, it was, by far, the "best" alternative. Other alternatives, while meeting *Glossip*/*West* requirements involve some level of pain and suffering, as, in fact, does the two-drug alternative.

Amended Complaint, III 323, ¶¶ 96-97, 330, Heading, 332, ¶ 177; *July 3, 2018 Second Amended Complaint*, XI 1446, ¶¶ 96-97, 1454, ¶ 177.[88]

Plaintiffs in their trial brief filed on July 5, 2018, four days prior to the commencement of trial, stated:

> Finally, discovery in this case has revealed at least **three other feasible and readily implemented alternatives to Protocol B**[89] as written: **(1) Defendants could eliminate the use of vecuronium bromide—according to their own witnesses it is unnecessary to cause death or preventing pain, is a noxious stimuli capable of overcoming any sedative effect of the Midazolam, and prolongs Plaintiffs suffering by at least three minutes**, (2) Defendants could reduce the amount of Midazolam to its maximum effective dose thus reducing the pain and suffering caused by injecting a bolus dose of acidic chemical into the veins of Plaintiffs and eliminate the vecuronium bromide; or….

XIII 1747 (emphasis added).

Also in the trial brief, Plaintiffs' argued:

> Weeks after Defendant Parker swore under oath that Protocol A is the preferred protocol the state eliminated it in a cynical move presumably designed to eliminate Plaintiffs' argument that a single-drug Pentobarbital lethal injection protocol is a feasible, known, and readily available alternative. Defendants cannot word process away Plaintiffs proof. Moreover, to the extent that this Court finds Defendants last minute maneuver has any impact on this litigation, it should be to estop Defendants from arguing that Plaintiffs have failed to prove an alternative.

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[88] Other statements related to the risks caused by vecuronium bromide and/or its lack of utility are found at ¶¶ 153, 160-176, 230, 231, 302, 303 and 308 in the *Second Amended Complaint*, XI 1416-1563 and in similarly numbered paragraphs in the prior complaints.

[89] At the time the brief was drafted, Tennessee still had Protocol A using single-drug Pentobarbital, and Protocol B, which was the three-drug method subject to challenge.

XIII , fn. 13.

2. Pursuant to Tennessee Rule of Civil Procedure 8.05, Plaintiffs sufficiently pled the two-drug alternative, such that (a) Defendants had more than adequate notice of this claim, and (b) the Court should have addressed this claim on its merits.

Tennessee "follows a liberal notice pleading standard, which recognizes that the primary purpose of pleadings is to provide notice of the issues presented to the opposing party and court." *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011) (citing *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011)). It is well-settled Tennessee law that "a complaint 'need not contain in minute detail the facts that give rise to the claim,'" rather, the complaint "must contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial.'" *Riad v. Erie Ins. Exch.,* 436 S.W.3d 256, 270 (Tenn. Ct. App. 2013) (quoting *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 704 (Tenn. 2002) which quoted *Donaldson v. Donaldson*, 557 S.W.2d 60, 61 (Tenn. 1977)). The purpose of pleadings is "to give notice of the issues to be tried so that the opposing party can adequately prepare for trial." *Sanford v. Waugh & Co., Inc.* 328 S.W.3d 836, 848 (Tenn. 2010); *Keisling v. Keisling*, 92 S.W.3d 374, 377 (Tenn. 2002).

The applicable rule of civil procedure, 8.05, states: "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." Tenn. R. Civ. P. 8.05(1). Whether an issue was sufficiently pled is a matter of law, which is reviewed *de novo* without any presumption of

correctness. *Mortgage Electronic Registration Systems, Inc. v. Ditto*, 488 S.W.3d 265, 275 (Tenn. 2015); *Lind*, 356 S.W.3d at 895.

This Honorable Court and the Court of Appeals have previously examined trial briefs to determine what claims have been pled. *Napolitano v. Board of Professional Responsibility*, 535 S.W.3d 481, 495 (Tenn. 2017) (pre-trial brief referred to by this Court as source of claim that attorney owed $40,000 in restitution); *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 541 (Tenn. 2008) (addressing a post-sale failure to warn claim that was first alleged in plaintiff's trial brief); *Dixon v. Grissom*, No. E201400947COAR9CV, 2015 WL 3643426, at *8 (Tenn. Ct. App. June 12, 2015) (noting that claim was not raised in complaint or in trial brief); *Saweres v. Royal Net Auto Sale, Inc.*, No. M2010-01807-COA-R3CV, 2011 WL 3370350 (Tenn. Ct. App., August 1, 2011) (pre-trial brief quoted from to define plaintiff's complaint; Court of Appeals then found "[t]he matters addressed by the court were clearly put in issue by the pleadings."). Clearly, the trial brief in this case explicitly identified the two-drug protocol as a feasible and readily available alternative. XIII 1747.

At trial, during legal discussion of the two-drug protocol, on both July 17 and 18, counsel for Plaintiffs made clear that it was their position that under Rule 8.05 adequate notice had been provided. XLIII 1940; XLV 1966. Counsel also noted that "this has been a fluid situation. It has been very, very rushed. We did get a new protocol July 5th and we have constantly been almost like hamsters in a wheel trying to keep this whole thing going." *Id.* at 1965-66.

Thus, in this case, pursuant to *Lind, Riad, Sanford* and Tenn. R. Civ. Pro. 8.05, as well as *Napolitano* and *Flax*, Plaintiffs more than adequately provided notice to the Defendants that a two-drug alternative would be advanced at trial, and to the Chancellor that such should be considered. Under appropriate *de novo* review, without a presumption of correctness, this Court should find that the Chancellor erred, and that the two-drug alternative should have been considered on its merits.

3. Alternatively, Plaintiffs should have been allowed to amend by implied consent, pursuant to Tennessee Rule of Civil Procedure 15.02.

In opening statement, counsel for Plaintiffs noted that they would most likely seek leave to amend the complaint to conform to the proof. XXIV 26. Similarly, Plaintiff's trial brief stated: "plaintiffs may ask leave to amend their complaint to conform to the proof that develops at trial—indeed, in this fluid situation, it is almost certain that the proof will differ from what was anticipated at the time of the complaint's drafting." XIII 1812. Indeed. While the trial brief was being written, Defendants changed their protocol. The trial brief with attachments was 340 pages, and it was filed at 8:02 p.m. XIII 1712 to XIV 2052.[90] The new protocol had been filed with the Clerk and Master at 1:17 p.m.. XII 1592.

[90] Plaintiffs will defer to this Honorable Court's collective wisdom as to how time-consuming such legal writing should be.

Tennessee Rule of Civil Procedure 15.02 permits very liberal amendment of pleadings, including amendments "as may be necessary to cause them to conform to the evidence." The full text of that rule reads:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. Provided, however, amendment after verdict so as to increase the amount sued for in the action shall not be permitted. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Tenn. R. Civ. Pro. 15.02.

It is well-settled that in normal circumstances (not the radically rushed circumstances of this case) that a motion to amend the pleadings to conform to the evidence should be granted if "the new issues were tried by the parties' express or implied consent and whether the defendant 'would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.'" *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 649 (Tenn. Ct. App. 1999) *quoting Zack Cheek Builders, Inc. v. McLeod,* 597 S.W.2d 888, 891 (Tenn.1980).

"[T]rial by implied consent will be found where [1] the party opposed to the amendment knew or should reasonably have known of the evidence relating to the new issue, [2] did not object to this evidence, and [3] was not prejudiced thereby." *Zack Cheek Builders, Inc. v. McLeo*d, 597 S.W.2d 888, 890 (Tenn. 1980); *see also Hyman v. Bd. of Prof'l Responsibility of Supreme Court*, 437 S.W.3d 435, 441 (Tenn. 2014) (as accused lawyer "did not object to the inclusion of [an uncharged allegation of misconduct] this incident was therefore tried by the implied consent of the parties.").

Examining the three parts of the *Zack Cheek* analysis, we see that an amendment to conform to the proof should have been permitted, and that the failure to permit such was an abuse of discretion (as will be further developed below).

A. *Zack Cheek* analysis Prong One: Defendants knew or reasonably should have known that Plaintiffs were submitting a two-drug alternative.

As has been set-forth in detail above, Plaintiffs' three complaints and the trial brief made very clear that a two-drug alternative would be raised at trial. XI 1446, ¶¶ 96-97, 1454, ¶ 177; XIII 1747. Then in opening statement, Plaintiffs reminded Defendants and the Court, that they would present "other lethal injection options" beyond single-drug Pentobarbital. XXIV 24-25.

Most importantly, after providing warning to Defendants that a two-drug protocol and "other lethal injection options" would be advanced at trial, Plaintiffs

then explicitly questioned their expert witnesses and the lead defendant about the two-drug alternative.

The first witness at trial, Dr. Craig Stevens, was unambiguously asked about a two-drug protocol by Plaintiffs' counsel:

> Q. From a pharmacological perspective and to a reasonable degree of scientific certainty, would a two-drug protocol involving just Midazolam and potassium chloride, but removing the three-minute interlude with vecuronium, be less painful and cause less suffering than the present three-drug protocol?
>
> A. It would in the sense of death comes sooner.

XXV 162-63. Earlier examination of Dr. Stevens also made clear that (a) vecuronium would cause "horrific" suffering and (b) it was not needed to cause an inmate's death (death would be caused by the potassium chloride). XXV 154-56, 159-60.

Plaintiffs' second expert witness, Dr. David Greenblatt, was similarly asked about the need to employ vecuronium in an execution protocol:

> Q. Do you see any effect from vecuronium bromide that would hasten the process of death within this protocol or diminish any pain or suffering that the person being executed experienced?
>
> A. It certainly would not—it would increase rather than diminish pain and suffering. I don't think it would hasten death except that there would be a period of time when they can't breathe. But I—I don't see any benefit to vecuronium.

XXVIII 542-43.

Dr. Lubarsky, the Plaintiffs' final expert, also discussed whether vecuronium bromide served any purpose:

Q. Does the Vecuronium Bromide do anything in the lethal injection protocol to protect the inmates from the sensation of pain?

A. No. As I think we covered, it paralyzes you and prevents anyone from seeing any sign of distress that you might voice or move or try to express.

Q. So instead of providing extra protection against the pain with Potassium Chloride, does it actually act as a stimulus to actually increase the risk of pain?

A. I believe it does, because you're causing air [hunger][91] and that's known to be a significant added stimulus.

XLII 1818-19.

Subsequently, Dr. Lubarsky explained the medical uses of vecuronium during surgery: (1) to relax the throat muscles and vocal cords, so that a breathing tube can be inserted, (2) to protect against insufficient anesthesia and a patient responding to pain by moving, mid-surgery, and (3) to make it easier to manipulate the patient and their internal organs, by relaxing surrounding muscles. XLII 1823-25. He was asked if these medical reasons were present in Tennessee's protocol, such that vecuronium was needed, and he answered they were not. *Id.* at 1825.

Defendant Commissioner of the Tennessee Department of Corrections Tony Parker was questioned about a two-drug protocol.

Q. Commissioner, is the Department of Correction able to carry out an execution using just Midazolam and Potassium Chloride?

A. I don't understand your question. We have a three-drug protocol. We would have to have all three drugs to carry out an execution.

[91] The transcript reads "air in the lung." However, Plaintiffs aver that the term used by Dr. Lubarsky (and other experts) to describe the sense of suffocation is "air hunger," and that is what was said during this passage.

Q. If the second drug—what role does the second drug play in the execution?

A. The second drug is a paralytic that paralyzes and stops the breathing.

Q. Will the Potassium Chloride alone kill an inmate?

MR. SUTHERLAND: Objection. Foundation.

THE COURT: The Court overrules the objection.

A. I am assuming it could, yes.

Q. If the Midazolam works as you intend it to work and the Potassium Chloride will kill the inmate, then the Vecuronium Bromide really serves no purpose as far as bringing about the death of the inmate, does it?

A. Well, from a layman's term or my opinion, which I'm not a medical professional, if the Potassium Chloride were to stop the heart, obviously, that could kill the inmate. So yes.

XXXVII 1315-16.

Thus, under the *Zack Cheek* analysis, we see two unambiguous instances where Plaintiffs' counsel raised a two-drug protocol alternative: with the very first witness, Dr. Stevens, and then with the lead defendant, Commissioner Parker. XXV 162-63; XXXVII 1315-16. This was done after multiple warnings had been given that a two-drug protocol would be explored. XIII 1747; XXIV 24-25. Additional questioning with Drs. Stevens, Greenblatt and Lubarsky clearly addressed the two-drug protocol, and further established that such a protocol would substantially reduce a significant risk of pain. XXV 154-56, 159-60; XXVIII 542-43; XLII 1818-19, 1825. *Zack Cheek* prong one is satisfied, Defendants knew or should have known that a two-drug protocol would be advanced by Plaintiffs as a feasible alternative.

B. *Zack Cheek* analysis Prong Two: Defendants did not object.

Plaintiffs' counsel will not repeat the quoted testimony from the prior section, but notably Defendants only objected one time, and that one objection was to "foundation." XXXVII 1315-16. At no point did Defendants lodge an objection that a two-drug protocol was irrelevant to the issues in dispute. At no point did Defendants object to an examination that was outside the scope of the Complaint. At no point did Defendants submit an objection under Rule 15.02 and its specific clause: "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings…" Tenn. R. Civ. Pro. 15.02.

Instead, learned counsel with decades of experience, having read Plaintiffs' Trial Brief and Complaints and having sat through opening statement, knowingly permitted explicit questioning about the two-drug protocol. *Zack Cheek* prong two is easily satisfied.

C. *Zack Cheek* analysis Prong Three: Defendants were not prejudiced.

In *Zack Cheek*, this Honorable Court held that consideration of whether the party opposed to the amendment would be prejudiced by the amendment requires consideration of whether the party "had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be tried on a different theory." *Zack Cheek*, 597 S.W.2d at 890-91 (citation omitted).

This Honorable Court recently reasserted that allegations of prejudice must be specific and concrete, and that "vague, speculative, or conclusory allegations are

insufficient." *Nunley v. State*, No. W201601487SCR11ECN, 2018 WL 3468745, at *23, fn. 26 (Tenn. July 19, 2018). It has long been the law in Tennessee that "conclusory statements made by counsel" are not evidence of prejudice. *State v. Kerley*, 820 S.W.2d 753, 757 (Tenn. Crim. App. 1991).

i. Defense counsel failed to identify any actual prejudice Defendants had suffered. In addition, any potential prejudice would have been easily cured, as all essential witnesses were available.

In this case, the issue of whether the Chancellor would consider the two-drug protocol as a *Glossip*/*West* alternative was addressed in open court on July 17, 2018, and then in more detail on the morning of July 18, 2018, prior to the start of Defendants' case. XLIII 1933-34; XLV 1959. Both defense experts, including the Defendants' key witness on medications, Dr. Evans, had yet to take the stand. All of Plaintiffs' experts were physically present and available to be recalled as witnesses by Defendants, if needed. XLVI 2203-04. Defendant Commissioner Parker was also available to be recalled to further address the issue of whether a two-drug protocol was feasible or readily available, or to explain his earlier answer on the subject.

When the two-drug protocol was discussed on July 17, 2018, the Chancellor asked Defendants' counsel if they were prepared to respond, or if they needed more time. Counsel asked for more time, but stated, "Frankly, it sounds like to me that it's possible. We would certainly need to talk to the Department. It sounds like to me it's certainly something we'd do." XLIII 1938.

On July 18, 2018—again with all six experts available—counsel for Defendants for the first time appeared to claim prejudice: "There's no way to—you know, you can't come in and change the entire complexion of a case, a cause of action at the end of proof when we're getting ready at this moment to defend the claim."[92] XLV 1985. Specifically, Defendants' counsel submitted that "We didn't question their experts in depositions on this…we'd have to re-do discovery in the case based upon this." *Id.* Finally, Defendants' counsel submitted, "If we had been dealing with this issue in the nature of an alternative—*Glossip* alternative, it would have changed the questioning. It would have changed our approach to that questioning." *Id.* at 1990.

What questions learned counsel for the Defendants would have asked, and why he could not recall the experts who were present in the courtroom to ask these probing questions was not explained. *Id.* at 1990, *established by omission.* Why defense counsel had chosen not to object when the two-drug protocol had been so explicitly raised during Plaintiffs' proof was not addressed. *Id.*

A brief continuance to re-depose the defense experts, or to gather an expert on the "unavailability of removing vecuronium from the protocol" was not requested, though clearly permitted under Rule 15.02. *Id.* Indeed, it was never articulated by defense counsel how it could possibly <u>not</u> be feasible to remove a drug

[92] Why pleading an alternative that had been fully alleged in the trial brief on July 5, 2018 "changed the entire complexion of the trial"—but publishing an entirely new lethal injection protocol on that same day did not—was not explained by defense counsel.

that their lead Defendant conceded was not needed. XXXVII 1315-16. While it may take some effort to purchase a pharmaceutical, it takes no effort not to purchase a pharmaceutical.

ii. Any claim of prejudice was waived due to failure to lodge a contemporaneous objection.

Defendants' failure to contemporaneously object, as contemplated by Rule 15.02, disadvantaged the Court and Plaintiffs. Under the rule, if evidence is objected to, then

> the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits.

Tenn. R. Civ. Pro. 15.02. By failing to make such a contemporaneous objection, Defendants denied the Chancellor the opportunity to hear and weigh their claim of prejudice in a timely manner. *See State v. Baugh*, 152 S.W.3d 453, 465 (Tenn. 2004) (failure to lodge timely objection prevented trial court from having an opportunity to rule).

Under Tennessee law, a failure to object is a waiver of any subsequent claim of prejudice. *Creech v. Addington*, 281 S.W.3d 363, 386 (Tenn. 2009) (failure to lodge timely objection to allegedly misleading jury instructions was waiver); *Baugh,* 152 S.W.3d at 465; *State v. Reid*, 91 S.W.3d 247, 283-84 (Tenn. 2002) (failure to object to prosecutor's allegedly prejudicial closing argument was waiver); *State v. Thompson*, 832 S.W.2d 577, 579 (Tenn. Crim. App. 1991). In this case, having had the two-drug alternative so clearly addressed, so many times both before and during trial, any

claim of prejudice was waived by defense counsel's repeated failures to lodge appropriate objections.

iii. The burden of proof was on Defendants to demonstrate prejudice, not on Plaintiffs to show entitlement to amend.

"[T]he court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby *and the objecting party fails to satisfy the court* that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits." Tenn. R. Civ. Pro. 15.02 (emphasis added). Rule 15.02 plainly places the burden to establish prejudice on the objecting party. Absent that burden being met, amendment should be "freely" permitted. *Id.* As noted, above, Defendants failed to articulate any form of prejudice.

Thus, no actual concrete prejudice was alleged. All claims of prejudice were mere conjecture. No prejudice was suffered. And any claim of prejudice was waived by defense counsel's failure to object. *Zack Cheek* prong three is easily met as well.

f. Amendments to conform to the proof are regularly permitted by the courts of this state in circumstances that are materially indistinguishable from our own—except that in those cases the parties had significantly more time to prepare for trial than did Plaintiffs.

Courts routinely permit amendments under Rule 15.02, including far more significant amendments than the one at issue here. *See, e.g., Goff v. Elmo Greer & Sons Const. Co., Inc.*, 297 S.W.3d 175, 196-97 (Tenn. 2009) (although plaintiffs' complaint only alleged "intentional and fraudulent misconduct," punitive damages

were awarded under amended theory of "reckless" misconduct pursuant to Rule 15.02); *Newcomb v. Kohler Co.,* 222 S.W.3d 368, 382-83 (Tenn. App. 2006) (plaintiffs permitted to amend complaint mid-trial to claim damages of $57,321 in back pay and $429,908 in front pay, although no specific damages were enumerated in complaint); *Hobbs v. Hobbs*, 987 S.W.2d 844, 847-48 (Tenn. App. 1998) (although counter-claim in divorce action failed to allege any grounds for divorce, under 15.02, party allowed to amend to conform to evidence of inappropriate martial conduct); *Varley v. Varley,* 934 S.W.2d 659, 665 (Tenn. App. 1996) (although complaint for divorce failed to allege adultery, four witnesses at trial alleged adultery without objection and divorce granted on amended theory of adultery under 15.02).

Meaningfully, the most significant distinction between any of those cases and the present matter is that they were traditional civil cases following traditional, unrushed trial schedules. *Goff,* 297 S.W.3d at 180-81 (suit originally filed in 1997, at least two amended complaints filed, trial began June 2006—8-9 years later); *Newcomb,* 222 S.W.3d at 380-81 (suit filed July 7, 2003, trial commenced April 2005—21 months later); *Hobbs*, 987 S.W.2d at 845 (simple divorce action filed September 23, 1996, trial commenced May 1997—8 months later); *Varley*, 934 S.W.2d at 660 (another divorce, filed May of 1994, final hearing April 1995—11 months later). In this case, four-and-a-half months passed from the filing of the initial complaint to the inception of a trial that would last over two-weeks.

4. The Chancellor summarily denied Plaintiffs leave to plead a two-drug alternative; her ruling did not involve any legal analysis under either Rule 8.05 or Rule 15.02; the Chancellor

abused her discretion by applying an incorrect legal standard and by reaching an illogical decision.

After significant discussion of the two-drug protocol, and of Plaintiffs' intent to argue that it was a feasible and readily available alternative that substantially reduced a risk of severe pain and mental anguish, XLIII 1929-1941; XLV 1958-1990, the Chancellor issued an oral ruling, which did not address Rule 8.05 at all:

> Rule 15.02 of the Tennessee Rules of Civil Procedure provides that when an issue is not raised by the pleadings or tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.
>
> The Court denies the Rule 15.02 motion to amend. The Court finds that the issue of removal of Vecuronium Bromide as an alternative protocol under Glossip was not tried by expressed or implied consent of the parties. The motion is denied.

XLV 1990-91.

Subsequently, the court issued a written order, which, in relevant part provided as follows:

> The Court denied Plaintiffs amending the pleadings to assert removal of vecuronium bromide from the Tennessee three-drug July 5, 2018 lethal injection protocol as a known, feasible and available alternative, *see Glossip…*This potential cause of action was known or could have been known by the Plaintiffs upon the filing of the lawsuit, and this cause of action has not been tried by express or implied consent . . . .

XV 2138.

A. The abuse of discretion standard, while deferential, is not supine.

"A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision that is against logic or reasoning that causes an injustice to the party complaining." *State v. Russell*, 382 S.W.3d 312, 317 (Tenn. 2012); *State v. Gomez,* 367 S.W.3d 237, 243 (Tenn. 2012). This Honorable Court has defined the standard as "[a]n abuse of discretion occurs when the trial court (1) applies an incorrect legal standard, (2) reaches an illogical or unreasonable decision, or (3) bases its decision on a clearly erroneous assessment of the evidence. *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014); *State v. Mangrum*, 403 S.W.3d 152, 166 (Tenn. 2013); *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). This court has also made clear that "a silent record" is not entitled to a presumption of legal regularity. *State v. Pollard*, 432 S.W.3d 851, 862 (Tenn. 2013).

B. The Chancellor employed an incorrect legal standard that is contrary to the logic of *Zack Cheek* and is not based on any known authority.

The standard employed by the Chancellor in denying Rule 15.02 amendment was "whether this cause of action was known or could have been known upon the filing of suit." XV 2138. This standard is not found in *Zack Cheek* or any other precedent of this Court or of the Court of Appeals.[93] Indeed, this standard is directly contrary to the logic of all other 15.02 cases; clearly in *Goff* the plaintiffs could have known to plead "recklessness" in their original complaint; in *Newcomb*, plaintiffs knew they had missed back pay and front pay; and in *Varley,* the wife was

[93] Westlaw search: adv: 15.02 /p known /p "cause #of action" has no case results in the Tennessee database as of 8/31/2018 at 9:59 a.m.

aware that she was leaving her husband because of his adultery. *Goff,* 297 S.W.3d at 196-97; *Newcomb*, 222 S.W.3d at 382-83; *Varley*, 934 S.W.2d at 665. Indeed, if such a standard had been applied in *Zack Cheek*, the amendment, requested more than 30-days *after* judgment had been entered, would never have been permitted. *Zack Cheek*, 597 S.W.2d at 889-90. Finally, in *Hyman*, this Honorable Court found it acceptable to amend a complaint to add an additional and entirely independent act of misconduct that the State presented at trial—clearly, the State had to have known about this misconduct before trial (otherwise they would not have subpoenaed witnesses to prove it). *Hyman*, 437 S.W.3d at 441, fn. 4.

Moreover, despite being directed to *Zack Cheek* and *Vantage Tech*[94] and the three-part analysis contained in those cases, the Chancellor did not attempt to apply the controlling standard. *See* XLIII 1939-41

Thus, the Chancellor's ruling was an abuse of discretion as she applied an incorrect legal standard, while completely ignoring proper analysis. *McCoy*, 459 S.W.3d at 8; *Mangrum*, 403 S.W.3d at 166; *Lee Med., Inc.*, 312 S.W.3d at 524.

C. Under Rule 15.02 there was implied consent, and the Chancellor's failure to find such was illogical and unreasonable.

Plaintiffs set-forth above why, under *Zack Cheek*'s three-part analysis, a Rule 15.02 amendment was proper. It is sufficient to simply note that the Chancellor's failure to engage in this analysis and to reach the obviously correct conclusion was

[94] The Chancellor acknowledged her knowledge of this case, noting it was "our non-compete case." XLIII 1939.

illogical and unreasonable, and thus, was an abuse of discretion. *McCoy*, 459 S.W.3d at 8; *Mangrum*, 403 S.W.3d at 166; *Lee Med., Inc.*, 312 S.W.3d at 524.

D. It was an abuse of discretion to ignore Rule 8.05.

Plaintiffs submitted that there was no need to amend the complaint, as the two-drug alternative had been adequately pled. XLIII 1940, XLV 1966-67. Specifically, Plaintiffs' counsel argued:

> I haven't necessarily perceived it as an amendment of the pleadings to conform to the proof. I do think under 8.05 we did provide adequate notice. We did in the original complaint, the amended complaint, say Vecuronium is unnecessary, that that's said in multiple paragraphs.

XLV 1966.

This contention was left entirely unaddressed by the Chancellor. *Established by omission from the record*. The Chancellor failed to engage in the proper legal analysis, as discussed above. Thus, the Chancellor employed an incorrect legal standard (no standard at all), and reached an illogical and unreasonable result. This is an abuse of discretion. *McCoy*, 459 S.W.3d at 8; *Mangrum*, 403 S.W.3d at 166; *Lee Med., Inc.*, 312 S.W.3d at 524.[95]

E. The Chancellor's errors caused an injustice to Plaintiffs.

It is an abuse of discretion when a court "applies an incorrect legal standard or reaches a decision that is against logic or reasoning that causes an injustice to

[95] This Honorable Court's standard of review of the ultimate issue under 8.05 is *de novo. Mortgage Elec. Registration Sys.*, 488 S.W.3d at 275.

the party complaining." *Russell*, 382 S.W.3d at 317. In this case, for the reasons that will be addressed in the immediately following section, analysis of a two-drug protocol would have resulted in a finding that Tennessee's three-drug protocol is unconstitutional. Thus, now-deceased Plaintiff Billy Ray Irick would not have been executed with the torturous three-drug protocol, but with a two-drug protocol[96] that would have substantially reduced (eliminated) a significant risk of severe pain and mental anguish. The remaining Plaintiffs will suffer a similar injustice, due to the Chancellor's failure to follow controlling legal precedent, and due to the Chancellor's illogical and unreasonable conclusions.

F. The United States Supreme Court makes clear that a constitutional claim will not be limited by specific arguments.

The United States Supreme Court permits litigants to advance new arguments in support of their broader constitutional claims. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). In *Citizens United*, the plaintiffs dismissed their facial challenge to the relevant campaign finance statute and only advanced an as-applied challenge. *Citizens United*, 558 U.S. at 329-30. Nonetheless, the Court addressed the facial constitutionality of the campaign finance statute (and, of course, found it

[96] Or, if the Defendants are not really so confident in the efficacy of Midazolam, and if they do not believe their pharmacy expert that Midazolam would have rendered Mr. Irick immobile and insensate to pain, then they would not have executed him as scheduled, as to do so would have let the public see his full reaction when the potassium chloride began coursing through his veins.

unconstitutional): "Citizen United's argument that *Austin* should be overruled is 'not a new claim.' Rather, it is—at most—"a new argument to support what has been a consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment.'" *Id.* at 331 (quoting *Lebron*, 513 U.S. at 379).

The Court in *Citizen United* also provided a warning against overly restrictive interpretations of facial and as-applied challenges:

> [T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint. The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved. Citizens United has preserved its First Amendment challenge to § 441b as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise—the permissibility of restricting corporate political speech—that is itself in doubt.

Citizens United, 558 U.S. at 331 (citing *United States v. Treasury Emp.,* 513 U.S. 454, 477–478 (1995)).

The logic of *Citizens United* is compelling on our facts. Under that precedent, it was not necessary for Plaintiffs to plead the 2-drug alternative in the complaint (although, appellants submit such was done under our liberal notice pleadings and Rule 8.05), rather, once the claim was made that the 3-drug protocol was "cruel and unusual," then the trial court was free to consider the 2-drug alternative.

In *Lebron*, the plaintiff argued, for the first time to the U.S. Supreme Court, that Amtrak was part of the federal government. *Lebron*, 513 U.S. at 378-39. In permitting this rather dramatic change of course, the Court held: "Lebron's contention that Amtrak is part of the Government is in our view not a new claim…but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment." *Lebron*, 513 U.S. at 379.

The arguments that were newly invoked in *Citizens United* and *Lebron* were of significantly greater significance than an alternative method of execution. Obviously, *Citizens United* is the most important campaign finance decision of the last decade, and it was based on an argument for the invalidation of a statute that had not been raised until the case reached the Supreme Court. Similarly, in *Lebron*, the plaintiff's contention about the very legal nature of the defendant changed on appeal. Conversely, nothing has changed in this case, it has always been consistent: Tennessee's three-drug protocol is cruel and unusual.

Thus, at worst, the 2-drug protocol alternative is a new argument in support of a constitutional claim, that should have been considered by the Chancery Court, and which should be considered by this Honorable Court. Under Rules 8.05 and 15.02 and under United States Supreme Court precedent, it was error for the Chancellor to fail to address the constitutional issue on its merits, and based on the proof presented at trial.

5. A two-drug protocol of Midazolam and potassium chloride would substantially reduce (entirely eliminate) the significant risk of

severe pain and mental anguish that will be produced by vecuronium bromide, and it will substantially reduce the duration of severe pain and mental anguish produced by the Midazolam.

The proof from Plaintiffs' experts was overwhelming and unassailed: (1) vecuronium will cause suffocation that is horrific and akin to being buried alive; (2) Midazolam will not render an inmate insensate to this suffering; (3) Midazolam will cause pulmonary edema, that will cause blood and fluids to fill the inmate's lungs until his heart is stopped; (4) the inmate's heart will be stopped and death will be caused by the subsequent injection of potassium chloride; (5) potassium chloride will kill before suffocation from vecuronium would become fatal; thus, (6) vecuronium is unnecessary; (7) vecruonium only prolongs the duration of an execution and the suffering of pulmonary edema; (8) vecuronium causes severe pain and mental anguish in its own right, and (9) an execution would involve significantly less pain, and death would result more quickly, if vecuronium was removed from the lethal injection protocol. XXV 161-63, 219-220; XXVIII 542-43; XLII 1818-21.

Neither of Defendants' experts, Dr. Evans or Dr. Li, disputed Plaintiffs' experts' conclusions regarding the horrific pain a sensate inmate would suffer from vecuronium. *Established by omission.* As has been noted before, the Chancellor accepted the findings of Plaintiffs' experts and acknowledged their expertise. XVI 2251,

Finally, Defendant Commissioner Parker admitted that a two-drug protocol was feasible and readily implemented. XXXVII 1315-16. Indeed, it is impossible

after an exercise of logic and reason to reach any conclusion other than that a two-drug protocol must be feasible and readily available: if the State of Tennessee can get three drugs, they can easily choose not to get, or not to use, one of those three.

The necessary standard under *Glossip* and *West* is clear, and it was met in this case with the two-drug protocol. First, under the current three-drug protocol there is a substantial risk of harm, that the three-drug protocol is sure or very likely to cause severe pain or needless suffering. *Glossip*, 135 S. Ct. at 2737; *West,* 519 S.W.3d at 563-64. Second, Plaintiffs have identified an alternative method that is feasible, readily implemented, and which will significantly reduce the substantial risk of pain of the vercuronium bromide—indeed it will eliminate the risk presented by the paralytic entirely. *Glossip*, 135 S. Ct. at 2737; *West*, 519 S.W.3d at 564.

Additionally, counsel would highlight the term "needless suffering" from both *Glossip* and *West*. Although execution with Midazolam and potassium chloride will be awful—the inmates will begin to drown in their own fluids, and they will then burn alive with chemical fire—the vecuronium needlessly extends this entire process by three minutes, while adding yet another form of completely needless pain and mental suffering. Plaintiffs have proposed an alternative that will remove both forms of needless suffering.

Had the Chancellor correctly addressed the two-drug protocol on its merits, she would have found that the *Glossip* and *West* standards had been met, and that the three-drug protocol violated the 8th Amendment, and Article I, § 16. This Honorable Court should now make such a finding.

f. Tennessee's three-drug, Midazolam-based protocol will cause severe physical pain and extreme mental anguish for up to 18 excruciating minutes; it thus amounts to constitutionally forbidden torture.

1. Appellants pled that the Tennessee three-drug lethal injection protocol inflicts torture upon the condemned, and they submitted that there was no need to identify an alternative to torture.

In the Amended Complaint, filed July 3, 2018, the inmates submitted that a three-drug protocol that relied on Midazolam to render inmates insensate and unresponsive to pain was unconstitutional, as it would result in the torture of the condemned. *E.g.* TR XI, 1423, ¶ 3; 1509, ¶¶ 561-62; 1540, ¶ 662; 1541, ¶ 665. Factually, among many pertinent allegations, Plaintiffs submitted:

> 301. The first drug utilized in Protocol B, Midazolam, has no painkilling properties.
>
> 302. The second drug utilized in Protocol B, vecuronium bromide, causes paralysis and severe mental anguish and terror.
>
> 303. The second drug utilized in Protocol B, vecuronium bromide, causes suffocation and severe mental anguish, terror, and pain.
>
> 304. The third drug utilized in Protocol B, potassium chloride, causes severe pain upon intravenous injection.
>
> 305. The third drug utilized in Protocol B, potassium chloride, causes severe pain from cardiac arrest.
>
> 306. Suffocation from the administration of vecuronium bromide and pain from the injection of potassium chloride is constitutionally unacceptable.

TR XI, 1467-68.

> 338. [M]idazolam is inappropriate for use as the first drug in a three-drug protocol because its pharmacokinetic properties do not and cannot prevent

constitutionally intolerable pain and suffering nor render Plaintiffs unaware of constitutionally intolerable pain, suffering and terror.

…

340. Midazolam does not and cannot prevent or relieve pain.

341. Midazolam does not and cannot prevent a human being's awareness to the serious and severe pain, suffering, and terror caused by the second and third drugs used in Protocol B.

…

344. Administration of vecuronium bromide creates a feeling of suffocation and terror in persons who are aware and sensate.

345. Vecuronium bromide serves no purpose in the protocol other than to act as a chemical veil that prevents witnesses from observing signed that an inmate is aware and able to feel the searing pain caused by the administration of potassium chloride.

…

347. The administration of potassium chloride is sure or very likely to result in the searing pain similar to being burned alive from the inside in persons who are aware and sensate.

Id. at 1473-74.

Legally, Plaintiffs submitted:

3. The Eighth Amendment prohibits cruel and unusual punishment, including executions which "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), or which "involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890) (citing *Wilkerson v. Utah*, 99 U.S. 130, 135

322. There is a substantial, objectively constitutionally intolerable risk that Plaintiffs will unnecessarily suffer serious pain and suffering under new Protocol B.

Id. at 1470.

> 324. New Protocl B violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article I, § 16.

Id. at 1471.

> 351. The administration of Protocol B therefore violates evolving standards of decency…where the Protocol as written is sure and likely to result in terror, pain, and agony in violation of Plaintiff's right to human dignity.

Id. at 1474.

> 662. Punishments which involve torture or a lingering death are clearly contrary to the Eighth Amendment. *Wilkerson*, 99 U.S. at 136.

Id. at 1540.

The inmates have explained why, when a method of execution rises to the level of torture, there is no requirement to prove an alternative. XIII, 1759-62. Plaintiffs unambiguously asserted that the protocol met the torture standard. *Id.* at 1761. "The use of Midazolam amounts to torture, which violates the Eighth Amendment and Article I, § 16, and must be prohibited, whether or not Plaintiffs can identify an alternative method." *Id.* at 1761-62.

2. For 140 the United States Supreme Court has maintained that the 8th Amendment prohibits torture, barbarism and unnecessary cruelty.

The Supreme Court first defined the outer limits of the 8th Amendment in 1878:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that emendment [*sic*] to the Constitution.

Wilkerson v. State of Utah, 99 U.S. 130, 135–36 (1878).

The Court specifically identified such punishments that qualified as torture as: "Cases…where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female." *Wilkerson*, 99 U.S. at 135.

The Court reiterated its holding in *Wilkerson* in 1890 in *In re Kemmler*, in which the Court held that "burning at the stake, crucifixion, breaking on the wheel, or the like" are "manifestly cruel and unusual." *In re Kemmler*, 136 U.S. 436, 446 (1890). The Court further explained that "[p]unishments are cruel when they involve torture or a lingering death." *Id.* at 447.

Justice Kennedy, writing for the majority in 2010, reiterated the vitality of these opinions: "The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances…' [P]unishments of torture,' for example, 'are forbidden.'" *Graham v. Florida*, 560 U.S. 48, 59 (2010), *as modified* (July 6, 2010) (quoting *Wilkerson v. Utah,* 99 U.S. 130, 136 (1879)).

3. No less than five current members of the United States Supreme Court agree that the Eighth Amendment categorically prohibits torture or forms of execution that are akin to torture—regardless of alternatives. Every current Justice agrees to the principles set-forth in *Wilkerson* and *In re Kemmler*.

The majority opinion in *Graham* cited above, appears explicit: "barbaric punishments" are prohibited "under all circumstances." *Graham*, 560 U.S. at 59. However, out of an abundance of caution, counsel for appellants can point to five current Justices of the United States Supreme Court who have affirmatively rejected the alternative requirement, and who believe that if a punishment is inherently barbaric, then it categorically violates the 8th Amendment. Moreover, every current Justice has written and/or joined opinions upholding the vitality of *Wilkerson* and *In re Kemmler*.

A. The *Baze* standard of Roberts and Alito: inhuman and barbarous punishments are prohibited; the alternative requirement applies when considering a risk, not a certainty.

Baze v. Rees, the plurality opinion written by Chief Justice Roberts, and joined in by Justice Alito,[97] reiterated the precedent of *In re Kemmler*:

"'Punishments are cruel when they involve torture or lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.'" *Baze v. Rees*, 553 U.S. 35, 49 (2008) (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890). Immediately after reaffirming this basic

[97] Counsel submit that five current justices have unequivocally agreed that the 8th Amendment categorically prohibits torture, regardless of the existence of an alternative. In reaching the count of five, neither the Chief Justice, nor Justice Alito are included. This is not to say that Roberts, C.J. and Alito, J. disagree that torture is prohibited, rather, unlike the five who are counted, their opinions contain a small measure of ambiguity.

principle, the plurality explained: "Petitioners do not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel or wanton infliction of pain…Instead, petitioners claim that there is a significant risk that the procedures will *not* be properly followed." *Baze*, 553 U.S. at 49. It was in this context of risk or possibility, that the Supreme Court articulated the alternative requirement.

B. Justice Thomas rejects *Baze* and *Glossip* alternatives; he believes the 8th Amendment categorically prohibits torture; either a punishment is cruel and unusual or it isn't.

Justice Thomas,[98] joined by Justice Scalia, concurred in the result in *Baze,* but he refused to "subscribe to the plurality opinion's formulation of the governing standard." *Baze*, 553 U.S. at 94, (Thomas, concurring in result). Justice Thomas believes that the "Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment." *Id.* at 99. In rejecting the need for an alternative, he wrote: "It strains credulity to suggest that the defining characteristic of burning at the stake, disemboweling, drawing and quartering, beheading, and the like was that they involved risks of pain that could be eliminated by using alternative methods of execution." *Id.* at 101-02.

Since *Baze*, Justice Thomas has remained adamant that the 8th Amendment is a categorical guarantee. In *Miller v. Alabama*, Justice Thomas (again joined by

[98] Justice Thomas is the first Justice that Plaintiffs' counsel counts as part of the five current justices who explicitly would hold that the 8th Amendment prohibits torture, regardless of the existence of alternatives.

Justice Scalia) reiterated: "the Cruel and Unusual Punishments Clause, as originally understood, prohibits "torturous *methods* of punishment." *Miller v. Alabama*, 567 U.S. 460, 506 (2012) (Thomas, J. dissenting) (*emphasis* in original). In his concurrence in *Glossip*, Justice Thomas maintained that "the broader interpretation of the Eighth Amendment advanced in the plurality opinion in *Baze* is erroneous." *Glossip v. Gross*, 135 S. Ct. 2726, 2750 (2015) (Thomas, J., concurring).

C. No less than four additional justices join with Justice Thomas and agree that the 8 Amendment categorically prohibits torture.

Justice Thomas is joined by four current Justices of the U.S. Supreme Court in explicitly calling for a categorical approach to 8th Amendment violations. Justice Sotomayor, joined by Justices Breyer, Ginsburg and Kagan, wrote in dissent in *Glossip*: "This Court has long recognized that certain methods of execution are categorically off-limits." *Glossip*, 135 S. Ct. at 2793 (Sotomayor, J., dissenting).

Those four justices submitted that the 8th Amendment prohibits "'inherently barbaric punishments *under all circumstances*." *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011 (2010)). "Irrespective of the existence of alternatives, there are some risks 'so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to.'" *Id.* at 2794 (quoting *Helling v. McKinney,* 509 U.S. 25, 36 (1993).

D. Ultimately, the majority, and possibly a unanimity, of the United States Supreme Court hold that there is no need to plead an alternative to torture.

Thus, the four dissenters in *Glossip,* plus Justice Thomas, are firmly on the record as categorically objecting to torture—regardless of alternatives. Moreover, the Chief Justice (joined by Justice Alito) clearly acknowledged the controlling standard of *In re Kemmler*, when composing the plurality opinion in *Baze.* Justice Gorsuch has not yet had opportunity to weigh in as a Supreme Court Justice. However, he joined in a majority opinion, while on the 10th Circuit Court of Appeals, that reiterated the bedrock standards set-forth in *Kemmler* and *Wilkerson*: "the Eighth Amendment [disallows] punishments of torture … and all others in the same line of unnecessary cruelty" and "punishments are cruel when they involve torture or a lingering death." *The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1109–10 (10th Cir. 2016), *cert. denied sub nom. Lockett v. Fallin*, 137 S. Ct. 2298 (2017) (citing *Baze,* 553 U.S. at 48; *In re Kemmler*; 136 U.S. at 447; and *Wilkerson*, 99 U.S. at 136).

Thus, every Justice of the United States Supreme Court has either explicitly (five justices), or implicitly (three justices), agreed that there is a categorical line of cruelty, beyond which an execution cannot pass.

4. The United States Supreme Court's definition of a punishment that is so inhuman and barbarous that the 8th Amendment prohibits it: for four justices our protocol has already been found to be barbarous; for the Chief Justice and Justice Alito it would be an execution of a conscious inmate with a paralytic and potassium chloride.

The Chief Justice, joined by Justice Alito, wrote in *Baze* that:

> It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.

Baze, 553 U.S. at 53.

As discussed herein, Tennessee's three-drug protocol cannot render an inmate insensate to pain, and will, in fact, cause additional suffering beyond that envisioned in *Baze* due to the injection of a small bottle of acid into the inmate's veins producing pulmonary edema, and causing the inmate to drown in his own blood and bodily fluids. As Midazolam, unlike sodium thiopental, cannot render an inmate insensate to the misery of drowning, the suffering of suffocation or the horror of being chemically burned by potassium chloride, per the Chief Justice's formulation, our protocol is "constitutionally unacceptable." *Baze*, 553 U.S. at 53.

Four more justices have come out even more explicitly against our protocol, on a much more meager record. Justice Sotomayor's dissent in *Glossip*, joined by Justices Breyer, Ginsburg and Kagan, found that those petitioners were "at the very least likely to prove that, due to Midazolam's inherent deficiencies, there is a constitutionally intolerable risk that they will be awake, yet unable to move, while chemicals known to cause 'excruciating pain' course through their veins." *Glossip*, 135 S. Ct. at 2793 (Sotomayor, J., dissenting). Sotomayor then reiterated that the 8th Amendment prohibits "inherently barbaric punishments *under all circumstances*." *Id.* at 2793 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (emphasis in original). Although the four justices did not further define what would

qualify as "inherently barbaric," they implicitly made clear that injecting a sensate inmate with a paralytic and potassium chloride met this standard.

Thus, there are six justices who have concluded that using a paralytic and potassium chloride on a sensate inmate would be unconstitutional. That is sufficient to establish that Tennessee's protocol categorically violates the 8th Amendment.

5. The forms of execution that have been found to be cruel and unusual: the gas chamber and electrocution inflict pain and suffering similar to that inflicted in Tennessee's protocol.

Although a majority of the United States Supreme Court has not yet found any method of execution to be unconstitutional, at least two methods of execution have been found "cruel and unusual" by other courts: the gas chamber and electrocution. In *Fierro v. Gomez*, the district court found that California's use of the gas chamber violated the 8th Amendment based on the following factual findings:

> [B]ased on the evidence presented at trial, the testimony of the experts and the scientific literature introduced as exhibits, the court finds that inmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of lethal gas. The court further finds that an inmate probably remains conscious anywhere from 15 seconds to one minute, and that there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, the court finds that inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects of the cyanide gas include tetany, an exquisitely painful contraction of the muscles, and painful build-up of lactic acid and

> adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain.

Fierro v. Gomez, 865 F. Supp. 1387, 1404 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir. 1996), *cert. granted, judgment vacated*, 519 U.S. 918 (1996), and *vacated sub nom. Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).

The Ninth Circuit upheld the District Court's factual finding, and concluded that:

> The district court's findings of extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual. Accordingly, we conclude that execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments.

Fierro, 77 F.3d at 308-09.

The *Fierro* court followed *In re Kemmler* and its prohibition on executions involving torture or a lingering death. *Id.* at 306. The court also unfavorably compared the gas chamber to hanging (which it had upheld just two years earlier in *Campbell v. Wood*). *Id.* at 306-07. Further, the *Fierro* court distinguished its holding from that of the Fourth and Fifth Circuits that had both upheld poison gas. *Id.* at 308-09 (referencing *Gray v. Lucas,* 710 F.2d 1048 (5th Cir.1983) and *Hunt v. Nuth,* 57 F.3d 1327 (4th Cir.1995). In regards to the Fifth Circuit's decision, the Ninth observed:

> Unlike the instant case, however, neither the district nor appellate court had the benefit of extensive expert witness testimony that had been subjected to searching cross-examination. Nor, apparently, did either court have the benefit

> of extensive prison medical records documenting inmates' deaths by lethal gas and the lengths of time that these inmates likely remained conscious after exposure to the gas.

Id. at 309.

The Ninth Circuit similarly discounted the Fourth Circuit's conclusion as also being based on a record that lacked both expert witnesses and "official records that set forth in detail what occurred in the gas chamber during an execution." *Id.* As the only appellate court that had the benefit of an "eight day trial," the Ninth Circuit was able to conclude that "execution by lethal gas is cruel and unusual." *Id.*

The primary source of unconstitutional suffering was "air hunger," *Fierro*, 865 F. Supp. at 1404, which is but one of the painful and terrifying components of Tennessee's protocol. The secondary painful stimuli from gas was identified as muscle contractions and the build-up of lactic-acid, *Id.* Here, inmates are drowning in bodily fluids, buried alive unable to cry out, suffocating, and then being injected with the excruciatingly painful "chemical fire" of potassium chloride. And this process lasts from 10-18 minutes. This pain and suffering is significantly more torturous than the "15 seconds to one minute" of suffering that could be followed by "several additional minutes" of "waxing and waning consciousness" that was struck down in *Fierro*. 875 F. Supp. at 1404.

Ultimately, with California's statutory adoption of lethal injection, plaintiffs were found to lack standing to challenge the gas chamber—thus, the judgment was vacated. *Fierro v. Gomez*, 519 U.S. 918 (1996), and *vacated sub nom. Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998). However, the Ninth Circuit reiterated its

holding in *LaGrand v. Stewart*, in which it enjoined Arizona from executing anyone by means of lethal gas. 173 F.3d 1144 (9th Cir. 1999). The *LaGrand* court accepted Arizona's admission that the proof at trial would be no different than that presented in *Fierro*, and thus "[t]here appears to be no reason to put the parties to the ritual of creating a new record in this case to parallel *Fierro.* We already know what conclusion is compelled by that record." *Id.* Respectfully, the record in our case compels a similar conclusion.

Electrocution has also been found to be unconstitutionally cruel and unusual. In *Dawson v. Georgia* the Georgia Supreme Court held that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." 554 S.E.2d 137, 142 (Ga. 2001) (quoting *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463 (1947) (plurality opinion)). In rejecting electrocution, the Georgia Supreme Court was not worried about risks, rather, "we hold that death by electrocution, with its specter of excruciating pain and its **certainty of cooked brains and blistered bodies**, violates the [Georgia] prohibition against cruel and unusual punishments." *Id.* at 144 (emphasis added).

The Nebraska Supreme Court rejected electrocution with similar force, under that State's constitutional prohibition against cruel and unusual punishments[99]:

> Besides presenting a substantial risk of unnecessary pain, we conclude that electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner's body. Electrocution's

[99] Identical to the 8th Amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Neb. Con. Art. I, § 9.

> proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man. Other states have recognized that early assumptions about an instantaneous and painless death were simply incorrect and that there are more humane methods of carrying out the death penalty. Examined under modern scientific knowledge, "[electrocution] has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber" of state prisons. We conclude that death by electrocution as provided in § 29–2532 violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, § 9.

State v. Mata, 745 N.W.2d 229, 278 (Neb. 2008).

The Nebraska Supreme Court reached its ultimate conclusion after a lengthy and detailed factual analysis. *Id.* at 268-278. In this, the Court summarized the underlying findings of the trial court:

> First, high voltage causes intolerable pain sensations by direct excitation of peripheral sensory nerves. Second, electricity causes widespread excitation of brain neurons. Third, applying external electricity to the brain can damage brain neurons by interrupting their natural polarity and lead to the loss of neuron function. The court concluded, however, that the loss of function was most critical in the brain stem because those neurons are the most indispensable to respiration and life. Fourth, high voltage causes intense muscle contractions throughout the body, called muscle tetany. The muscles remain locked in full contraction as long as the current is applied. Fifth, high voltage will not cause fibrillation of the heart. Fibrillation is an arrhythmia in which the heart quivers in a chaotic pattern instead of intermittently contracting. Sixth, current flowing through the body will cause thermal heating, known as joule heating. But it is impossible to predict heating in any particular part of the body because of wide variations in the current flow.

Id. at 271.

The Court also concluded that "[b]urning of the prisoner's body is an inherent part of an electrocution." *Id.* at 269. The Nebraska Supreme Court adopted the trial court's finding that "some prisoner's would remain conscious for 15 to 30 seconds or during the entire application of the current…[and] some prisoners could revive and have revived and regained consciousness." *Id.* at 272.

The Court observed that pain was inherent in electrocution:

> Obviously, a conscious prisoner would suffer excruciating pain from the electrical burning that is occurring in the body. But…there are other ways a high voltage current causes pain…[T]he electric current that did enter the brain would excite multiple areas in the brain known to cause pain when electrically stimulated. Also, alternating current, which alternates in polarity 60 times per second and is used in electrocutions, is known to repetitively excite nerve tissue…a prisoner would experience extreme air hunger because the prisoner cannot breathe while his or her diaphragm is rigidly contracted.
>
> [A] prisoner experiences extreme pain and suffering from electrical stimulation of sensory nerves in the skin and muscles. [T]he skin is rich in nerve fibers with skin receptors that send messages to the brain when stimulated. Muscles also have pain receptors, so the violent contractions of muscles throughout the body would be painful. In addition, the heart's contraction is like the pain of a heart attack.

Mata, 745 N.W.2d at 277.

Finally, and most pertinent to our cause (and most relevant to the learned Chancellor's finding that 10-18 minutes of pain is not unconstitutional), the Nebraska Supreme Court concluded:

> We reject the State's argument that electrocution would not be cruel and unusual punishment if a prisoner remained conscious for 15 to 30 seconds. Fifteen to thirty seconds is not a blink in time when a human being is electrically on fire. We reject the State's argument that this is a permissible

> length of time to inflict gruesome pain. It is akin to arguing that burning a prisoner at the stake would be acceptable if we could be assured that smoke inhalation would render him unconscious within 15 to 30 seconds.

Id. at 278.

Respectfully, the Supreme Court of Nebraska's analysis and logic is compelling, and their conclusion is directly on-point. Tennessee's protocol will result in many minutes of pain, suffering and anguish, not just 15 to 30 seconds. Those minutes are "not a blink of time when a human being is [chemically] on fire." Our protocol is, in the words of their learned Justices, something better fit for the laboratory of the Baron Frankenstein.

Ultimately, the facts of Tennessee' 10-18 minutes of suffering are much worse than the shorter periods of pain and suffering found unconstitutional by the Ninth Circuit and the Supreme Courts of Nebraska and Georgia.

g. This Honorable Court long-ago made clear that Article One, § 16 of the Tennessee Constitution prohibits punishments that involve "torture, lingering death, wanton infliction of pain, or like methods." This prohibition does not contain any comparative analysis; an inmate is not required to prove a readily feasible alternative to burning at the stake, or that reasonable transactional efforts would provide a substitute to drawing and quartering.

Without equivocation, this Honorable Court held in 2005 that "punishments may not include torture, lingering death, wanton infliction of pain, or like methods." *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306 (Tenn. 2005). In *Abdur'Rahman* this Court examined whether a lethal injection protocol that relied on the barbiturate, sodium Pentothal, as the first drug "offends either society or the

inmate by the infliction of unnecessary physical pain and suffering." *Id.* at 307. Based on the evidence in that record, this Court concluded that inmates executed using a sodium Pentothal protocol, would not experience "any pain or discomfort;" thus it was constitutional. *Id.* at 308.

Abdur'Rahman expressly interpreted both the state and federal constitutional prohibitions against "cruel and unusual punishments." *Abdur-Rahman*, 181 S.W.3d at 305-06. This Court recognized that under either constitutional provision, torture was prohibited. *Id.* at 306.

Later in *West v. Schofield*, this Court explicitly addressed three claims: "(1) the [single drug Pentobarbital] protocol is unconstitutional because it creates a substantial risk of serious harm; (2) the protocol is unconstitutional because it creates a substantial risk of a lingering death; and (3) the trial court erred by dismissing their claim that the protocol is unconstitutional because it requires the State to violate federal drug laws." *West v. Schofield,* 519 S.W.3d 550, 552 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, 138 S. Ct. 476 (2017), and *cert. denied sub nom. Abdur'Rahman v. Parker*, 138 S. Ct. 647 (2018), *reh'g denied*, 138 S. Ct. 1183 (2018) (emphasis added). The Plaintiffs' substantive claims in that facial challenge were limited to matters of risk, or "possibilities." *Id.* at 565. The *West* Court was not confronted with a claim that the protocol was torture, *per se*. Such a claim is presented here.

In in the 2017 *West* opinion, while examining the first claim, the risk of serious harm, this Court employed *Glossip's* analytical framework for resolving

claims of "unacceptable risk of severe pain." *Id.* at 563. In denying relief, this Court determined that the *West* plaintiffs had failed to establish a "substantial risk of serious harm;" instead the dangers were "mere possibilities." *Id.* at 565.

This Court's resolution of the second claim, "Risk of Lingering Death," is of greater importance. This Court recognized that "punishments are cruel when they involve torture or a lingering death…." *Id.* at 566 (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) and *In re Kemmler*, 136 U.S. 436, 447 (1890)). In disposing of this claim, this Court did not require Plaintiffs to prove that they could provide a faster or less torturous method of death; rather this claim was dealt with on its substantive merits (which this Court found to be lacking): "[W]e decline to hold that a lethal injection protocol that causes unconsciousness within seconds violates the Eighth Amendment because it may take an hour or more for the inmate's heart to cease all electrical activity or because there may be some possibility that the inmate could be resuscitated after being declared dead…." *Id.* at 567. This Court declined to determine what would qualify as a lingering death, but noted that other precedents "imply strongly" that it takes longer than an hour, and would be a death during which "the inmate is consciously suffering." *Id.* The *West* plaintiffs did not claim "Torture," and thus this Court did not further address or define the issue.

1. **Tennessee' definition of torture: the infliction of severe physical or mental pain upon [a human] while he or she remains alive and conscious.**

To the best of counsel's review, this Honorable Court has never defined "torture" in the Eighth Amendment and Article I, § 16 contexts (nor, for that matter, has this Court defined "lingering death" outside of the *dicta* in *West*).

Obviously, the proof in this case—unlike the proof in any other known lethal injection case heard by this Court or any court—was explicitly presented to establish that the condemned will suffer both severe physical and mental pain, while sensate and aware, and thus the condemned will be tortured. *Davidson*, 509 S.W.3d at 219; *Willis*, 496 S.W.3d at 730-31. The proof is unequivocal (and the Chancellor's findings are not to the contrary) the condemned's physical pain will be great, and he will suffer mental anguish. *Van Tran*, 864 S.W.2d at 486; *Irick*, 762 S.W.2d at 132. Pursuant to *Abdur'Rahman*, this torture violates the Tennessee constitution, Article I, § 16. 181 S.W.3d at 306.

2. Alternatives apply to risk, not certainty; we never can tolerate the needless infliction of suffering.

This violation of our protection against cruel and unusual punishments does not hinge on the existence of alternatives. Rather, this Court examined alternatives in the *West* context, where the issue was the risk or possibility of undesired events occurring during execution. In that context, this Court required that petitioners prove the existence of an alternative that entailed "a lesser risk of pain." *West*, 519 S.W.3d at 565. In the torture context, the issue is not risk—rather it is the unconstitutional inevitability that an inmate will suffer severe pain and mental anguish, while conscious.

In *Glossip*, the Court held that the death penalty has been held to be constitutional, so it therefore follows that there must be a means to carry it out. But that simple proposition can be subject to abuse. It bears remembering that when the Supreme Court found the death penalty constitutional, and reversed *Furman*, it did so with caution:

> As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment…Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.

Gregg v. Georgia, 428 U.S. 153, 182–83 (1976) (internal citations deleted).

Thus, under the Tennessee Constitution, as well as that of the United States, Tennessee's three-drug protocol must be struck down, regardless of alternatives, because it involves torture, in that it inflicts severe pain, mental anguish and needless suffering for the last lengthy minutes of the condemned's life.

h. We must reject the unconstitutional attack on freedom of conscience that is embodied in the State of Tennessee's claim that death row inmates deserve a torturous death as punishment for the actions of pharmaceutical companies who have declined to sell their healing products for use in the termination of life.

In closing argument, the State of Tennessee submitted that "[t]he reason [lethal injection drugs are] not available…is the death penalty opponents have applied pressure on drug manufacturers not to provide drugs for…lethal injection executions." Tr. July 23, 2018, L 67. No proof was presented at trial in support of this claim. *Established by omission from the trial record.* Nonetheless, the

Chancellor appeared to agree with this contention, and invoked a much-abused passage from *Glossip:* "anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences." *Glossip*, 135 S. Ct. at 2733; XVI 2233.

Appellants object to the State's argument and the Chancellor's acceptance of it for multiple reasons. First, the Chancellor and State seem to confuse the limited persuasive powers of the men on death row and their court appointed counsel, with the incredible persuasive power of religious leaders and moral authorities around the world. *See* http://www.umc.org/what-we-believe/political-community#death-penalty (last visited September 3, 2018 at 2:08 p.m.) (United Methodist Church position against the death penalty, which "denies the power of Christ to redeem, restore and transform all human beings"); Jane Onyanga-Omara, *Pope Francis changes Catholic Church teaching on death penalty, declares it 'inadmissible',* USA TODAY (August 2, 2018, 11:22 a.m.), https://www.usatoday.com/story/news/world/2018/08/02/pope-francis-changes-church-teaching-death-penalty/887495002/; David Paulsen, *Atlanta Bishop rallies opposition to death penalty with book of articles by faith, legal leaders,* Episcopal News Service, February 12, 2018.[100]

[100] Obviously, thousands of churches and church leaders, political figures, business executives, retired judges and former commissioners of departments of correction could be referenced in a string-cite that would cover thousands of pages. Appellants simply wish to make the point that many influential individuals, around the world, who are NOT members of any hypothetical "Death Penalty Abolitionist Organization," have spoken out against capital punishment.

Secondly, this claim does violence to modern Supreme Court precedents upholding religious liberty and the freedom of conscience.

Thirdly, this claim ignores the clearly established First Amendment Rights of corporations to participate in the political sphere.

Fourth, the implicit suggestion that some QAnon aligned secret cabal of death penalty abolitionists are responsible for Tennessee's "Drug Procurer's" ineptitude, indolence and perverse choice to fail (which the record clearly reflects is why Tennessee failed to purchase Pentobarbital post-*West* when there were no less than ten willing and able sellers) is completely unsupported by anything in the factual record. Ex. 105, *TDOC Documents re: Securing LICs,* at Vol. 10, pp. 1477, 1486-94, at Vol 11. pp. 1495-1512.

Fifth and finally, it is illogical and perverse to suggest that more painful forms of punishment are appropriate, because business leaders refuse to provide the tools for less painful executions.

The constitutional underpinnings of the second and third concerns will be developed further, below.

1. **The First Amendment's free-exercise clause protects the religious liberty rights of individual citizens and corporations, so that they can choose, based on their own personal religious beliefs, not to participate in terminating human life.**

The State's position, and the Chancellor's Order, unconstitutionally attack the religious liberties of citizens, including corporate leaders, who sincerely believe

that they must follow the Commandment from God unto Moses on Sinai: "Thou shalt not kill."[101]

In *Burwell v. Hobby Lobby Stores, Inc.*, the Court upheld the religious liberty rights of three corporations to not purchase health insurance that provided certain forms of contraception. – U.S. –, 134 S. Ct. 2751 (2014). It was the sincerely held belief of the corporations that the contraceptives led to termination of a living fetus, which would be a "sin against God to which they are held accountable." *Id.* at 2764-66. *Hobby Lobby* explained that the free-exercise clause protects "not only belief and profession but the performance of (or absention from) physical acts…Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition." *Id.* at 2769-70 (internal citations deleted).

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, the Court upheld the religious liberty rights of a baker not to sell cakes that would be used to celebrate same sex weddings – U.S. –, 138 S.Ct. 1719 (2018). *Masterpiece Cakeshop* is explicit that under the free exercise clause of the First Amendment, the government "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.* at 1731.

Both of these cases reject the position of death penalty advocates that it is somehow immoral for major drug corporations to decline to sell drugs that will be used in executions. These companies have a constitutionally protected religious

[101] This would be the Sixth Commandment of the Jewish faith, and the majority of Protestant faiths, while it is viewed as the Fifth Commandment by the Catholic Church.

liberty to abstain from terminating life. *Hobby Lobby,* 134 S. Ct. 2769-70. They should be free from the moral judgment of the Attorney General that suggests that their belief in "Thou Shalt Not Kill" is illegitimate. *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

2. Corporations have protected First Amendment Rights pursuant to *Citizens United*.

Implicit in the argument of the State and in the Chancellor's Order, is the conclusion that corporations must be unthinking and apolitical capitalist entities that are not entitled to moral judgment, and must, instead, sell their product to the highest bidder. If *Hobby Lobby* and *Masterpience Cakeshop* have not sufficiently put such a notion to rest, then *Citizens United* should.

Clearly, in modern America, corporations have the same First Amendment rights as individuals. *Citizens United*, 558 U.S. at 342 (enumerating all of the cases that recognize that "First Amendment protection extends to corporations"). "Political speech does not lose First Amendment protection 'simply because its source is a corporation." *Id.* (quoting *First Nat'l Bank of Boston v. Belloti*, 435 U.S. 765, 784 (1978)). Thus, just as an individual baker can choose not to sell his cakes for a purpose to which he objects, an individual corporation can choose not to sell drugs for use in ending human life.

3. The Tennessee Constitution, Article I, § 3 protects the rights of conscience to a greater extent than the First Amendment, and the Tennessee Preservation of Religious Freedom Act provides statutory relief for unconstitutional government burdens on religious liberty.

Article I, § 3, on its face, provides more comprehensive protections of religious liberty and "the rights of conscience" than does the First Amendment:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Tenn.Con. Art. I, § 3.

The courts of Tennessee have long recognized that Article I, § 3 provides "substantially stronger" protections of religious liberty than the First Amendment. *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111 (Tenn. 1975); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956) ("[O]ur own organic law is broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience."); *Martin v. Beer Bd. for City of Dickson*, 908 S.W.2d 941, 946 (Tenn. Ct. App. 1995) (detailed historical analysis of Article I, § 3; notes "substantially stronger guaranty of religious freedom than its federal counterpart").

In 2009, with the enactment of the Tennessee Preservation of Religious Freedom Act (TPRFA), Tenn. Code. Ann. § 4-1-407, our legislature made a clear decision to favor religious liberty and freedom of conscience over governmental authority. In most relevant part, this act prevents the government from substantially burdening a person's free exercise of religion unless such a burden is "essential to further a compelling governmental interest, and the least restrictive means of furthering that compelling interest." T.C.A. § 4-1-407(c). The "Exercise of

Religion" protected by the TPRFA is defined by Article I, § 3 of the Tennessee Constitution and the First Amendment to the U.S. Constitution. T.C.A. § 4-1-407(a)(1). Thus, the definitions of free exercise found in *Cakeshop* and *Hobby Lobby* are applicable under the TPRFA. Plainly, the use of a pharmaceutical company's medications, outside of proper distribution controls, and in violation of contract, would run afoul of the TPRFA.

Just as a baker cannot be compelled by the government to decorate cakes in a manner that offends his religious values, under Tennessee law, drug manufacturers cannot be compelled to allow their intellectual property to be used for the termination of human life.

4. The constitutional rights of both citizens and corporations not to participate in executions must be respected; Plaintiffs ought not to be punished for those citizens exercising their constitutional rights.

When this Honorable Court reaches its conclusion on the merits of Plaintiffs' substantive claims, Plaintiffs hope that the illogical, unconstitutional and religiously intolerant position of the State will be rejected, and that the right of pharmaceutical companies not to participate in executions will be recognized. Moreover, the evidence-free claim that Billy Ray Irick, Ed Zagorski and their lawyers belong[ed] to a secret conspiracy to overbear the corporate will of multi-billion dollar drug companies, must be finally put to rest.

It would be unfair to Plaintiffs if constitutional protections against torture were abandoned or reduced, based on a false-belief that the Plaintiffs are somehow responsible for the State's inability to kill them in a "more humane" manner.

Indeed, it would be a perverse warping of democratic principles if the exercise of constitutional rights by corporations, religious leaders and a groundswell of citizens was used to justify Tennessee's wanton infliction of barbaric deaths on the condemned. Indeed, it would seem more rational to reconsider the very constitutionality of the death penalty, when essential members of the public are no longer willing to participate.

II. Defendants' promulgation of the Protocol violates Plaintiffs' substantive due process rights (Count VIII).

Plaintiffs are entitled to judgment in their favor on their claims that the Defendants' promulgation of the Protocol shocks the conscience and, thus, violates their substantive due process rights under the Fourteenth Amendment and Article 1, § 8 of the Tennessee Constitution. First, the evidence at trial proves that Defendants' actions in formulating the Midazolam based three-drug protocol meets the substantive due process standard applicable in this context—deliberate indifference—in that their actions were arbitrary, irrational, and so egregious that it shocks the conscience. Second, Defendants' argument that Plaintiffs' substantive due process claim is precluded by their Eighth Amendment claim has no merit.

a. Defendants violated Plaintiffs' substantive due process rights. Their conduct in promulgating Protocol B was deliberately indifferent to Plaintiffs' rights and was arbitrary, irrational, and so egregious that it shocks the conscience.

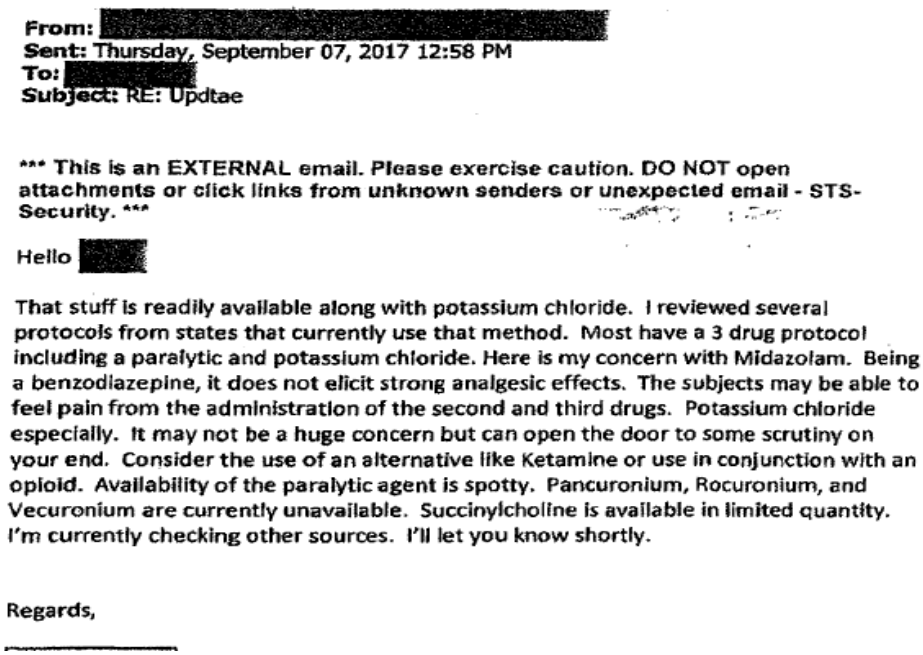
"Substantive due process . . . is implicated where an executive agency of government acts in a manner that is (1) arbitrary, irrational or improperly motivated or (2) so egregious that it shocks the conscience." *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 309 (Tenn. 2005) (citing *County of Sacramento*, 523 U.S.

at 840; *Parks Properties v. Maury County*, 70 S.W.3d 735, 744 (Tenn. Ct. App. 2001)).

Analysis of a substantive due process claim "demands an exact analysis of circumstances," as "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." *County of Sacramento*, 523 U.S. at 850. Thus, the standard of liability varies in a substantive due process claim depending on the amount of time prison officials had to make decisions concerning inmate welfare. For example, "a much higher standard of fault than deliberate indifference has to be shown for officer liability in a prison riot," *Id.* at 852-53 (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)), or where a motorist is killed during a high-speed chase by police officers, *id.* at 855, because officers in those situations must act "in haste, under pressure, and frequently without the luxury of a second chance." *Id.* (quoting *Whitley*, 475 U.S. at 320). Further, prison officials and police in these circumstances "calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs." *Id.* at 854. Here, where prison officials had ample time to make a decision about the drugs to be used in an execution, deliberate indifference is the correct standard for a substantive due process claim.

The crux of Plaintiffs' substantive due process claim is that Defendants selected a method of execution without investigating the effects of using Midazolam as the first drug in the three-drug protocol despite an explicit warning from their

supplier about the ineffectiveness of Midazolam for use in an execution by lethal injection. This conduct is especially egregious given the history of litigation surrounding three-drug protocols. In September 2017, before Defendants adopted a Midazolam-based option, Defendants' Drug Supplier explicitly warned them by email that their "subjects may be able to feel pain from the administration of the second and third drugs" because Midazolam "does not elicit strong analgesic effects." The supplier suggested that the State "[c]onsider the use of an alternative."



From: [redacted]
Sent: Thursday, September 07, 2017 12:58 PM
To: [redacted]
Subject: RE: Updtae

*** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security. ***

Hello [redacted]

That stuff is readily available along with potassium chloride. I reviewed several protocols from states that currently use that method. Most have a 3 drug protocol including a paralytic and potassium chloride. Here is my concern with Midazolam. Being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium chloride especially. It may not be a huge concern but can open the door to some scrutiny on your end. Consider the use of an alternative like Ketamine or use in conjunction with an opioid. Availability of the paralytic agent is spotty. Pancuronium, Rocuronium, and Vecuronium are currently unavailable. Succinylcholine is available in limited quantity. I'm currently checking other sources. I'll let you know shortly.

Regards,

Ex. 114, *Sept. 7, 2017 Email from Drug Supplier to Drug Procurer*, at Vol. 12, p. 1628. Trial testimony establishes that, although the email put Defendants on notice that using Midazolam would lead to Plaintiffs' suffering, they failed to heed the supplier's warning by inquiring with the supplier or other qualified experts about the problems with using Midazolam as the first drug in a lethal injection protocol.

Courts impose liability for mere deliberate indifference where prison officials

do not encounter "unforeseen circumstances demand[ing] an officer's instant judgment." *Id.* at 853. "[L]iability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Id.*

Defendants in this case had the luxury to make unhurried judgments to select drugs for the State's lethal injection procedure that would not cause Plaintiffs needless suffering, and they were deliberately indifferent for failing to do so. Commissioner Parker testified that he was the primary individual responsible for making the decision to use Midazolam. Yet, he did not even take the time to contact the Drug Supplier to ask about the supplier's email warning that Midazolam would not keep Plaintiffs from experiencing pain and that the State should consider alternative drugs. Nor did he delegate that call to a subordinate. Instead, Commissioner Parker chose to rely on people he personally knew—likely leaders of other departments of corrections who are also political appointees—rather than experts that could have informed him about the severe risk inherent to Midazolam. This choice to ignore an explicit warning from the State's own supplier and failure to investigate the destructive effects of the use of a bolus dose of Midazolam as part of an execution protocol was arbitrary and irrational to the point of shocking the conscience. When Defendants chose Midazolam as the first drug in their three-drug protocol they were aware that its use is controversial and is associated with

numerous problematic executions. Defendants had "extended opportunities to do better," in choosing a humane lethal injection protocol.[102] Their failure to do so, "teamed with protracted failure even to care," "is truly shocking." *Id.*

Defendants conduct is more egregious when viewed in light of the Department's knowledge of the agony, suffering, and torture that Plaintiffs will experience from the second and third drugs if Midazolam does not render them insensate. Also troubling is the Departments history of intransigence and failure to correct known deficiencies – even in the face of proof from their own experts.

Tennessee's first two executions (Coe and Alley) used a three-drug cocktail that used the barbiturate sodium thiopental as the first drug. This protocol was "copy-catted" from other states. Ex. 106, *Abdur'Rahman v. Sundquist*, Ex. Vol. 106. On February 1, 2007, Governor Bredesen revoked the protocol which he referred to as a "cut and paste job." Ex. 107, *Executive Order*, at Vol. 16. At the request of Governor Bredesen a committee was formed to study the state's lethal injection protocol. Debbie Inglis was on the committee. The committee recommended a one drug protocol which is what their expert recommended. The Commissioner rejected the committee's recommendation, and readopted the controversial three-drug protocol on April 30, 2007. On May 9, 2007, Philip Workman was executed.

On September 19, 2007, after hearing testimony from gubernatorial and TDOC officials, the lethal injection protocol which had been used to execute Coe, Alley, and Workman was declared unconstitutional by the United States District

[102] Nothing prevented Defendants from stockpiling API for pentobarbital.

Court for the Middle District of Tennessee. Ex. 108, *Harbison v. Little,* 511 F. Supp. 872 (M.D. Tenn. 2007), Ex. Vol. XI 1534. Significantly, the Court held that: 1) there was a substantial risk that the inmates would remain conscious; 2) there was no consciousness check; 3) executioners were not adequately trained; 4) administration of the drugs was not adequately monitored; 5) the State knowingly disregarded an excessive risk by failing to follow the committee's recommendation to use a one-drug protocol, adequately train the executioners, and implement appropriate safeguards. Though this order was later vacated by the Sixth Circuit, the district court fact findings were not overturned. Many of these same risks continue today. On February 4, 2009, Steve Henley was executed. On December 2, 2009, Cecil Johnson was executed.

On November 22, 2010, Chancellor Bonnyman struck down the lethal injection protocol that was used to execute Coe, Alley, Workman, Henley and Johnson. Ex. 109, *West v. Ray*, No. 10-1675-I. Chancellor Bonnyman's ruling echoed the federal district court's ruling in *Harbison*.[103] Two days after the Chancellor's order, the TDOC relented and adopted a consciousness check. In 2011, the State of Tennessee illegally obtained sodium thiopental which was seized by the DEA. No Tennessee inmate has been executed under the three-drug protocol struck down by Chancellor Bonnyman.

On September 27, 2013, the State adopted a single drug protocol. From that date until June 20, 2018 (the date of Parker's deposition), the State maintained that

[103] Harbison was granted executive clemency.

they could obtain pentobarbital for executions. The State did not eliminate pentobarbital as an option in the protocol until July 5, 2018. The trial proof established that between September 27, 2013 and October 19, 2017, eleven midazolam-based executions took place where the inmate demonstrated physical signs that he was sensate and in pain during the execution: Dennis McQuire, Paul Howell, Clayton Lockett, Joseph Wood, Christopher Brooks, Ronald Smith, Ricky Gray, Kenneth Williams, Ronald Phillips, Garry Otte, and Torrey McNabb. *See* Attachment A, Timeline of Indifference.

In spite of all of this, TDOC adopted a midazolam-based three drug protocol. And, instead of adopting safeguards to protect the inmates, defendants took affirmative action to conceal signs of consciousness increasing the risks to the inmate because these measure interfere with the Warden and Executioner's ability to recognize evidence that the inmate is experiencing pain. These measures include the strap configuration on the gurney and the act of taping the inmates' hands to the gurney. Both of these measures prevent movement in a sensate and aware inmate. Nevertheless Billy Irick did move and strain against the straps after the consciousness check.[104]

The use of vecuronium bromide in the protocol is intended to conceal the pain and suffering of the condemned. So too is the modification to the execution gurney

[104] Recently obtained records show that TDOC did not have the required back-up dose of Midazolam prepared. In fact, the Midazolam that was used was prepared two hours after the other drugs and within a minute of injection. The records are troubling and still being reviewed.

which now straps down the shoulders and chest of the inmate which will further prohibit him from alerting officials to the fact that he is aware and sensate. The modification was intentional. The only purpose for these measures is to conceal the ineffectiveness of the Midazolam from the public. The failure of the State to purchase and use an EKG, EEG or BIS monitor, when such monitors were important to the Court in *Glossip* is similar evidence of the Department's indifference. The failure to do so is intentional. When one considers that the EKG strip shows that Joseph Wood's heart was still beating when he was declared dead, one can imagine why TDOC refuses to employ these safeguards.

The Plaintiffs have shown a violation of their substantive due process rights. Accordingly, they respectfully request that the Court declare that the July 5, 2018 protocol violates the Eighth and Fourteenth Amendments and Article 1, § 8 of the Tennessee Constitution as it violates substantive due process and shocks the conscience.

b. Plaintiffs' substantive due process claim is not barred by their method-of-execution claim.

The Chancery Court erroneously held that Plaintiffs' substantive due process claim was subsumed by Plaintiff's method of execution claim. XVI 2264. This misconstrues Plaintiffs' substantive due process claim, which does not challenge the *use* of Midazolam—*that* is their method-of-execution challenge (Count I)—but instead alleges that the *process* by which Defendants decided to use Midazolam in its protocol shocks the conscience. The Chancery Court also misconstrues the law in this area.

This Court decided on the merits a substantive due process claim brought by inmates challenging an execution protocol, even though the inmates also had a method-of-execution claim under the Eighth Amendment and Tennessee constitutions. *Abdur'Rahman*, 181 S.W.3d at 309.[105] There, the Court rejected the inmates' substantive due process claim, concluding that there was "nothing arbitrary, irrational, improper or egregious in the Department of Correction following the legislative mandate to implement lethal injection as a method of punishment" or "in the manner in which the Department implemented a lethal injection protocol, i.e., by studying the lethal injection protocols of other states and the federal government and by using those protocols as models for the creation of Tennessee's protocol." *Id.* at 310. The Court also based its decision on its conclusion that the inmates had not prevailed in their "cruel and unusual punishment issue" as there was no evidence that the State's lethal injection protocol in place at the time created "an unreasonable risk of unnecessary pain and suffering." *Id.* The facts underlying Plaintiffs' substantive due process claim in this case are different than those raised in the 2005 *Abdur'rahman* case, and do, in fact, constitute a substantive due process violation.

[105] In another context, the Tennessee Court of Appeals stated: "We know of no State court authority stating that a substantive due process claim cannot be brought when another provision of the State constitution could also apply to the conduct or injury alleged." *Consolidated Waste Systems, LLC v. Metropolitan Government of Nashville & Davidson County*, No. M2002-02582-COA-R3CV, 2005 WL 1541860 at *25 (Tenn. Ct. App. June 30, 2005) (upholding a finding that a zoning ordinance violated a would-be developer's equal protection rights and also his substantive due process rights based on its arbitrariness).

It is also clear under United States Supreme Court jurisprudence that Plaintiffs can pursue both an Eighth Amendment claim and a substantive due process claim because the challenged government behavior is sufficiently distinct. In *City of Sacramento*, the Supreme Court considered a claim brought under 42 U.S.C. § 1983 alleging that police officers violated the Fourth Amendment rights of a motorcyclist who died while they pursued him at high speeds. *Id.* at 836-37. The Court rejected the officers' argument that the plaintiffs' substantive due process claim was improper because it was "necessarily governed by a more definite provision of the Constitution"—the Fourth Amendment. *Id.* at 841-42. The Court held that "[s]ubstantive due process analysis is [] inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment. It is not." *Id.* at 843. As the Supreme Court held, "[w]here a particular Amendment provides an explicit textual source of constitutional protection *against a particular sort of government behavior*, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *City of Sacramento*, 523 U.S. at 842 (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of REHNQUIST, C.J.) (*quoting Graham*, 490 U.S. at 395 (emphasis added). However, as the Court noted several times, *Graham*

> does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

Id. at 843 (quoting *Lanier*, 520 U.S. at 272, n. 7). As a result, courts allow substantive due process claims to proceed alongside Fourth or Eighth Amendment claims where each claim challenges distinct government conduct.[106]

Here, the "particular sort of government behavior" challenged by Plaintiffs' method-of-execution claim is different than that challenged in their substantive due process claim. *Id.* at 842. Plaintiffs' substantive due process claim relates to Defendants' adoption of an execution protocol that they were explicitly warned would cause Plaintiffs' to experience constitutionally intolerable pain. It is about the Defendants' decision-making process. That claim is not—and *cannot*—be "covered by" their method-of-execution claim. *City of Sacramento*, 523 U.S. at 843.

III. The protocol violates plaintiffs' right to counsel and access to courts. (Count V).

The Protocol violates Plaintiffs' right to counsel and access to the courts under the First, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8, 16, and 17 of the Tennessee Constitution in the following ways: (1) from the observation room, attorneys cannot observe the

[106] For example, a district court in Wisconsin allowed a substantive due process claim as well as a Fourth Amendment claim against a police officer who allegedly sexually assaulted a woman while responding to a call she made for police assistance. *Lemons v. City of Milwaukee*, No. 13-C-0331, 2016 WL 3746571, at *16 (E.D. Wis. July 8, 2016). The *Lemons* court also noted that the Seventh Circuit has recognized and permitted substantive due process in the context of claims by victims of sexual assault by law enforcement. *See Alexander v. DeAngelo*, 329 F.3d 912, 916 (7th Cir. 2003); *Wudtke v. Davel*, 128 F.3d 1057, 1063 (7th Cir. 1997).

syringes, and therefore cannot ascertain the sequence and timing of the injections from the different syringes;[107] (2) the vecuronium bromide is a paralytic, which will prevent the attorney from recognizing any signs of the inevitable suffering when the Midazolam fails to prevent serious pain and suffering;[108] (3) the official witness room does not provide a telephone for Plaintiffs' attorney to contact co-counsel or the court in the foreseeable event that the execution process results in unnecessary and constitutionally intolerable pain;[109] and (4) does not permit an additional defense counsel witness to be present forcing the only defense counsel witness to leave the official witness room in search of a phone should it be necessary to contact the court, leaving the condemned inmate with no counsel in the official witness room.[110]

Plaintiffs' proof at trial established the real barriers to observation that defendants place between counsel and her client. Federal Public Defender Ben Leonard took detailed measurements of the execution chamber and official witness room. XXXIII 891.He provided those measurements to the Court. *Id.* 897; Ex. 83, *Ben Leonard's Diagram of the Execution Chamber*, at Vol. 8, p. 1185. He prepared a schematic of the gurney. XXXIII 897. He identified photos of the chamber and the gurney during his testimony. XXXIII 905-15; *see also*, Exhibits 85-93, *Photographs*

[107] The proof established that other states now permits defense counsel to view the pushing of the syringes.
[108] The proof established that Arizona has agreed to never again use a paralytic.
[109] Defendant Parker was agreeable to providing telephone access during his deposition then reversed his position afterward.
[110] Defendant Parker was agreeable to allowing a second attorney to be present during executions then reversed his position afterward.

of the Execution Chamber, at Vol. 8, p. 1187-95. Mr. Leonard described the strap configuration of the gurney and how the straps were bolted to the gurney. *See also* Ex. 84, Ben *Leonard's Diagram of the Execution Gurney*, at Vol. 8, p. 1186. He also described the number of video cameras and telephones with landlines present in the execution chamber and official witness room. *Id.* 916.

Witnesses Julie Hall, Dale Baich, and Robin Konrad provided graphic testimony regarding the harm that befell their client, Joseph Wood, when they were prohibited access to a telephone in the execution chamber. XXV 222-290; XXV-XXVI 291-311; XXVII 325-468. Carol Wright described similar problems. XXX 698-99. Six of the other seven jurisdictions that have used Midazolam do not limit the attorney witnesses to just one witness. *See generally*, XXVII 325-468 (multiple attorney witnesses in Arizona); XXI 766-793 (Alabama, same); XXXI 794-816 (Florida, same); XXXI 816-30 (Arkansas, same); XXXI 830-48); XXXI 850-70 (Oklahoma, same). The remaining jurisdiction, Ohio, has a telephone placed in a position where the attorney can continue to view the execution chamber while on the phone with the Court. XXX 670.

"It is clear that prisoners have a constitutional right to have meaningful access to the courts . . . ." *Lewis v. Casey*, 518 U.S. 343, 347 (1996). The "right to file for legal redress" is more valuable to a prisoner than to any other citizen: "Inasmuch as one convicted of a serious crime and imprisoned usually is divested of the franchise, the right to file a court action stands . . . as his most 'fundamental political right, because [it is] preservative of all rights.'" *Thaddeus–X v. Blatter*, 175

F.3d 378, 391 (6th Cir. 1999) (quoting *Hudson v. McMillian*, 503 U.S. 1, 15 (1992)) (Blackmun, J., concurring in the judgment). Thus, "inmate access [must be] adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). In evaluating a claim of denial of meaningful access to the courts, courts must "weigh[] the interests of the prison as an institution (in such matters as security and effective operation) with the constitutional rights retained by the inmates." *Thaddeus–X*, 175 F.3d at 390; *see also Turner v. Safley*, 482 U.S. 78, 89–91 (1987). In order to raise a claim, a prisoner must demonstrate that he "ha[s] suffered, or will imminently suffer, actual harm." *See Lewis*, 518 U.S. at 349; *accord Hadix v. Johnson*, 182 F.3d 400, 404–06 (6th Cir.1999).

The United States District Court for the Middle District of Tennessee held that an inmate

> has the right under the First, Eighth and Fourteenth Amendments to have some access to his counsel during the last hour before the execution and to have his counsel witness the execution, from either the witness room or a room with closed circuit live television transmission. His counsel must have access to a telephone with an unimpeded outside line *at the time* that he or she witnesses the execution.

Coe v. Bell, 89 F. Supp. 2d 962, 967 (M.D. Tenn.), *vacated as moot*, 230 F.3d 1357 (6th Cir. 2000) (emphasis added). The district court held "given society's (and the state's) interest in assuring that capital punishment is carried out in a humane manner and the minimal inconvenience to the state, this court finds the plaintiff's position well taken." Thus, the court held that inmate Coe was "entitled to an injunction prohibiting Defendant from preventing his counsel from witnessing Plaintiff's execution in order to safeguard Plaintiff's constitutional right of access to

the courts to address violations of his Eighth Amendment right against cruel and unusual punishment." *Id.* Although the Sixth Circuit vacated the district court's injunction on appeal, that was only because the case was moot and did not fit the capable-of-repetition-yet-evading review exception to the mootness doctrine, partly because an inmate in Coe's position would have time to litigate the issue again and partly because Tennessee had subsequently enacted a statute providing an inmate the right to have counsel present for his execution. *Id.*; *see* Tenn. Code Ann. § 40-23-116(8).

The district court's reasoning in *Coe* is sound and should be followed here. Pursuant to the statute passed after the holding in *Coe*, Defendants now permit one counsel to be physically present for Plaintiffs' executions. However, given the nature of the new three-drug protocol—exacerbated by Defendants' new plan to use compounded drugs—counsel's mere presence is not sufficient to ensure Plaintiffs' right to counsel and the courts. Plaintiffs have an actual injury, in that their executions are sure or very likely to be unnecessarily painful, yet their counsel will be unable to observe the painfulness of the execution or reach the courts to seek redress. Plaintiffs' demonstrated that Midazolam is incapable of rendering inmates insensate to pain, which makes it particularly dangerous for Defendants to couple with a paralytic that makes it impossible for Plaintiffs to show—and their counsel to observe—that they are suffering. Given the known ineffectiveness of Midazolam and the lack of any instruction in the Protocol for the timing of the syringe pushes, counsel must be able to see the sequence and timing of the injections from the

different syringes, see the inmate well enough to observe indications that he has awareness and is experiencing pain, and have access to an outside telephone line to contact the court to alert it to any Eighth Amendment violation during an execution.

As Plaintiffs have shown that they will "imminently suffer [] actual harm," *Lewis*, 518 U.S. at 349, by lack of access to counsel and the courts, their constitutional rights must be weighed against the prison's interests in such matters as security and effective operation. *Thaddeus–X*, 175 F.3d at 390. Defendants have given no persuasive justification for not allowing counsel the access they request.

The only concerns Defendants have offered for allowing counsel a better view of the syringes and the inmate is that counsel not be able to see the executioner's face. But Defendants could set up a video monitor to allow counsel a closer observation of the injection site, the syringe pushes, and the inmate's face without allowing counsel to see the executioner's face. V 647-50 (Sealed deposition).

As to the use of the paralytic, Defendants have offered no justification, Commissioner Parker agreed that an execution could be carried out without the paralytic. XXXVII 1316.

As to the use of a phone line, Ms. Inglis' testimony is illuminating. She was clear that the reason the department deprives counsel of a phone is because she does not want them to call the Court and possibly have the Court interrupt an execution:

> Q: Do you see any problems with having a phone in there for the defense attorney?

> A: I do see some issues.
>
> Q: What issues?
>
> A: Yes. I mean, there's not to be any photographing or recording. That's one. The other would be interruption of an execution without knowing sort of – the Court not having enough information to make a decision about what would happen if an execution was staying in the middle of it.
>
> Q: But would you agree that if a lawyer is not permitted to hae a phone to call the Court if a problem comes up, that the execution may go forward in a manner that would be unconstitutional?
>
> A Well, no. I'm not going to agree with that, but the attorney can leave and call the Court.

XL 1648-49. Inglis admits that it is Defendant's intent to deprive the inmate access to the Courts.

Commissioner Parker testified in deposition that he saw no problem with allowing counsel to have an outside phone line. (Parker Dep. at 274:19-22 ("I would certainly not be opposed in any way to providing the attorneys access to communications that they would need to do their job."); *see also* 273:23- 274:1.) However, counsel for Defendants immediately retracted that offer by email communication, without explanation. This Court should allow Plaintiffs access to a phone line, just as the district court enjoined the Riverbend Warden to provide to Coe's counsel. Plaintiffs' constitutional rights clearly outweigh Defendants' concerns, all of which can be accommodated in a manner that protects Plaintiffs' rights.

In a recent dissent from the Supreme Court's denial of an application for stay

of execution and denial of certiorari, Justice Sotomayor articulated perfectly inmates' right to counsel and to access to the courts:

> I continue to doubt whether Midazolam is capable of rendering prisoners insensate to the excruciating pain of lethal injection and thus whether Midazolam may be constitutionally used in lethal injection protocols. . . . When prison officials seek to limit that right, the restriction is permitted only if "it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Here, the State has no legitimate reason—penological or otherwise—to prohibit Arthur's counsel from possessing a phone during the execution, particularly in light of the demonstrated risk that Midazolam will fail. *See Arthur*, 580 U. S., at ——, 137 S. Ct., at 733 (detailing "mounting firsthand evidence that Midazolam is simply unable to render prisoners insensate to the pain of execution"). To permit access to a telephone would impose no cost or burden on the State; Arthur's attorneys have offered to pay for the phone and provide it for the State's inspection. The State's refusal serves only to frustrate any effort by Arthur's attorneys to petition the courts in the event of yet another botched execution. Its action means that when Thomas Arthur enters the execution chamber tonight, he will leave his constitutional rights at the door.

Arthur v. Dunn, 137 S. Ct. 1521, 1522 (Sotomayor, J., dissenting) (some citations omitted). Although the Supreme Court did not decide to grant cert in the *Arthur* case, that cannot be interpreted as a repudiation of Justice Sotomayor's concerns given the small percentage of cases in which the Court grants certiorari and the myriad reasons it my deny certiorari in any particular case. Justice Sotomayor's opinion is persuasive authority on the merit of Plaintiffs' claims that Defendants have "no legitimate reason—penological or otherwise—to prohibit their counsel from having phone access to the court during an execution." *Arthur*, 137 S. Ct. at 1522.

The Chancery Court erroneously held that Plaintiffs' claim is based on

speculation that something may go wrong. Plaintiffs have reliable scientific evidence that Midazolam is scientifically incapable of rendering an inmate insensate to pain, thus assuring the need for counsel to observe the execution better than they currently are able given the configuration of the execution chamber and the need for counsel to be able to reach the court to seek relief. Where *Glossip* emphasized the importance of safeguards, the safeguards addressed in Count V (removal of the paralytic, access to a phone, additional counsel in the chamber, and the ability to view the syringes) are all important safeguards.

These safeguards were lacking in Mr. Irick's execution. As a result, the Department did not follow their protocol because no back-up syringes of Midazolam were prepared. *See* Attachment A to Motion to Expand the Record, TDOC Public Records. Mr. Irick showed signs of awareness and sensation, and yet the Warden proceeded with the execution. *See* Attachment B to Motion to Expand the Record, September 2, 2018 *Declaration of Dr. David Lubarsky*.

The Court's reliance on *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017), which is misplaced. XVI 2274. Unlike *Whitaker*, plaintiffs do not allege a Sixth Amendment right-to-counsel claim. Second, the plaintiffs in *Whitaker* had only speculative evidence about potential mishaps and did not plead that the protocol violated the Eighth Amendment on its face. Here, Plaintiffs do not claim that they will suffer because of a mishap. They have pled that they will suffer when the protocol is carried out as intended. *Arthur v. Comm'r*, 680 F. App'x 894, 901-10 (11th Cir. 2017), is also unavailing because, unlike Arthur, Plaintiffs here proved an

Eighth Amendment violation.

To the extent that T.C.A. § 40-23-116 is interpreted as preventing more than one defense counsel witness to be present during an execution, then it is unconstitutional because there is no compelling reason to exclude an additional attorney and the inmates right to counsel at execution is fundamental. *See Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W. 1 (2000).

For these reasons, Plaintiffs respectfully request that this Court reverse the judgment of the Chancery Court and hold that the July 5, 2018 Protocol violates the First, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8, 16, and 17 of the Tennessee Constitution, as the protocol (1) fails to provide Plaintiffs' counsel adequate visual access to the execution to allow proper monitoring of the proceedings; and (2) fails to provide telephone access between Plaintiffs' counsel, co-counsel, and the courts, which violates Plaintiffs right to access the courts.

IV. The trial court's denial of Plaintiff Edmund Zagorski's motion to amend the complaint to raise an as-applied challenge to the unqualified Drug Supplier/Compounder was an abuse of discretion.

Plaintiffs first learned of the Department's intent to compound Midazolam on June 21, 2018. Less than an hour before the deposition of Debbie Inglis, counsel for Defendants called Plaintiffs' counsel to inform them that he had just learned of the intent to compound Midazolam. During Inglis' deposition, Plaintiffs learned that

Defendants intended to have their secret supplier compound the Midazolam. Prior to the deposition, Plaintiffs did not know, and could not know, that the Defendants intended to use this drug supplier to compound the drugs for then-protocol B.

The January 8, 2018 protocol did not explicitly indicate, or even suggest, that compounded drugs might be used for the three-drug Midazolam protocol, then called "Protocol B." In fact, it was the opposite: the Protocol indicated that the 3-drug protocol would use commercially manufactured chemicals. The "Procurement" instructions for the 3-drug (Midazolam) protocol require the RMSI procurement officer to contact "the Procurement Officer at DeBerry Special Needs Facility (DSNF) to order the needed chemicals." Ex. 1, *1/8/2018 Lethal Injection Manual*, at Vol. 1, p. 37. DeBerry Special Needs facility has a pharmacy license and therefore can order commercially manufactured chemicals. TE Vol. XL, p. 1615 (testimony of TDOC Deputy Commissioner and general counsel Debbie Inglis). This is inn contrast to the "Procurement" instructions for then-Protocol A (pentobarbital), which required the warden to obtain a physician's order and submit that to a pharmacy. Moreover, Plaintiffs' counsel were aware that the *West v. Schofield* decision had upheld the use of compounded pentobarbital. On its terms, the January 2018 lethal injection manual made a plain distinction in the source and nature of the chemicals to be used for the two protocols. Moreover, at the time of Ms. Inglis's deposition, Plaintiffs had received discovery productions and Tennessee Public Records Act productions from TDOC that contained email communications, invoices, and photographs that all indicated TDOC had acquired manufactured

chemicals for the 3-drug Protocol B.

If, as the Chancery Court concluded, the January 2018 protocol manual gave notice that TDOC may use compounded chemicals for the 3-drug Protocol B, then there was no reason for Defendants' counsel to call Plaintiffs' counsel to give notice of the compounding plan, nor was there need for TDOC to revise the Protocol manual to explicate the use of compounded Midazolam.[111]

At the time that Plaintiffs learned this information from Defendants' counsel, they knew the identity of the State's secret supplier for manufactured Midazolam, from information in documents that were produced by the State in response to a Public Records Act request. Plaintiffs knew that the supplier was not licensed in its home state for high-risk sterile compounding, as required to compound Midazolam.[112] Other 5, Ex. 1 (sealed). Plaintiffs also knew that the compounder was not licensed in Tennessee – at all. They further knew that the owner had been subject to discipline by the owner's state Board of Pharmacy for failing to reveal a conviction of a misdemeanor crime on the individual's Application for Pharmacy License and that the chief pharmacist had been disciplined by the state Board of Pharmacy for failing to properly supervise a pharmacy employee. Other 5, Ex. 2 (sealed). They

[111] From the recently produced TDOC materials, it appears that the protocol continues to evolve. Apparently, the drugs for Mr. Irick's execution were mixed at the prison at the last minute. They were also frozen, rather than refrigerated, although the protocol calls for the drugs to be maintained at room temperature in a heavy gauge steel container. There is no evidence that RMSI has a freezer for the storage of lethal injection drugs.

[112] The secret source's website specifically stated that it was updating its clean room and only engaged in non-sterile compounding, meaning it did not have the necessary license to compound Midazolam.

knew. Other 5, Ex. 3 (sealed). This knowledge was reason for Plaintiffs not to believe or suspect that Defendants would acquire compounded lethal injection chemical from that source. Therefore Plaintiffs could not have known any earlier than June 21, 2018, when they received explicit notice that the Defendants would actually use a non-licensed pharmacist with a history of disciplinary problems with its state Board of Pharmacy to compounded Midazolam.

Upon learning of Defendants' intention to compound Midazolam for the upcoming scheduled executions, Plaintiffs acted with haste to amend their complaint to add claims related to this development. On June 25, 2018, four days after Ms. Inglis' deposition, Plaintiffs filed a motion alerting the court to these problems with the State's drug supplier and requesting, among other things, leave to amend their complaint to add factual allegations and new legal claims regarding the unwritten protocol involving the use of compounded Midazolam and to add as-applied claims on behalf of Plaintiffs Irick, Zagorski, and Miller, the plaintiffs with execution dates already set. IX 1150-1227 (Pls.' 6/25/15 mot. and exhibits regarding compounded Midazolam) at 1151-52, 1160, 1163. On June 26, 2018, the court ordered Defendants to respond to Plaintiffs' allegations about their drug supplier. IX 1233-39. On June 27, 2018, the court ruled that it would hold Plaintiffs' motion to amend in abeyance pending Plaintiffs' forthcoming formal motion to amend the complaint. X 1259-65. That same day, Defendants responded to Plaintiffs' allegations. IX 1240-58. In particular, Defendants acknowledged that the "pharmacist/person/entity who is compounding the Midazolam" has been subject to disciplinary orders from their

state Board of Pharmacy, but asserted that this fact was inconsequential. IX 1253. On June 28, 2018, a week after Ms. Inglis' deposition, Plaintiffs moved to file a Second Amended Complaint to add as-applied claims related to the State's drug supplier's lack of proper credentials and clear pattern of misconduct. X 1275-1349 (Pls.' 6/28/18 mot. and exhibits). Specifically, Plaintiffs moved to amend the complaint to allege that the secret source: (1) was not properly licensed in the State of Tennessee; (2) did not have adequate facilities to compound high-risk sterile injectables; and (3) has a disciplinary history that calls into question their competence to provide sterile, stable, potent chemicals for lethal injections in the State of Tennessee. The Chancery Court denied the request, citing undue delay. The following day, the trial court denied Plaintiffs' motion to add as-applied challenges. X 1353-63 (6/29/18 order). The court's primary reason for denying the motion to amend was that Plaintiffs had unduly delayed bringing the claims related to compounding. X at 1357-62. As set forth above, Plaintiffs had no indication that Defendants would use compounded chemicals for the 3-drug (Midazolam) Protocol B, and in fact had clear indications from Defendants to the contrary, including the "procurement" procedures of the lethal injection manual. The court did not squarely address Plaintiffs' claims about the as-applied challenges related to the State's drug supplier.

Plaintiffs' promptly filed a motion to reconsider. X 1399-1407 (Pls.' 7/2/18 motion to reconsider); VII 967 (under seal, Pls.' 7/2/18 notice of filing exhibit to motion to reconsider under seal); Other 5 (under seal, exhibits 1-3 to Pls.' 7/2/18 motion to

reconsider); XII 1564-72 (Defs.' 7/3/18 response); XII 1577-81 (Pls.' 7/3/18 reply). In their motion to reconsider, Plaintiffs attached the exhibits—redacted and under seal—documenting the licensing status and disciplinary history of the secret source listed above.[113]

The court denied Plaintiffs' motion to reconsider as well, based on its reasoning in its initial order on the motion to amend. XII 1585-88. As to Plaintiffs' allegations about the particular lack of licensing and disciplinary issues regarding the State's drug supplier, the court ruled that it would allow Plaintiffs to make an offer of proof at trial, XII 1586-87. As recounted in the procedural history, at trial, the court so circumscribed the offer of proof (providing a list of questions Plaintiffs could ask Debbie Inglis with no follow-up questions allowed), that the Plaintiffs declined to ask Ms. Inglis the questions and instead made a proffer on the record of what they anticipated the evidence would show if they had been permitted to make the offer of proof necessary for the record. XLII 1682-89.

This court reviews rulings on motions to amend pleadings for abuse of discretion. *Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 741 (Tenn.

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[113] Plaintiffs took care to redact even that which is under seal in order to protect the identity of the secret source from accidental disclosure. Plaintiffs are not responsible for any disclosures made by TDOC staff regarding the identity of the secret source to any person or entity. Plaintiffs do not agree with Defendants' interpretation of the law in this area, but have no need or desire to publicly name the source. The only statute that addresses this matter is a subsection of the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-504(h)(1), which exempts the identity of the source from disclosure under the public records act. There is no law that protects their identity if discovered through investigation. However, it is deeply troubling that the Department would take advantage TPRA to use a secret unqualified source to compound drugs for executions.

2013). Respectfully, the trial court's June 29th and July 3rd orders denying Plaintiffs' motion to amend were an abuse of discretion.

Tenn. R. Civ. P. Rule 15.01 provides that leave to amend "shall be freely given when justice so requires." This Court wrote in *Gardiner v. Word*, 731 S.W.2d 889 (Tenn. 1989):

Rule 15 … "needs no construction, it means precisely what it says, that 'leave shall be freely given.' " 527 S.W.2d at 92. Cases since *Branch v. Warren* have emphasized the liberality with which trial courts should approach the question of whether a pretrial motion to amend should be granted. See, e.g., *Craven v. Lawson*, 534 S.W.2d 653, 655 (Tenn. 1976); *Walden v. Wylie*, 645 S.W.2d 247, 250 (Tenn. App. 1982); *Douglass v. Rowland*, 540 S.W.2d 252, 256 (Tenn. App. 1976); see also *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. App. 1979); cf. *Liberty Mutual Insurance Co. v. Taylor*, 590 S.W.2d 920, 921 (Tenn. 1979).

Id. at 891. "In considering whether to grant a motion to amend, a trial court should consider several factors such as undue delay in filing the amendment, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and the futility of the amendment." *Id.* at 891–92. None of these factors weigh against Plaintiffs.

Plaintiffs drafted and filed their initial complaint less than two months after learning of the State's new protocol promulgated on January 8, 2018. In so doing,

they relied on the language of the Protocol that made a distinction between procedures for procuring pentobarbital and Midazolam and TDOC's TPRA productions which revealed that they had obtained manufactured Midazolam. Based on TDOC's representations, Plaintiffs diligently and expeditiously pursued their right to relief. It was Defendants' conduct that prevented Plaintiffs from learning of this frightening turn of events.

In *Gardiner*, this Court found that the trial court erred in finding undue delay. In so doing the Court looked to the conduct of the defendants. Here, Defendants promulgated an entirely new protocol on the eve of trial, which for the first time provided for compounding Midazolam. If Plaintiffs' conduct is not diligent, then diligence does not exist.

V. The trial court erred in dismissing Counts 2 and 3

a. Count II is legally sufficient.

Count II asserts that Tennessee's three-drug midazolam protocol violates evolving standards of decency which define the parameters of the Eighth and Fourteenth Amendments and Article 1 §16 of the Tennessee Constitution and the government's obligation to respect the dignity of all persons. *Hall v. Florida*, 572 U.S. __, 134 S. Ct. 1986 (2014); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (assessing a state's punishment against the evolving standards of decency that mark the progress of a maturing society). Defendants' argued in their motion to dismiss that there is no basis for relief on this claim, even if a method of execution violates evolving standards of decency. II 219. This is incorrect.

In considering a method-of-execution challenge, a court must consider four criteria, including the requirement that the method of execution not violate evolving standards of decency. As the Tennessee Supreme Court held in the 2005 *Abdur'Rahman* case:

> The analysis is quite similar in cases where the challenge is not simply to the type of punishment but also to the method for carrying out the punishment. *See* [*State v. Webb*, 750 A.2d 448, 454 (Conn. 2000)] (analyzing whether methods of execution are cruel and unusual). The United States Supreme Court has considered, for instance: (1) whether a method of execution comports with the contemporary norms and standards of society; (2) whether a method of execution offends the dignity of the prisoner and society; (3) whether a method of execution inflicts unnecessary physical pain; and (4) whether a method of execution inflicts unnecessary psychological suffering. *Weems*, 217 U.S. at 373. These factors dictate that punishments may not include torture, lingering death, wanton infliction of pain, or like methods. *Estelle*, 429 U.S. at 102; *In re Kemmler*, 136 U.S. 436, 447 (1890).

Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 306 (Tenn. 2005).[114] Torture is but one way that a method of execution may violate the Eighth Amendment. *In re Kemmler*, 136 U.S. at 447 (holding that a method of execution violates the Eighth Amendment not just when it inflicts unnecessary pain, but also when it creates a lingering death). "The Eighth Amendment also demands that a penalty accord with 'the dignity of man.'" *Hope v. Pelzer*, 536 U.S. 730, 738 (2002).

In *Wilkerson v. State of Utah*, 99 U.S. 130 (1878), the United States Supreme Court observed that the terms "cruel and unusual" were difficult to "define with

[114] The Tennessee Supreme Court in *Abdur'Rahman* and Plaintiffs' complaint both look to the practice of the states to determine the current status of this evolution. *Id.* at 306-307.

exactness" and declined to provide a comprehensive definition. *Id.* at 136. The terms "cruel" and "unusual" are by their very nature mutable. What may well have been accepted, or even deemed essential, in an earlier time (e.g., burning at the stake) now unquestionably would be both cruel and unusual. Under the facts presented in that case, the Court held only that "it is safe to affirm" that "punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden." *Id.* It did not hold that only methods of execution which inflict torture violate the Eighth Amendment.

An execution method can be unconstitutional if the method represents "devolution to a more primitive" method. *Glossip*, 135 S. Ct. at 2796- 97 (Sotomayor, J., dissenting). In order to determine which punishments are so disproportionate as to be cruel and unusual, the Supreme Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society.'" *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005) (quoting *Trop*, 356 U.S. at 100-01). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

A national consensus can exist against a punishment even though it is legally permitted by a majority of states. The mere infrequency of a particular punishment suffices to establish a national consensus against the practice. *Graham v. Florida*,

62–67 (2010). When deciding whether a punishment practice is "unusual" in the constitutional sense, the Supreme Court has looked to the number of states engaging in that practice. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002); *Roper*, 543 U.S. at 564-66; *Glossip*, 135 S. Ct. at 2777 (Breyer, J., dissenting). The meaning of "cruel" and "unusual" as used by the Framers in drafting the Eighth Amendment should be determined by looking to the evolving practices of the "advanced" societies that share the country's Anglo-Saxon heritage. *See Roper*, 543 U.S. 561; *Atkins*, 536 U.S. at 321; *Thompson v. Oklahoma*, 487 U.S. 815, 826-30 (1988). The "consistency of direction of change" away from a particular punishment is also a relevant factor in evaluating whether our society, as a whole, still tolerates the punishment. *See Roper*, 543 U.S. at 566.

In 2013, Defendants intentionally and deliberately abandoned the three-drug method (including the excruciatingly painful second and third drugs), in favor of moving to what they believed to be a more humane execution method using a single drug. Defendants knew that removing the paralytic drug and potassium chloride from a lethal injection protocol removed two sources of needless, unnecessary physical pain and torturous mental suffering and anguish from their execution protocol. Besides Tennessee, only one other state has renounced a three-drug method of execution, moved forward with a one-drug method, but then later reintroduced the three-drug method. Defendants' revival of a three-drug protocol using a paralytic drug and potassium chloride violates standards of decency and is therefore "cruel" and "unusual." By intentionally reintroducing the second and third

drugs back into Defendants' execution protocol—and by utilizing midazolam as the first drug even though it is widely known to be unable to render an inmate insensate to the excruciatingly painful second and third drugs—Defendants have intentionally, knowingly, or recklessly moved backward to an execution method that increases the substantial risk of harm and needless pain and suffering, thereby contravening the evolving standards of decency in violation of Plaintiffs' Eighth Amendment rights.[115] III 349-52 (Amd. Compl., ¶¶ 332-38, 348-51) (alleging that the trend of the practices among the sister states is to abandon the use of midazolam).

Although all states that permit capital punishment provide for lethal injection as a manner of execution, only a small fraction of those states actually carry out their executions using a three-drug midazolam protocol. Midazolam was once used for lethal injection in seven states. Of the 31 states that still retain the death penalty as a valid sentencing option, only five states currently allow midazolam to be used as the first drug in a three-drug method of execution. Thus, only 16% of death penalty states—which account for less than 10% of all state and

[115] Thirty-one states retain the death penalty as a sentencing option but, in practice, the majority of these states have abandoned carrying out those executions. As a result, only a minority of states actively execute death row prisoners. Of those thirty-one states that still formally retain the death penalty, twelve states have not executed an inmate in almost ten years or longer. None of these twelve states permit execution by a three-drug midazolam method. Thus, while nineteen states have formally abolished the death penalty, at least another twelve have done so in practice. As a result, similar to the calculations by the Court in *Atkins* and *Roper*, thirty-one states have rejected the punishment challenged in the complaint.

federal jurisdictions—sanction the use of the midazolam three-drug method in executions. As of July 2017, the total population of those five states is estimated to be 34,723,639 whereas the United States' population is estimated to be 325,719,178. Accordingly, almost 90% of the U.S. population lives in a state that does not condone using a midazolam three-drug method to execute inmates. The consistency of direction of change away from the three-drug midazolam method of execution demonstrates it is disfavored under current standards of decency.

Plaintiffs sufficiently set forth a cause of action based on evolving standards of decency. Defendants offered no authority limiting or overruling controlling Eighth Amendment jurisprudence and the trial court erred in dismissing Count II.

b. Count III is legally sufficient.

Count III asserts that the three-drug midazolam option utilizing drugs not sanctioned for animal euthanasia—violates the government's obligation under the Eighth and Fourteenth Amendments and Article 1 §16 of the Tennessee Constitution to respect the dignity of all persons. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (holding that the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"); *Trop*, 356 U.S. at 101 (holding that a state's punishment is assessed under the Eighth Amendment against the evolving standards of decency that mark the progress of a maturing society); *see also McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (capital punishment must accord with the dignity of man).

Defendants argued in their motion to dismiss that there is no basis for relief on this claim, even if Defendants inflict a punishment on Plaintiffs that denies their humanity. II 220 ("[T]he concept of 'dignity of man' provides no separate basis for relief."). Defendants misunderstand the nature of this count. They argue that any cause of action arising under the Non-Livestock Animal Human Death Act is foreclosed by this Court's 2015 *Abdur'Rahman* decision. But Plaintiffs' invocation of that Act is not as a cause of action but as an illustration of how Defendants' execution protocol deprives them of human dignity. *See Hancock v. Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969) (holding punishment was unnecessarily cruel where a prisoner was forced to live and eat under animal-like conditions); *Bonds v. Tenn. Dep't of Corr.*, No. 1:16–cv–00085, No. 1:16–cv–00089, 2016 WL 7131507, *4 (M.D. Tenn. Dec. 6, 2016) (denying motion to dismiss § 1983 claim based on inhumane conditions of confinement).

For many of the same reasons as set forth above (and incorporated herein), the trial court erred in dismissing Count III of Plaintiffs' complaint. Plaintiffs allege that Defendants' lethal execution protocol treats them in a manner considered intolerable for even family pets. III 352-53 (Amd. Compl. ¶¶ 356-358). Defendants offered no argument that being treated worse than a pet is in any way consistent with any concept of human dignity. Rather, Defendants argued that—even if basic human dignity is violated by their decision to administer vecuronium bromide and potassium chloride to the Plaintiffs in the course of inflicting punishment—they may do so without violating the Eighth Amendment and Article 1, §16 of the

Tennessee Constitution so long as they do not also torture Plaintiffs in the process. II 219-21. *But see Hope*, 536 U.S. at 745 (finding that handcuffing prisoners to a hitching post amounts to "obvious cruelty" and treats prisoners "in a way antithetical to human dignity"). But Defendants cite no authority to support that proposition and *Abdur'Rahman*, 181 S.W.3d at 292, *Wilkerson*, 99 U.S. at 130, and Eighth Amendment jurisprudence provide otherwise.[116] Accordingly, Plaintiffs sufficiently pled a cause of action, and the trial court erred in dismissing Count III of Plaintiffs' complaint.

VI. The trial court abused its discretion by imposing extreme restrictions on Plaintiff's ability to conduct discovery essential to its claims.

The applicable standard of review for pretrial discovery decisions is abuse of discretion. *West v. Schofield*, 460 S.W.3d 113, 120 (Tenn. 2015) (citing *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992)). "The abuse of discretion standard of review does not [] immunize a lower court's decision from any meaningful appellate scrutiny." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citation omitted). "An abuse of discretion occurs when the trial court applies incorrect legal

[116] Defendants cited in support of their motion to dismiss this Court's 2015 *Abdur'Rahman* decision—the very case in which the Court recognized that a method of execution may not violate the dignity of man. *Abdur'Rahman* held only that the Non-Livestock Animal Humane Death Act did not create a cause of action for the plaintiff. *Id.* at 313. It in no way posited an opinion on whether treating a human being in a manner not allowed for even a pet was contrary to the principles of human dignity. Notwithstanding their convictions, Plaintiffs are entitled to the same dignity afforded all humans, and that dignity remains protected by the Eighth Amendment and Article 1, §16 of the Tennessee Constitution. *Roper*, 543 U.S. at 560 ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.").

standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *West*, 460 S.W.3d at 120 (citing *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008)).

As this court held in its 2015 *West* decision, analysis of a litigant's right to discovery begins "with the text of Tennessee Rule of Civil Procedure 26.02(1):

> Parties may obtain discovery regarding any matter, *not privileged, which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including ... the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

West, 460 S.W.3d at 120 (quoting Tenn. R. Civ. P. 26.02(1) (emphasis in original). "Thus, before a trial court may order matters divulged under this Rule, it must make a threshold determination that the matters sought are (1) not privileged and (2) relevant to the subject matter of the lawsuit." *Id.* at 121. As explained in *West*, relevancy means that the information has some probative value with respect to the subject matter involved in the pending litigation. *Id.* at 125-26.

Here, the trial court repeatedly imposed restrictions on Plaintiffs' ability to conduct discovery on issues relevant—indeed central—to their claims, each time based on an erroneous interpretation of this Court's 2015 *West* decision's holding that the identities of individuals involved in the execution process are not relevant to a method-of-execution challenge. However, Plaintiffs here were not seeking the identities of those involved in the execution process for the sake of knowing their

identities, but instead for the sake of gaining access to the information those individuals possessed. The court could have easily crafted (or invited the parties to craft) measures to maintain the confidentiality of individuals involved in the execution process without depriving Plaintiffs of access to individuals who possess information relevant to Plaintiffs' claims. The four orders at issue are as follows:

a. May 7, 2018 order denying Plaintiffs' first motion to compel discovery

On May 7, 2018, the trial court abused its discretion by issuing an order sharply restricting Plaintiffs' ability to conduct discovery needed to present evidence of an alternative method of execution as required by *Glossip* and *West.* V 617-32 (5/7/18 Order).[117] The court ruled that, on the basis of the "survey of other jurisdictions and approval of those as consistent with the public policy of Tennessee" contained in *West*, 460 S.W.3d at 122-25, the following identities must be kept confidential:

- the identities of supplies [sic] of the substances necessary to carry out lethal injection executions,
- the State employees who procured those substances,
- persons directly involved in the execution, such as the execution team, and
- the manufacturer, supplier, compounder, prescriber of the drugs, medical supplier or medical equipment for the execution.

V 624.

The court disallowed or limited Plaintiffs' discovery in the following ways:

- disallowed discovery based on the September 7, 2017 email from Defendants' supplier of lethal injection chemicals (Direct Source) about the inefficacy of

[117] II 244-84 (Pls.' 4/9/18 mot.); III 390-405 (Defs.' 4/20/18 resp.); IV 455-84 (Pls.' 4/27/18 reply); IV 541-64 (Pls.' supplemental facts in support); XXI 1-140 (5/2/18 oral argument transcript).

midazolam for relieving the pain of the second two drugs because information that Defendants might have about the efficacy of Protocol B (midazolam) is "cumulative to their own expert and witnesses' testimony, *id.* at 627;

- disallowed discovery on availability of pentobarbital from anyone other than the "named, nonconfidential Defendants," on the basis that "Plaintiffs' challenge is a facial constitutional challenge," *id.*;
- allowed Plaintiffs to obtain certain documents from Commissioner Parker and Warden Mays about their knowledge of the availability of pentobarbital for the upcoming executions but not to know the "source and basis of [their] knowledge," *id.* at 678;
- denied Plaintiffs' motion to compel answers to Interrogatory 1 (which requests the contact information for "all persons having knowledge of" the September 7, 2017 email from the Direct Source) "except for the named Defendants," because this Court's 2015 *West* decision prohibits discovery of persons inquired about, *id.* at 629; *see also id.* at 618 (quoting Interrogatory 1).
- denied Plaintiffs' motion to compel answers to Interrogatory 2 regarding the persons who drafted, revised, prepared and/or promulgated the January 8, 2018 Protocol as "not relevant because the Plaintiffs' challenge in this case is to the constitutionality of the Protocol as written," *id.*;
- categorically "denied as not calculated to lead to the discovery of admissible evidence on a facial constitutional challenge," the request for production of documents as to a wide array of issues relevant to Plaintiffs' claims listed in the court's order, including, *inter alia*, "the persons who gathered and considered information regarding a change to the execution protocol"; "the methods of execution that were considered when changing the protocol"; "the intended purpose for the drugs chosen for new Protocol B and the information considered regarding such purposes"; "the information gathered and considered regarding alternative methods"; Defendants' knowledge about the unnecessary and severe pain and suffering caused by the second two drugs in Protocol B; "Defendants' knowledge of available safeguards to ensure Plaintiffs are unable to experience the unnecessary and severe pain and suffering from the vecuronium bromide and potassium chloride used during their executions and why such safeguards are not included in Protocol B"; "whether Defendants know that midazolam has a ceiling effect" or "know that that paradoxical effect is a known and recurring problem with the administration of midazolam," *id.* at 630-31.

b. May 24, 2018 order denying Commissioner Parker and Warden Mays' motion for a protective order seeking to quash their depositions but imposing extreme limitations on the scope of their depositions

On May 24, 2018, the trial court abused its discretion by imposing extreme and unwarranted limitations on the time and scope of Commissioner Parker and Warden Mays' depositions.[118] Other 2 (sealed, unredacted 5/24/18 order); X 1364-89 (redacted 5/24/18 order); X 1350-1352 (6/28/18 order to redact 5/24/18 order pursuant to 6/13/18 order (VI 738-45) and place on public docket). Plaintiffs sought to depose these individuals to discover what they knew about Defendants' efforts to obtain pentobarbital—Plaintiffs' identified alternative method of execution. The court was correct in ruling that Parker and Mays' request to quash the depositions was "a superficial application and over-simplification of *Glossip v. Gross* and a misapplication of *West v. Schofield*." Other 2, pp.1-2.

As the trial court properly held, Defendants' position that a facial challenge only requires looking to the text of the protocol because the "Protocol speaks for itself" is simply wrong. Other 2, pp. 4-5, 7. The court was correct in holding that Plaintiff have the right to conduct discovery as to the second *Glossip* prong of availability, although it was mistaken in concluding (in this order and the others discussed here) that they do not have the right to conduct discovery on every element of their claims. As the court noted, this Court's 2017 *West* decision held that *Glossip* places the burden on a claimant to plead and prove both prongs of the test. *Id.*, p. 7 (quoting *West 2017* and *Glossip*). But, of course, Plaintiffs have the burden of proving all of their claims.

[118] V 661-671 (Parker and Mays' 5/21/18 motion for protective order); V 672-674 (court's 5/21/18 order staying deposition); XXII 1-63 (5/21/18 hearing on protective order motion, particularly pp. 7-13, 42-45).

Despite allowing Plaintiffs to depose Commissioner Parker and Warden Mays, based on its misunderstanding of *West 2015*, it placed the following limitations on his deposition:

- limited both depositions to six hours, *id.*, p.18;
- imposed limitations on the scope of the depositions by "incorporat[ing] its reasoning and authorities from the May 7, 2018" order, *id.*;
- disallowed questions relevant to *Glossip* prong one, *id.*;
- restricted questions relevant to *Glossip* prong two to "information solely within their possession that is calculated to lead to the discovery of admissible evidence on this essential element . . . [which] is permissible even under a facial challenge," *id.*;
- restricted questions as to their other claims to the "limited" issues related to their "knowledge of the logistics of administering and implementing Protocol B as written, *id.*, p.19;
- enumerated an exclusive list of permissible topics, *id.*, pp.19-20;
- enumerated a long list of impermissible topics, including (1) any other available alternative drug for use in Tennessee's lethal injection protocol; (2) identities and identifying information about the chemicals necessary to carry out lethal injection executions; (3) identities and identifying information of the State employees who procured those substances; (4) identities and information of the persons directly involved in the execution; (5) identities and identifying information of the manufacturer, supplier, compounder, prescriber of the drugs, medical supplier, or medical equipment for the execution; (6) identities and identifying information of the persons who gathered and considered information regarding a change to the execution protocol; (7) all of the long list of topics listed as prohibited in its May 7, 2018 order, *id.*, pp. 21-22.

c. June 12, 2018 order denying the question Plaintiffs certified during Commissioner Parker's deposition

The trial court erred in its June 12, 2018 order denying Plaintiffs' certified question from Commissioner Parker's deposition. Other 1, pp.1, 5-6 (under seal); X 1390-98 (redacted); X 1350-1352 (6/28/18 order to redact 6/12/18 order pursuant to 6/13/18 order (VI 738-45) and place on public record). The court denied Plaintiffs'

request to have Commissioner Parker respond to the question they certified during his deposition: "Which Departments of Correction [has Commissioner Parker] consulted with"? Other 1 (6/12/18 order at pp. 5-6, sealed). The court found that the question was not permitted under the court's May 24 2018 order limiting the scope of depositions. Other 1, pp.5-6.

The context of the question was Plaintiffs' attempt to identify which departments of correction Commissioner Parker had consulted with to locate pentobarbital, as the discussion at the deposition made clear. III 443-45 (sealed, Parker Dep.). Plaintiffs' counsel conducting the deposition explained: "[W]e believe that we are entitled to inquire as to States that you have had general discussions with about the ability to obtain pentaobarbital [sic] and other execution drugs for execution and that we would want to ask you for the specific names of places that you have consulted." III 444 (sealed). Counsel followed this explanation with an immediate request that the court reporter certify the question. III 444-45 (sealed).

Plaintiffs sought the information about which departments of corrections Commissioner Parker had talked with in his search for pentobarbital because it would have provided information about a source for pentobarbital. *See State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Aug. 6, 2018) (Lee, J., dissenting) ("Surely, our TDOC should be as resourceful and able as correction officials in Texas and Georgia in obtaining pentobarbital"). The trial court abused its discretion in not allowing this question.

d. June 13, 2018 order denying Plaintiffs' motion to compel the deposition of a TDOC staff member and an associate Riverbend warden and

imposing extreme limitations on the scope of TDOC General Counsel/Assistant Commissioner Debbie Inglis' deposition testimony

In its June 13, 2018 order on Plaintiffs' second motion to compel, the court abused its discretion by (1) denying the motion to compel the deposition of a TDOC staff attorney and an associate warden at Riverbend; and (2) granting the motion to compel the deposition of Debbie Inglis, the TDOC Deputy Commissioner, but imposing extreme limitations on the scope of the deposition that are not supported by law. VI 738-45.[119] The trial court again incorporated by reference the draconian discovery limitations contained in its May 7, 2018 order. V 617-32. As Plaintiffs stated in their motion to compel and reply thereto, they believe on the basis of knowledge, experience, and public records that Ms. Inglis, a TDOC staff member (whom Plaintiffs have referred to throughout this litigation as the "Drug Procurer"), and an assistant warden at Riverbend possess non-privileged information that is relevant to the Plaintiffs' remaining claims. XVII 2430 (Pls.' motion).[120]

The record is replete with evidence that the TDOC Drug Procurer was the individual responsible for procuring lethal injection chemicals for the State, including the following:

- As detailed in Plaintiffs' motion to compel, the Drug Procurer's name appears in an email obtained by Plaintiffs' counsel through a public

[119] I 107-III 355 (Pls.' 6/1/18 motion and mem. under seal); XVII 2429-XIX 2678 (Pls.' 6/1/18 redacted motion and exhibits); III 356-66 (Defs.' 6/8/18 resp., under seal); VII 901-66 (Pls.' 6/11/18 reply, under seal); XVII 2363-2428 (Pls.' 6/11/18 redacted reply and exhibits).

[120] Plaintiffs referred to the latter two individuals by name in its original filing, but later redacted the names in response to the court's order. Here, Plaintiffs refer to these individuals by their job descriptions and, therefore, cite to the redacted version of the pleadings.

records request to TDOC that suggests that the individual has relevant information regarding the availability of drugs necessary to carry out a lethal injection in Tennessee. XVII 2432. The email sender (presumably the pharmacy that provides the State with lethal injection chemicals—"Direct Source") addresses the Drug Procurer by name and states that the Direct Source is receiving another shipment the next day of midazolam and vecuronium bromide and will give the Drug Procurer the details when it arrives. XVII 2432 (Pls.' motion). Plaintiffs' motion details other email exchanges that also clearly indicate that the Drug Procurer was the one communicating with Direct Source. *Id.*, 2432-33.

- Plaintiffs' motion to compel also explained that Inglis, the Drug Procurer's supervisor, testified in the 2015 trial before Chancellor Bonnyman that "one of [her] attorneys" was responsible for making calls to locate a pharmacist willing to compound the lethal injection chemicals." *Id.*, 2433 (citing transcript).

- Ms. Inglis' trial testimony indicated that the Drug Procurer was the only person tasked with locating lethal injection chemicals. XL at 1609 (Drug Procurer was only TDOC person working on locating drugs); at 1611 (all of the information about availability of pentobarbital presented in the PowerPoint to top decision makers came from the Drug Procurer); at 1619 (Drug Procurer did the search with Source B for the chemicals to be used for Protocol B); at 1627, 1631 (Inglis was "caught in the middle" between the Procurer and the Commissioner); 1643 (Inglis does not know when the Commissioner learned that manufactured midazolam was not available).

- Commissioner Parker's trial testimony indicates that the Drug Procurer was tasked with locating lethal injection chemicals. XXXV 1152 (Inglis and "her staff" "play a big part" in the lethal injection "process" and he relies on what they tell him other people have told him).

Indeed, the chancery court made a finding of fact that Commissioner Parker and Assistant Commissioner Debbie Inglis "delegate[d] the task of investigating supplies of pentobarbital to a member of their staff." XVI 2242 (7/26/18 final order). The court also referenced the "staffer delegated to research sources" in discussing the meaning of a text message by the "staffer" to an unidentified person, presumably the Direct Source of the State's lethal injection chemicals. The author of

the text message—the Drug Procurer—texted the Direct Source to ask for "a list of all companies etc u reached out to about sourcing so I can have it for when we have to show it's unavailable." XVI 2246. The court makes a finding of fact as to this message that "the staffer delegated to research sources was putting together a PowerPoint presentation for the boss/superior . . . ." *Id.*

The Drug Procurer appears to be the only person in Tennessee State government who has first-hand knowledge about the availability of pentobarbital. He also likely has relevant information as to Defendants' knowledge of the September 7, 2017 email from the Direct Source warning about midazolam's ineffectiveness and what actions were taken in response to the email, which is relevant to Plaintiffs' substantive due process/shocks the conscience claim. As discussed in the section of this brief addressing the Plaintiffs' showing of an alternative execution method as required by *Glossip*, Plaintiffs were extremely prejudiced by the inability to depose the Drug Procurer and obtain information about documents and information in his control.

As to the Riverbend assistant warden, as Plaintiffs' motion to compel states, the protocol explicitly provides that if the warden cannot perform his duties during an execution, the assistant warden is required to carry out the execution. XVII 2435. Thus, the assistant warden is familiar with the protocol and has knowledge of the execution procedures that have not been reduced to writing but are part of the protocol, such as the timing of the syringe pushes. The assistant warden is also responsible for security at the prison and so has unique information about what, if

any, security challenges might be presented by allowing Plaintiffs' counsel telephone access during executions or adequate visual access to the execution to allow counsel to properly monitor the proceedings, which are relevant to Count V, Plaintiffs' access to counsel and to the courts claim. XVII 2435-36.

As to the strict restrictions on Plaintiffs' questioning of Ms. Inglis, Plaintiffs' motion to compel sets forth numerous bases for their belief that she has information relevant to their claims. XVII 2433-35. The damage to Plaintiffs ability to conduct discovery caused by the trial court's refusal to allow Plaintiffs to depose the Drug Procurer was exacerbated by the court's restrictions on the scope of questions Plaintiffs could ask during Ms. Inglis' deposition.

e. These orders were an abuse of discretion.

The trial court abused its discretion in repeatedly restricting Plaintiffs' discovery in all the ways articulated in *West 2015*. That is, the court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, and employed reasoning that caused an injustice to the complaining party. 460 S.W.3d at 120.

First, the court applied incorrect legal standards. As to Plaintiffs' burden to prove *Glossip* prong 1, the court incorrectly concluded that Plaintiffs had no right to conduct discovery as to that prong because their method-of-execution claim is a facial challenge. There is simply no support in law or logic for this holding. As discussed elsewhere in this brief, there is nothing about a facial constitutional challenge that deprives a plaintiff from conducting discovery on matters on which they have the

burden of proof.

As to Plaintiffs' burden to prove a "feasible and readily implemented" alternative to under *Glossip* prong 2 and their other causes of action, the court applied the wrong legal standard in that it interpreted this Court's 2015 decision in *West*, 460 S.W.3d at 125-31, as precluding Plaintiffs from obtaining discovery from individuals protected by the execution-secrecy provisions in Tennessee Public Records Act ("TPRA), Tennessee Code Annotated § 10-7-504(h).[121]

The trial court extended the 2015 *West* decision well beyond its facts and holding. That decision only held that the *identity* of those involved in the lethal injection process was not relevant to a method-of-execution claim. Plaintiffs here do not seek the *identity* of those involved in the lethal injection process. Instead, they seek to obtain *information* from individuals who have information and documents relevant to Plaintiffs' claims. Again, the trial court could craft measures to protect those individuals' identities. To prevail on a method-of-execution claim under *Glossip* and 2017 *West*, Plaintiffs must be able to conduct discovery to obtain evidence to meet their burden of proof on both prongs of *Glossip*. Neither the execution secrecy

[121] Tenn. Code Ann. § 10-7-504(h)(1) provides confidentiality from disclosure under the Public Records Act "those parts of the record identifying an individual or entity as a person or entity *who or that has been or may in the future be directly involved* in the process of executing a sentence of death . . . ." This includes "a person or *entity involved in the procurement or provision of chemicals*, equipment, supplies and other items for use in carrying out a sentence of death." *Id.* (emphasis added). By its terms this statute does not apply to court proceedings and discovery. No court has ever held that it does. In *dicta*, the Tennessee Supreme Court pondered the possibility of creating a common law privilege – but it declined to do so. No privilege exists under case law or statute.

provision of the TPRA nor the 2015 *West* decision hold otherwise. [122] If they did, Tennessee would effectively be insulated from a challenge that it violates the state and federal constitutional prohibitions against cruel and unusual punishments. As this is contrary to the law and an illogical conclusion, the court's orders constitute an abuse of discretion.

The court also abused its discretion by basing its decisions on a clearly erroneous assessment of the evidence with respect to its conclusions that General Counsel/Assistant Commissioner Debbie Ingis, Commissioner Parker, and Warden Mays could provide the information needed by Plaintiffs to prove their claims. As Plaintiffs' motions to compel made clear, these individuals were unable to answer most questions about the State's search for pentobarbital, because they simply were not the individuals charged with conducting that search and so had no personal knowledge to respond to many important questions Plaintiffs posed during their depositions.[123]

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[122] It is important to note that at the time of the 2015 *West* decision, inmates were not required to prove an alternative method of execution to prevail in a method-of-execution challenge. Further, the Defendants did not abdicate the responsibility to obtain execution drugs to a third party until 2017.

[123] Plaintiffs are unable to cite to Ms. Inglis' deposition transcript because it is not in the record, but the deposition transcripts in the record for Commissioner Parker and Warden Mays show many examples of their limited knowledge on a number of issues relevant to Plaintiffs claims. *See, e.g.*, IV 495-96 (Parker does not know whether a prescription for compounded pentobarbital was filled at RMSI) (under seal); *id.* at 500 (Parker does not know if TDOC ever possessed pentobarbital) (under seal); *id.* at 516-17 (Parker does not know what "that stuff" is in reference to an email apparently sent from the State's drug supplier to its Drug Procurer that says "[t]hat stuff is readily available, along with potassium chloride.") (under seal);

Last, the trial court's orders severely restricting the scope of Plaintiffs discovery constitute an abuse of discretion because they caused a grave injustice to Plaintiffs. The discovery orders effectively deprived Plaintiffs of the ability to obtain evidence to bolster their claims. These restrictions impacted their ability to obtain proof for all of their claims, including their substantive due process and access to counsel and courts claim. But the restrictions had the most detrimental impact on their method-of-execution claim. Simply put, Defendants had information about the availability of pentobarbital, and the court's orders denied Plaintiffs the ability to obtain that information. Refusing to allow them to depose the Drug Procurer—the

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id. at 543-45 (Parker does not know about a packet of emails entitled "Update" obtained by Plaintiffs through a TPRA request in which the author—presumably the Drug Procurer—says "[s]o the word from the powers that be is that they first want to try to find Midazolam if there (sic) none out there to get.") (under seal); *id.* at 552-53 (Parker does not know about a September 1, 2014 contract between a pharmacist and TDOC in which TDOC requests that the pharmacist provide drugs necessary to carry out an execution by lethal injection.) (under seal); *id.* at 554 (Parker does not know whether TDOC has terminated this contract with the pharmacist) (under seal); *id.* at 589 (Parker does not know why TDOC would only accept a minimum of ten executions worth of pentobarbital.) (under seal); V 601-04 (Parker has no personal knowledge of and cannot authenticate any documents that TDOC produced in this litigation) (under seal); *id.* at 605 (Parker is unaware of any other information about TDOC's attempts to obtain pentobarbital other than what was discussed during his deposition.) (under seal).

VI 766 (Mays does not know whether anyone at Riverbend is attempting to obtain pentobarbital for the upcoming executions.) (under seal); *id.* (Mays does not know whether there will be any pentobarbital for the upcoming executions.); *id.* at 803 (Mays states that the only knowledge he has of how a lethal injection execution should be carried out is from the manual and trainings); *id.* at 854 (Mays does not know of anyone outside of TDOC attempting to obtain pentobarbital on behalf of TDOC) (under seal).

one person responsible for locating pentobarbital for the State—hampered their ability to prove that pentobarbital is a "feasible and readily implemented" alternative to the midazolam protocol. This is the clearest example of the court's abuse of discretion, but the summary of the orders above shows that the trial court crafted a complicated maze of questions Plaintiffs could not ask and information they could not obtain.

The court's discovery orders identified here were an abuse of discretion and cannot stand, or else this State's law will effectively insulate Tennessee's execution methods from state or federal constitutional review.

VII. The Chancery Court erred in allowing the testimony of Dr. Feng Li, where Defendants knowingly hired him despite his unavailability, failed to exercise due diligence, and acted in bad faith.

The Chancellor erred in accommodating the Defendants' request to have defense expert Dr. Feng Li testify after the conclusion of the trial—at a time when Plaintiff's experts were unavailable to provide rebuttal evidence. Defendants had at least seven months to obtain an expert—or several experts—in addition to Dr. Lee Evans for the July hearing. Defendants knew when they adopted Protocol B (the midazolam option) in January 2018 that it would be challenged by Plaintiffs. They also knew when Dr. Li would be out of the country. Defendants were on notice that the Court intended to set this case for trial when they appeared in Court on April 16, 2018. Plaintiffs suggested a trial date for which Dr. Li was available. Defendants then countered with a proposed trial date when Dr. Li was not available and sat silent about his unavailability. The Chancellor accepted defendant's

proposed date—thereby making Dr. Li unavailable. In light of these uncontested facts, the Chancellor's acquiescence to the post-trial presentation of Dr. Li's testimony was an abuse of discretion.

a. Relevant timeline.

1. In 2017, Dr. Feng Li planned a trip to Africa from July 7-21, 2018. Affidavit of Dr. Feng Li, ¶ 4, VI 710. Dr. Feng Li is a forensic pathologist (one of seven employed by Forensic Medical Management of Nashville). Curriculum vitae of Dr. Feng Li, VI 712; http://forensicmed.com/pathologists/, last visited June 2, 2018).

2. In September of 2017, Defendants began examining a revision to their Lethal Injection Protocol, so that it would incorporate Midazolam as the first drug of an alternative three-drug method of execution. XXXVI, 1237. The Defendants began consulting with other trusted individuals (whose names and identities have not been provided by Defendants) regarding the use of Midazolam in this potential new protocol. XXXVI 1230. Defendant Parker testified that or more of these trusted individuals was a medical professional. XXXVI 1232. Plaintiffs were precluded from knowing the identity of the medical personnel (learning only that that person consulted was not an anesthesiologist, XXXVI 1233) leaving the possibility that Dr. Li was the "medical personnel" consulted by the department.

3. On January 8, 2018, the Lethal Injection Protocol that is the subject of this lawsuit was formally approved by Defendant Tony Parker. XXXVI 1209.

4. On January 18, 2018, Plaintiffs Abdur'Rahman, Hall, Irick, Johnson, Miller, Sutton, West, Wright, and Zagorski filed a Response to the Motion to Set Execution Dates in the Tennessee Supreme Court asserting that a challenge would be filed to the new lethal injection protocol and requesting that the Supreme Court establish an expedited litigation schedule. M1988-00026-SC-DPE-PD (Abdur'Rahman); E1997-00344-SC-DDT-DD (Hall); M1987-00131-SC-DPE-DD (Irick); M1987-00072-SC-DPE-DD (Johnson); E1982-00075-SC-DDT-DD (Miller); E2000-00712-SC-DDT-DD (Sutton); M1987-00130-SC-DPE-DD (West); M1985-0008-SC-DDT-DD (Wright); M1996-00110-SC-DPE-DD (Zagorski). This notice was served on Deputy Tennessee Attorney General Jennifer L. Smith. *Id.* Thus, as of January 18, 2018, Defendants were on notice that litigation regarding the newly adopted lethal injection protocol was imminent.

5. On February 15, 2018, counsel for Plaintiffs Abdur'Rahman, Hall, Irick, Johnson, Miller, Sutton, West, Wright and Zagorski filed with this Court a Notice of Intent to Respond to Motion to Set Execution Dates, and asked to be given fourteen (14) days to do so. M1988-00026-SC-DPE-PD (Abdur'Rahman); E1997-00344-SC-DDT-DD (Hall); M1987-00131-SC-DPE-DD (Irick); M1987-00072-SC-DPE-DD (Johnson); E1982-00075-SC-DDT-DD (Miller); E2000-00712-SC-DDT-DD (Sutton); M1987-00130-SC-DPE-DD (West); M1985-0008-SC-DDT-DD (Wright); M1996-00110-SC-DPE-DD (Zagorski). In this Notice, Plaintiffs for the second time alerted the State of their intent to challenge the constitutionality of the new lethal injection protocol. *Id.*

6. On February 20, 2018, Plaintiffs filed their original complaint in this cause. I 1.

7. On April 6, 2018, Defendants responded to a request for interrogatories and identified a single expert witness, Dr. Roswell Lee Evans.

8. On April 9, 2018 as requested by the Court, Plaintiffs filed a proposed scheduling order which suggested that trial would be held from June 18 to June 27, 2018.

9. On April 10, 2018, Defendants filed their own proposed scheduling order, suggesting that a 3-4 day trial be held starting July 16, 2018.

10. The Chancellor convened a scheduling conference on April 11, 2018. XX 1-75. All parties were on notice that the purpose of the conference was to set an expeditious trial date in light of Mr. Irick's August 9, 2018 execution date. At the conference, this Court heard the positions of both sides, and then determined that trial would be set from July 9 to July 18, 2018. II, 285; XX 42.

11. After setting the trial date and verifying availability of counsel, this Chancellor asked Plaintiffs if they had experts ready for trial. Plaintiffs responded:

> We tentatively have experts lined up. We're just going to have to now run the dates past them to be sure that they'll be able to be here or we'll have to get substitute experts.

XX 46.

12. At this scheduling conference Defendants verified that they had provided notice of a single expert witness, Dr. Evans (*see also*, II 272; *see also* XX

49); the court gave the defense until May 11, 2018 to provide notice of any additional experts. II, 285.

13. On May 3, 2018, Defendants contacted Dr. Li about participating in the case. XLVIII 118.

14. On the May 11th deadline, Defendants provided notice of two expert witnesses: Dr. Evans (who had previously been disclosed) and Dr. Feng Li. IX[124] 1085. This notice did not make any mention of Dr. Li's "unavailability" as a witness. *Id.*

15. On May 21, 2018—almost three weeks after Defendants belatedly contacted him, the Defendants revealed that Dr. Li was not available for trial, as he would be in Tanzania. XXII 39; *see also* VI 705, Defendants' Motion to Permit Medical Expert, Dr. Feng Li to Testify by Evidentiary Deposition In Lieu of Appearance at Trial with Attachment, filed June 1, 2018. Defendants indicated that they wanted to offer an evidentiary deposition instead of his live testimony. *Id.*

16. At the May 21, 2018 conference, Plaintiffs stated that they would object to Dr. Li testifying by way of evidentiary deposition. XXII 39. Plaintiffs proposed that the State ask to vacate the upcoming execution dates, so that there would be adequate time to conduct a trial and to permit Dr. Li's testimony:

> This is not a normal civil case. In a normal civil case, a case of this magnitude, we're not going to trial for a year. We offered the State that if they would simply go to the Tennessee Supreme Court and announce

[124] Confusingly designated in the record as VIIII.

> to vacate Mr. Ira's[125] [sic] date. We have dates intact. Dr. Li can testify. We can have some more time.
>
> We are not in control of this schedule. The State is entirely in control of the schedule. They knew this was going to come. They should have been talking to Dr. Li back in January. And when they found out he was scheduled to be in Tanzania, they should have found another expert. That's really not plaintiff's fault and we shouldn't have to accommodate that.

XXII 47.

17. The Chancellor denied the defendants' motion for Dr. Li to testify by evidentiary deposition based upon the court's "determination that Defendants' presenting the expert testimony by deposition and not in person was unfairly prejudicial to Plaintiffs." XIX 1228.

18. On June 19, 2018 the defendants filed a Renewed Motion to Permit Dr. Feng Li to Testify by Evidentiary Deposition; Or, to Testify Out-of-Order; Or, to Continue This Trial. XVIII 1070. Plaintiffs filed a response in opposition on June 22, 2018.

19. On June 23, 2018, the court held another status conference to discuss the state's proposal of holding the proof open until June 23 for the presentation of Dr. Li's testimony. XXIII 1-14. At the time of that hearing, Defendants had still not provided Dr. Li's report to Plaintiffs. *Id.* Following that conference, Dr. Li's report was provided and the court ruled that Dr. Li's testimony would be taken on June 23. IX 1228. The court changed its ruling for two reasons: "First, Counsel

[125] A mis-transcription of "Irick," referring to Billy Ray Irick.

for the Defendants has affirmatively stated as officers of the Court that they 'have triad and have been unable to secure an expert witness to replace Dr. Feng Li, M.D. . . . Second, at the time the Court denied Dr. Li's testimony at trial by evidentiary deposition, the Defendants did not provide the Court with any alternative solutions for Dr. Li's testimony. The Defendants' first Motion made no reference or suggestions that Dr. Li could be available to testify live in court on Monday, July 23, 2018." *Id.* The Chancellor stated that "because of the nature of this litigation" she had previously determined that an evidentiary deposition in lieu of appearance was unfairly prejudicial. *Id.*

b. Legal Argument.

The Defendants claimed that the court's accommodation was necessary because: (a) Dr. Li was scheduled to be on vacation more than 100 miles away from Nashville at the time of trial and, therefore, qualified as an "unavailable witness" under Rule 804; (b) that the out-of-time testimony would not cause Plaintiffs prejudice; and (c) that they were entitled to this accommodation because they were unable to find another witness willing to testify in Dr. Li's stead. The Chancellor abused her authority in allowing defendants to proceed with Dr. Li's testimony after the close of the proof—when Plaintiffs' experts were unavailable to return.

1. A party who knowingly hires an unavailable expert has procured that expert's absence from trial; they have not have not exercised due diligence and they have not acted in good faith; thus, they cannot avail themselves of Tennessee Rule of Evidence 804.

The Defendants claimed that Dr. Li was unavailable as defined by

Tennessee Rule of Evidence 804(a)(6), because he was to be over 100-miles from trial, due to his long-planned vacation to Africa. However, a witness is not deemed unavailable if his "absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." *Tenn.R.Evid. 804.*

As the factual recitation, above, makes clear, Dr. Li's inability to appear in court in July was not a surprise to defendants. Clearly, Dr. Li was not contacted, or retained, until after the April 11, 2018, conference; he testified at trial that the first contact he had with the Defendants about this case was on May 3, 2018. XLVIII 118. Thus, Defendants affirmatively chose to engage an expert knowing he would be in Africa at the time of trial.

Defendants had been working on the protocol since some time in 2017; they have never denied that they were aware that a change to the protocol would necessitate litigation. Defendants had since 2017 to secure an expert who would commit to attending the trial; that they failed to did so does not justify designation of their expert as "unavailable."

While, (not surprisingly) there is not a large body of case law regarding litigants knowingly hiring experts who cannot be present in court, such conduct is not permitted. The Second Circuit Court of Appeals first explained the rationale for preventing such:

> [U]nlike the typical witness whose involvement with the case may depend on the fortuity of his observing a particular event and whose presence at trial is often involuntary, a party ordinarily has the opportunity to choose the expert witness whose testimony he desires and

> invariably arranges for his presence privately, by mutual agreement, and for a fee. Although a requirement of an attempt to secure the voluntary attendance of a witness who lives beyond the subpoena power of the court is not ordinarily imposed before prior testimony can be used in civil litigation, we think that such a requirement is particularly appropriate when dealing with the testimony of expert witnesses whose earlier attendance is almost invariably secured by such voluntary arrangements.

Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972), *cert. denied*, 412 U.S. 929 (1973) (*internal citations deleted*).

The rule of *Carter-Wallace* has been followed around the country. In New Jersey it has been expressed as follows:

> [I]t is the responsibility of trial counsel to discuss . . . [the expert's] voluntary attendance at trial. If the expert is beyond the jurisdiction of the court to compel attendance at trial, it is the responsibility of the party offering the expert to ascertain the willingness and availability of the expert to appear at trial. The proponent of the expert must attempt to arrange a trial date at which the expert can appear. Since the expert is under the control of the offering litigant, due diligence must be used to secure the attendance of the witness at trial.

Thompson by Thompson v. Merrell Dow Pharm., Inc., 551 A.2d 177, 189 (N.J. Super. App. Div. 1988) (12 expert witnesses' prior testimony found inadmissible).

In Puerto Rico, *Carter-Wallace* was followed leading to the rejection of two expert witnesses:

> Rio Mar Defendants are responsible for selecting their own expert witnesses and presumably have control over them. Rio Mar Defendants designated Dr. George Richard Braen and Dr. Enrique Carrazana as their experts on July 8, 2008. Rio Mar Defendants have offered no explanation for the purported unavailability of either

> George Richard Braen or Enrique Carrazana after having been designated approximately 10 months ago. Rio Mar Defendants have not shown that they have requested these chosen experts to appear at trial nor that they have offered to pay for the expert's fee and expenses. Thus, Rio Mar Defendants appeared to have "procured" the absence of these experts to take advantage of the expert's deposition testimony and save on paying their professional fees in violation of Fed.R.Civ.P. 26(a)(2). Hence, Dr. Braen and Dr. Carrazana are not unavailable for purposes of Fed.Evid.R. 804.

Fiorentino v. Rio Mar Assocs., LP, SE, No. CV 01-2653(PG), 2009 WL 10680817, at *2 (D.P.R. Apr. 21, 2009).

Courts in both Massachusetts and Delaware have reached the same conclusion as the District Court for Puerto Rico, and held that litigants "procured" an expert's unavailability when they hired an expert who would be out of the jurisdiction at the time of trial. "By selecting an expert from Arizona, the plaintiff's counsel 'procured' the absence of his expert from the Commonwealth in the sense that he voluntarily created a situation in which his expert would be out of the Commonwealth unless he should make arrangements for the expert's appearance at trial." *Caron v. Gen. Motors Corp.,* 643 N.E.2d 471, 474 (Mass. App. 1994). An identical result, using near identical language (replacing Arizona with Texas) was reached in *Aubrey Rogers Agency, Inc. v. AIG Life Ins. Co.,* No. CIV.A.97-529 MMS, 2000 WL 135129, at *2 (D. Del. Jan. 13, 2000). That court explained that: "Parties are expected to use other reasonable means to procure the attendance of their experts because the parties select their experts and arrange for their appearance at trial." *Id. See also*, *Hanson v. Parkside Surgery Center*, 872 F.2d 745, 750 (6th Cir. 1989) ("plaintiff's inability to procure the witness'

attendance at trial was at least in part due to plaintiff's own lack of diligence."); *Myers v. Estate of Alessi*, 560 A.2d 59, 66 (Md. App. 1989) ("appellants alone were responsible for selecting an expert who resided in Washington. They were responsible for the decision not to pay him to attend trial."); *Holmes v. Merck & Co., Inc.*, No. 2:04CV00608-BES(GWF), 2006 WL 1744300, at *2 (D. Nev. June 22, 2006) (finding that depositions are admissible when "for legitimate and unanticipated reasons, the expert was not available to testify at trial;" but not when "the proponent failed to make adequate efforts to secure the attendance of the expert witness at trial.").[2]

Plaintiffs have not found a case in Tennessee where a litigant intentionally hired an expert who could not be present at trial. However, the Court of Criminal Appeals has repeatedly held that a criminal defendant who wishes to use Tennessee Rule of Evidence 804 to introduce hearsay from an unavailable witness must first make a "good-faith effort" to obtain and/or locate the witness prior to trial. *State v. Cureton,* 38 S.W.3d 64, 79 (Tenn.Crim.App.2000) (good faith effort to secure witness's attendance required); *State v. Finchum*, No. E2001-01072-CCA-R3CD, 2002 WL 31190924, at *6 (Tenn. Crim. App. Oct. 2, 2002) (defendant failed to make good faith effort to locate and secure witness); *State v. Amos*, No. 01C01-9601-CC- 00011, 1997 WL 602949, at *5 (Tenn. Crim. App. Sept. 30, 1997) (to introduce former testimony under TRE 804, defendant must first make good faith effort to secure witness for trial).[3]

Here, Defendants intentionally chose an expert knowing the expert was

on vacation throughout the time period set for trial. Dr. Li's expertise was not so specialized that Defendants were could to timely obtain and designate another expert for trial, especially when Defendants had, by the most conservative measure, at least five months to do so.

The Defendants intentionally procured Dr. Li knowing he was on vacation at the time of trial and Rule 804 does not provide for accommodations under such circumstances. In fact, Rule 804 contains an express provision that a witness whose absence was procured by a party is not "unavailable." Dr. Li was not "unavailable" as intended by the rule, thus, the Chancellor abused her discretion in accommodating his out-of-time testimony.

2. The court's order permitting Li to testify out of time prejudiced Plaintiffs.

Permitting Dr. Li to testify out of time prejudiced Plaintiffs.[126] Plaintiffs were entitled to the assistance of their experts during the trial and expert assistance in this matter was especially important because Plaintiffs' allegations are scientifically based. *Malek v. Fed. Ins. Co.*, 994 F.2d 49 (2d Cir. 1993). Defendants provided notice of Dr. Evans who testified at trial and in the presence of Plaintiffs' experts who Plaintiffs' counsel consulted for purposes of Dr. Evans' cross-examination. The

[126] Here the Chancellor ignored Dr. Li in her ruling other than her acknowledgement that "the Defendant's two experts, while qualified, did not have the research knowledge and imminent publications that Plaintiff's experts did" (XVI 2251) and where the Chancellor found that Petitioners have proven that Midazolam "does not elicit strong analgesic effects and the inmate being executed may be able to feel pain from the administration of the drugs" to the contrary to Dr. Li's testimony, the prejudice Plaintiffs suffered from the admission of his testimony is difficult to cite. *Id.*

Chancellor's accommodation of the Defendants' witness problem deprived Plaintiffs of the ability to competently cross-examine of Dr. Li

VIII. Should this Honorable Court engage in any *de novo* factual review, the testimony of Dr. Roswell Lee Evans and Dr. Feng Li should be given no weight; the Chancellor should have excluded their testimony pursuant to *McDaniel v. CSX* and Tennessee Rules of Evidence 702 and 703.

The Chancellor in her Findings of Fact and Conclusions of Law, made virtually no mention of the Defendants' experts, Dr. Roswell Lee Evans and Dr. Feng Li. *Order*, XVI 2229-78 (established by nearly complete omission). Dr. Evans' opinion regarding compounding (which is not at issue in this appeal, and which was an area, as a pharmacist he was qualified to opine on) was mentioned approvingly. XVI 2263-64. The only other time Defendants' experts were mentioned was at the end of a long footnote detailing the qualifications of Plaintiffs' "four well-qualified and imminent experts." XVI 2251. After devoting a full paragraph to describe the qualification of each of Plaintiffs' experts, the Chancellor observed, "[t]he Defendants' two experts [who she did not name], while qualified, did not have the research knowledge and imminent publications that Plaintiffs' experts did." *Id.*, fn. 7. The testimony, opinions, and conclusions of Dr. Evans and Dr. Li (outside of Dr. Evans' on compounding) do not appear in her opinion.

None of the Chancellor's legal conclusions relied on the testimony of Dr. Evans or Dr. Li (again, with the exception of her finding on compounding). Thus, as they were irrelevant, it might seem unnecessary to further examine their credentials (or lack thereof). However, to the extent that this Honorable Court believes it proper to

engage in any *de novo* factual analysis, appellants feel it prudent to explain why that *de novo* review should pay no regard to the defense experts.[127]

a. Tennessee Rules of Evidence 702 and 703.

Expert scientific opinion testimony is only admissible under certain circumstances. As a predicate, the proponent of the opinion testimony must be "qualified as an expert by knowledge, skill, experience, training, or education." *State v. Ferrell*, 277 S.W.3d 372, 378 (Tenn. 2009); *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby Cnty. Airport Auth.,* 169 S.W.3d 627, 640 (Tenn. Ct. App. 2004); Tenn. R. Evid. 104(a), 702. An expert who is so qualified may provide opinion testimony if it will "substantially assist the trier of fact to understand the evidence or to determine a fact in issue." Tenn. R. Evid. 702. However, "[t]he court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate a lack of trustworthiness." Tenn. R. Evid. 703. The Tennessee Supreme Court has taken the "substantially assist" and "trustworthiness" requirements from Rules 702 and 703 and combined them into an analysis of the "reliability" of the expert opinion. *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 274-75 (Tenn. 2005); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263-65 (Tenn. 1997).[128] In making these determinations, the Tennessee Supreme Court notes that

[127] If this Honorable Court sees no need to reweigh the evidence or to consider the testimony of Drs. Evans and Li, then the following sections of this brief can be skipped.

[128] The "substantially assist" prong also considers whether the subject matter of the opinion is one for which expert testimony is needed, or whether it is a matter that is within the common-sense understanding of the fact finder. *See Mabry v. Board of*

Rule 702 requires that the opinion "substantially assist" the trier of fact, unlike the federal rule, which merely requires that it "assist;" thus Tennessee requires that the "probative force of the testimony must be stronger before it is admitted in Tennessee." *State v. Scott*, 275 S.W.3d 395, 410 (Tenn. 2009); *McDaniel*, 955 S.W.2d at 264.

b. Defendants' proffered experts were unqualified.

Tennessee has long recognized that an expert's qualifications are a "preliminary question for the trial judge." *Ferrell*, 277 S.W.3d at 378; *94th Aero Squadron*, 169 S.W.3d at 640. As the Tennessee Supreme Court held in *Scott*:

> When assessing the admissibility of expert testimony, the trial court must first determine whether the witness is qualified by knowledge, skill, experience, training, or education to express an opinion within the limits of his or her expertise. This determination hinges upon whether the proposed expert's qualifications authorize him or her to give an informed opinion upon the fact or issue for which his or her testimony is being proffered.

Scott, 275 S.W.3d at 402 (citing *State v. Stevens,* 78 S.W.3d 817, 834 (Tenn. 2002)).

"To give expert testimony, one must be particularly skilled, learned or experienced in a science, art, trade, business, profession or vocation. The expert must possess a thorough knowledge upon which he testifies that is not within the

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Prof'l Responsibility of Supreme Court, 458 S.W.3d 900, 909 (Tenn. 2014) (holding expert in law was not appropriate expert, as "his knowledge of the disciplinary process would have hardly 'substantially assisted' a trial judge, who is an expert in law himself."); *State v. Farmer*, 380 S.W.3d 96, 104-105 (Tenn. 2012)(whether an injury creates a "substantial risk of death" is outside of a juror's common-sense understanding, and is an appropriate subject for expert testimony). In this case the pharmacological and physiological properties of complex pharmaceuticals were plainly outside the common-sense understanding of jurists and lawyers.

general knowledge and experience of the average person." *State v. Ayers*, 200 S.W.3d 618, 621 (Tenn. Crim. App. 2005) (quoting *Otis v. Cambridge Mut. Fire Ins. Co.,* 850 S.W.2d 439, 443 (Tenn. 1992)). A qualified expert should have "some special as well as practical acquaintance with the immediate line of inquiry." *Martin v. Sizemore*, 78 S.W.3d 249, 273 (Tenn. Ct. App. 2001); *Bradford v. City of Clarksville*, 885 S.W.2d 78, 83 (Tenn. Ct. App. 1994).

1. Dr. Roswell Lee Evans qualifications; he was qualified to testify about compounding, but he had no relevant experience, professional expertise, research interest, or basis of knowledge to testify about Midazolam, or to offer an opinion on its efficacy as an anesthetic.

Dr. Evans is a Pharm.D. He is not a Ph.D. Though he has lived in Alabama for the past 24 years, he is not licensed in Alabama. XLV 2061. He is only licensed in the State of Georgia, but he has not practiced there since 1970. *Id.* 2034; Ex. 141, *Evans CV*, at Vol. 16, p. 2268-69. When Dr. Evans received his Pharm.D, in 1972, the degree only required 18 months of post-graduate education. XLV 2059. Midazolam wasn't on the market in 1972. *Id.* The last time Evans was in an operating room (other than as a patient) was in 1972, as a graduate student.

Since 1994, the majority of Evans' professional time (85%) has been devoted to administrative tasks. XLV 2121. He spent very little time teaching (at most two hours a week). *Id.* 2122. Prior to being hired to testify for the state of Florida in 2014, Evans has not studied Midazolam for lethal injection, nor has he researched it. *Id.* *Id.*

Evans has never been present when Midazolam was administered. *Id.* He has no experience in prescribing Midazolam, indeed he is not allowed to prescribe

medications. *Id.* 2060. Evans has never researched, published, or presented on the subject of Midazolam. He did present lectures regarding Xanax (generic name alprazolam) at places such as "The Ozark Society" and the "Black Hills Winter Seminar" in the 1980's and he did write an article about Xanax in 1992. *Id.* 2062-2064. Xanax is administered orally. *Id.* 2064. Evans is not a pharmacologist. XLV 2058.

2. Dr. Feng Li's is not qualified to provide an opinion on pain and suffering in living humans: he has spent his career examining dead humans.

Dr. Li is a forensic pathologist. He is not a pharmacologist. XLVIII 42. He is not a member of any organization that deals with pharmacology. XLVIII 43. He is not an anesthesiologist. XLVIII 42. He is not familiar with the American Society of Anesthesiology. XLVIII 43. He has never administered Midazolam. XLVIII 43-44. He has not seen Midazolam administered. He graduated from medical school in China in 1983. XLVIII, 42; Ex. 149, *Li CV*, at Vol. 19 2752.[129]

Dr. Li has never conducted research on pharmaceuticals. XLVIII 44; Ex. 149. Dr. Li has never published an article about any pharmaceutical. XLVIII 44; Ex. 149. Dr. Li has never presented a lecture about pharmaceuticals. XLVIII 44; Ex. 149. Dr. Li does not have an H-Index –in fact he does not know what an H-Index is. XLVIII 45.

[129] Thought Dr. Li identified Ex. 149 as his current CV on direct examination. On cross-examination he stated that it was not current. XLVIII 45. Defendants did not provide the Court with an updated CV. According to Dr. Li, any additions to his CV are not relevant to the issues before the Court.

Dr. Li has spent his entire professional career as a medical examiner. Ex. 149, at Vol. 19 2752. Dr. Li has never conducted an autopsy on person who overdosed from Midazolam. XLVIII 46. Dr. Li testified that he cannot tell from an autopsy whether the decedent was aware of pain prior to their death. XLVIII 47.

3. Neither defense experts' qualifications met the standard for admissibility.

Under the less-demanding federal standards, multiple federal courts have excluded expert testimony from unqualified experts. In *Mancuso v. Consolidated Edison Company of New York, Inc.*, 967 F. Supp. 1437 (S.D.N.Y. 1997), the district court declined to consider expert testimony from an individual who had no "specialized knowledge of the scientific issues…as a result of training or experience," but instead, after being hired, had "subsequently attempted, with dubious success, to qualify himself as such by a selective review of the relevant literature." *Id.* at 1443.

In *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 526 (6th Cir. 2012), the Sixth Circuit affirmed the exclusion of a forensic engineer who had sought to testify that a particular forklift was defectively designed, despite having no relevant experience with that model forklift and only limited experience in driving forklifts from other manufacturers: "An expert who presents testimony must 'employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id.* at 527 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)) (alteration in original).

A. Pharmacists, like Dr. Evans, are regularly found not to be

qualified to testify regarding pharmacology or medical matters.

At least four federal courts have excluded testimony from pharmacists who attempted to offer opinions on pharmacological and/or medical issues. In *Dellinger v. Pfizer Inc.,* No. 5:03CV95, 2006 WL 2057654, at *8 (W.D.N.C. July 19, 2006) a court excluded a pharmacist offered to establish a "pharmacological link between Neurotonin and pneumonia and/or pancreatis":

> Keeys is not a doctor and has a degree in pharmacy—not pharmacology. Without a degree in pharmacology, Keeys is not qualified to render a relevant or reliable pharmacological opinion regarding the effects of Neurontin.
>
> In addition to a lack of professional training in pharmacology, Keeys readily admits that he has no specialized knowledge of, or experience with, pancreatitis or pneumonia. Furthermore, Keeys never performed independent research on the pharmacologic design, efficacy or mechanism of Neurontin. For these reasons, Keeys' opinion lacks the necessary background and expertise to qualify him as an expert witness on the issue of causation. Therefore, Keeys' opinion is inadmissible under Fed. R. Evid. 702.

Id. (internal citations deleted).

Two different federal district courts have excluded the same proffered expert—Dr. James O'Donnell, Pharm. D.—from offering expert opinion testimony on the pharmacological effects of medications.[130] In *Newton v. Roche Labs., Inc.,* 243 F. Supp. 2d 672 (W.D. Tex. 2002), Dr. O'Donnell was offered to testify that Accutane is pharmacologically capable of causing schizophrenia. Pointing out

[130] Roswell Lee Evans is also a Pharm.D. Though he has not been engaged in the practice of pharmacy for years and does not hold a pharmacy license his state of residence. Dr. Evans has been in academic administration for nearly thirty years.

O'Donnell's "lack [of] appropriate pharmacological training relevant to the issues" presented, the court explained its reasons for excluding him as follows:

> O'Donnell admits that he took just one course related to pharmacology during his year-long Pharm. D. program. . . . [H]e has no expertise in what causes psychosis, including schizophrenia, or in any field of science relevant to plaintiffs' claims (such as psychiatry, psychology, dermatology, neurology, biology, biochemistry, or epidemiology). Not only does O'Donnell lack appropriate pharmacological training relevant to the issues in this case, he concedes that he has not performed even basic "bench or clinical research" on Vitamin A or Accutane. He has conducted no serious scientific research independent of this litigation. *See Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1317 (9th Cir.), *cert. denied,* 516 U.S. 869, 116 S. Ct. 189, 133 L.Ed.2d 126 (1995) ("One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."). Instead, O'Donnell's opinion in this case is based solely on an incomplete review of existing literature (mainly limited to anecdotal case reports), certain FDA documents, and a small subset of the spontaneous adverse event reports produced in an earlier litigation. As one Court of Appeals has put it, an individual's "review of literature" in an area outside his field does "not make him any more qualified to testify as an expert ... than a lay person who read the same articles." *United States v. Paul,* 175 F.3d 906, 912 (11th Cir. 1999).

Id. at 677–78 (some internal citations and footnotes deleted). Two years later, another district court followed the *Newton* court's lead, when O'Donnell was offered as an expert on the inadequacy of a drug label's warning about withdrawal risks of Paxil. *Devito v. Smithkline Beecham Corp.*, No. CIV.A. 02-CV-0745NPM, 2004 WL 3691343, at *7 (N.D.N.Y. Nov. 29, 2004). The *Devito* court characterized O'Donnell as merely possessing "the sort of 'litigation-drive[n] expertise' which courts have eschewed." *Id.* at *7. "O'Donnell is *not* a pharmacologist. Therefore, he cannot, as he

does in his 'expert report,' opine to a 'reasonable pharmacological certainty,' that plaintiff is experiencing 'withdrawal toxicity reactions from Paxil[.]' Clearly, allowing a pharmacist/nutritionist such as O'Donnell to testify in that way would run afoul of the rule that an expert must stay 'within the reasonable confines of his subject area[.]." *Id.* (internal citations omitted).

Finally, in the unreported opinion of *Wehling v. Sandoz Pharm. Corp.,* 162 F.3d 1158 at *3-4 (4th Cir. 1998) (table), the Fourth Circuit upheld the exclusion of a pharmacist who intended to testify about the interaction within the human body between Clorazil and the benzodiazepine, Klonopin: "Without prior training, education, or experience in the field, McBay's review of the literature, after he was retained as an expert witness in this suit, was insufficient to qualify him as an expert on the issues in dispute." *Id.* at 4.

4. Accordingly, the testimony from Dr. Evans and Dr. Li should be given no weight, should there be a *de novo* review of the evidence.

The above body of law strongly supports the conclusion that neither Dr. Li nor Dr. Evans was qualified to proffer expert opinions on the capacity of Midazolam to render an inmate insensate to noxious stimuli, and/or on the pain and suffering that would be caused by Tennessee's three-drug lethal injection protocol. Dr. Li is a pathologist whose specialty is the cause of death, who displays no meaningful knowledge of how Midazolam operates, or what the noxious effects of vecuronium bromide or potassium chloride could be. Dr. Evans is a pharmacist who has spent much of last three decades in administration, has not published any relevant

articles in peer-reviewed journals, has not conducted relevant research, and whose past involvement with benzodiazepines was related to their use as psychiatric/anxiety medications, not as surgical sedatives.

Neither defense expert had any real world experience with any issue in dispute. Moreover, both engaged in a "litigation-driven," incredibly selective reading of a small portion of the relevant scientific literature, while ultimately relying as the final source of their opinions on the "package insert" that comes with every prescription for commercially manufactured Midazolam. This type of reading does not make them "any more qualified to testify as an expert ... than a lay person who read the same [package insert]." *Paul,* 175 F.3d at 912; *Newton*, 243 F. Supp. 2d at 678. Moreover, neither the package insert, the FDA, nor the manufacturers of Midazolam indicate that it is appropriate for use as a general anesthetic.

For these reasons, this Honorable Court should conclude that neither of Defendants' experts are qualified to provide an expert opinion under Rule 702.

c. Defendants' proffered experts are not reliable.

In *McDaniel*, this Court announced the Tennessee standard for the admissibility of opinion testimony from qualified experts:

> Tennessee Rules of Evidence 702 and 703 impose a duty upon trial courts to determine whether scientific evidence will substantially aid the trier of fact and whether the underlying facts and data relied on by the expert witness indicate a lack of trustworthiness. The trial court must further determine whether the reasoning or methodology underlying the scientific evidence is sufficiently valid and reliable, and whether it can properly be applied to the facts at issue.

> In making this determination, the trial court should focus on the principles and methodology underlying the science, and not on the conclusions of experts. The trial court is not required to determine that the principles and methodology employed are generally accepted by the scientific community. The court needs only to determine that the principles and methodology are scientifically valid and reliable.

955 S.W.2d at 258.

The *McDaniel* court provided a "non-exclusive list of factors to determine reliability":

> (1) whether scientific evidence has been tested and the methodology with which it has been tested;
>
> (2) whether the evidence has been subjected to peer review or publication;
>
> (3) whether a potential rate of error is known;
>
> (4) whether, as formerly required by *Frye,* the evidence is generally accepted in the scientific community; and
>
> (5) whether the expert's research in the field has been conducted independent of litigation.

Id. at 265.

Here, Defendants' proffered experts did nothing more than conduct limited research and then draw conclusions not supported by the research they cite.

1. **Defendants' proffered experts' opinions were based on speculation, not science.**

Subsequent to *McDaniel*, this Honorable Court further defined the reliability analysis to include "four general inter-related components: (1) qualifications assessment, (2) analytical cohesion, (3) methodological reliability, and (4)

foundational reliability. *Scott*, 275 S.W.3d at 402. Methodological reliability is somewhat tautological as it "focuses upon the reliability of the methodology employed by the expert." *Id.* at 403. Foundational reliability, however, is more concretely defined:

> The foundational inquiry has two steps. The first step is to assess the expert's field or discipline itself by focusing on the reliability of the studies, articles, and data that compose the field and that provide the underlying foundation for the expert's testimony. The second step is to analyze the reliability of the underlying facts or data upon which the expert's opinion is predicated.

Id.

The Court in *Scott* additionally required that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 402-3. The Court enunciated a crucial distillation of these principles in *McDaniel*: "The court…must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation." *McDaniel*, 955 S.W.2d at 265.

Thus, ultimately, the inquiry focuses on whether the expert's proffered opinion is an intellectually rigorous one based on scientific methodology, or merely the product of litigation-driven speculation.

2. *Ipse dixit* expert opinions are not reliable, not admissible, and have been frowned on since the time of Pythagoras and Cicero.

In *Scott*, this Court eloquently explained why an expert's opinion should not be admitted, merely because he or she is an expert:

> *Ipse dixit* assertions were insufficient to support the contentions of the Pythagoreans,[4] and they remain so with regard to appeals to the authority of a modern expert as a sole basis for admission. Just because an expert is speaking does not make what he or she is saying sufficiently reliable to be admitted into evidence as expert testimony. The courts "must analyze the science and not merely the qualifications [of the expert]."
>
> FN 4: The literal translation of the Latin phrase "ipse dixit " is "he himself said it." It refers to dogmatic statements—"something said but not proved." The first prominent historical use of the expression ipse dixit is attributed to Cicero's critique of adherents of Pythagoras. "Nor am I in the habit of commending the custom of which we hear in connection with the Pythagoreans, of whom it is said that when they affirmed anything in argument, and were asked why it was so, their usual reply was 'the master said it,' 'the master' being Pythagoras, and the force of preconceived opinion being so great as to make authority prevail even without the support of reason."

Scott, 275 S.W.3d at 402 (internal citations deleted).

Scott's holding is consistent with that of the United States Supreme Court: "Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). In *Joiner,* the Supreme Court upheld the exclusion of two expert witnesses, who concluded that the plaintiff had incurred lung cancer from PCBs, when the experts had reached their conclusion based on (1) animal studies involving massive doses of daily applications of PCBs to infant mice; (2) studies which reached a contrary conclusion: "there were apparently no grounds for associating lung cancer deaths and exposure in the plant;" and the rate of cancer was "not statistically significant," (3) one study that did not involve PCBs at all, and

(4) a single study, which found a statistically significant increase in cancer, but involved subjects exposed to multiple carcinogens. *Id.* at 518-10.

In *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002), this Court upheld the exclusion of a crime scene reconstructionist, who wished to testify that the murder scene was consistent with a sexually motivated assault: "we cannot allow an individual's guilt or innocence to be determined by such opinion evidence connected to existing data only by the *ipse dixit* of the expert." *Id.* at 835.

In *Brown v. Crown Equipment Corp.,* 181 S.W.3d 268 (Tenn. 2005), this Court cautioned trial courts against using an expert's qualifications "as the sole basis of reliability," as doing so "would result in a reconsideration of the Rule 702 requirement that the expert witness be qualified by knowledge, skill, experience, training, or education to express an opinion within the limits of the expert's expertise. As a result, the expert testimony would become "perilously close to being admissible based upon the *ipse dixit* of the expert." *Id.* at 274.

Respectfully, Plaintiffs submitted highly-credentialed experts who did not rely on *ipse dixit* at all, whereas Defendants submitted two pleasant gentlemen who claimed that their ability to read a package insert is somehow greater than that possessed by this Honorable Court. Indeed, Dr. Evans most paradoxically claimed to be able to draw conclusions based on the research papers of Dr. Greenblatt, that were contrary to the conclusions reached by Dr. Greenblatt in those papers. Dr. Evans and Dr. Li both ask this Honorable Court to accept their opinions on the efficacy of Midazolam, not based on science, let alone Midazolam's mechanism of

action, but because they are experts. They asked the court to accept their nonsensical conclusion that while Midazolam cannot bring someone to a plane of general anesthesia, it can bring them beyond general anesthesia straight to coma.[131]

Dr. Li explicitly testified at trial that, although he is unable to point to specific studies or science to support his conclusions, he is an expert pathologist and at some undefined point read something (beyond the package insert) that supported his opinion that enough Midazolam would render a patient sufficiently insensate to pain that the second two drugs could be administered without suffering.[132] Albeit, he was unsure of what suffering, if any, the second two drugs would cause.[133] Dr. Li,

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[131] Madeleine L'Engle wrote a charming series of books, beginning with "A Wrinkle in Time." In these books, specially skilled humans (and stars that take on human form) can warp time and space, so that they can jump from Point A straight to Point Q, bypassing points B through V. It is interesting fiction. However, it is unlikely that Dr. Evans or Dr. Li has mastered these fictional skills.

[132] Dr. Li claimed to rely on phantom sources. He stated that he did not include all of his sources in his report, and when challenged to name any additional authority for his testimony, he was unable to name them. XLVIII 48 ("I don't want to list everything I have or I know."); XLVIII 121 ("some sources are listed, some **sources I don't list** as a result of too many references to put in. So as I said, today, and in the past, I cannot list everything I studied or researched on. I can only put **certain most important** as I said, I mean, in the report.")(emphasis added); XLVIII 122 ("I cannot explain everything I have."); XLVIII 125 ("I cannot list everything I have."); XLVIII 156 ("I don't want to list them all."); XLVIII 160 ("I mean I don't list it here."); XLVIII 169 ("I cannot list everything I have or everything I know in this declaration.").

[133] Contrary to every other expert and the Chief Justice of the United States Supreme Court in *Baze*, Dr. Li maintains that an injection of potassium chloride without anesthesia would not be painful. XLVIII 48.

ultimately, acknowledged that whatever it was he read, he may have read it during medical school, in China, in the 1980s.[134]

3. Defendants' proffered experts relied on warnings on package inserts, which are of no significance.

Defendants' experts' testimony that Plaintiffs will not experience pain as a result of Protocol B largely rests on the Midazolam package insert, which warns of the risk of coma, from which they extrapolate that if a normal dose of Midazolam can occasionally cause a coma, then a large enough dose will always cause a coma, and ultimately death.[135] The full warning reads: "The manifestations of Midazolam overdosage reported are similar to those observed with other benzodiazepines, including sedation, somnolence, confusion, impaired coordination, diminished reflexes, coma and untoward effects on vital signs." Aside from the unscientific absurdity of Defendants' experts conclusion—which is akin to reading the label on a box of Cheerios, which says "Can Help Lower Cholesterol" and concluding that six boxes of Cheerios a day will eliminate all cholesterol—the experts' reliance on the package insert was also legally unsound.

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[134] Dr. Greenblatt was responsible for the original studies on the efficacy of Midazolam, which were done in the early 1980's. Thus, what experience Dr. Li would have had with Midazolam in 1980's Communist China has never been explained. When confronted with his apparent lack of sources, Dr. Li resorted to invocations of "common knowledge" as the basis of his opinions. XLVIII 129; XLVIII 159-60

[135] The FDA package insert for Tylenol lists coma as a possible side effect of overdose. No one would suggest using a massive quantity of Tylenol as the first drug in a three drug protocol.

First, "the FDA regulations on warnings provide that a causal relationship need not have been proved" before warnings are added to drug labels." *Newton.*, 243 F. Supp. 2d at 683; *see also Nozinch v. Johnson and Johnson, Inc.*, No. 09-02105 DKV, 2011 WL 13124085, at *7-10 (W.D. Tenn. July 6, 2011). This is because, under federal regulations, a medication's label must "include a warning about a clinically significant hazard as soon as there is reasonable evidence of a causal association with a drug; a causal relationship need not have been definitely established." 21 C.F.R. § 201.57(c)(6)(i). Thus, the fact that Midazolam's package insert warns of a risk of coma is not proof that there is a causal connection between Midazolam and coma. Second, a package insert that fails to adequately warn of any possible risk (however remote) can lead to a lawsuit when the 1 in 1,000,000 risk actually occurs—and even if the specific pharmaceutical is not responsible for the tragic result.[136] Thus, not only are drug manufacturers legally required to place warnings

[136] *See, e.g. Rheinfrank v. Abbott Labs., Inc.,* 680 F. App'x 369, 370 (6th Cir. 2017) (suit for inadequate packaging that allegedly failed to warn of danger of birth defects caused by Depakote; defendant ultimately prevailed); *Strayhorn v. Wyeth Pharm., Inc.,* 737 F.3d 378, 391 (6th Cir. 2013) (discussion of multiple cases alleging failure to provide additional warnings); *Marsh v. Genentech, Inc.,* 693 F.3d 546, 548 (6th Cir. 2012) (Defendant, allegedly, knew of dangerous side effects that it concealed from the public and did not include in the drug's label; motion to dismiss for failure to state a claim granted and upheld); *Smith v. Wyeth, Inc.*, 657 F.3d 420, 423 (6th Cir. 2011) (plaintiffs alleged that their long-term use of generic metoclopramide caused tardive dyskinesia, and manufacturers failed to provide adequate warnings on the product's label; case dismissed); *Barnes v. Kerr Corp.*, 418 F.3d 583, 590 (6th Cir. 2005) (plaintiffs claimed that manufacturer failed to include warnings about the dangers of exposure to mercury in dental fillings); *Boggs v. DuPont Pharm.,* 865 F.2d 1267 (6th Cir. 1989) (plaintiffs contended that DuPont's package insert inadequately warned of the danger of necrosis of the skin following the use of Coumadin).

in package inserts before a causal relationship has been proven, but doing so is also a wise business decision to avoid litigation.

In *Newton*, cited above for the district court's holding that Dr. O'Donnell was unqualified to testify, the court found another of the plaintiff's expert opinions unreliable because it was based in large part on a package insert:

> Dr. Rossiter claims to rely on two things to conclude that [plaintiff's] schizophrenia was induced by her use of Accutane: (1) the temporal association between [plaintiff's] Accutane use and her illness; and (2) the Physician's Desk Reference and package insert warnings supplied by Roche Labs. Neither of these bases is sufficiently reliable. As Defendants point out, the Fifth Circuit has rejected expert testimony that relies "substantially on the temporal proximity between exposure and symptoms." Defendant contends further that the warning label should not be considered a "reliable" source for Dr. Rossiter's opinion. FDA-approved warnings to physicians generally are not evidence of causation. Indeed, the FDA regulations on warnings provide that "a causal relationship need not have been proved" before warnings are added to drug labels.

Newton, 243 F. Supp. 2d at 683 (internal citations deleted).

In contrast to Plaintiffs' experts, Defendants experts' cite no relevant literature (in the case of Dr. Li), or only cite to a small and selective body of science, which, paradoxically includes the published writings of Dr. Greenblatt (in the case of Dr. Evans). Neither of Defendants' proposed experts could explain how Midazolam's pharmacological properties can render an inmate insensate to pain. Instead, both experts relied on a small number of anecdotal reports of fatalities

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Plaintiffs' counsel note that the above string cite only contains cases from the Sixth Circuit Court of Appeals. Running a national Westlaw search for: *adv: ((package product) +s (label insert)) /s (insufficient missing failure inadequate) /s warning* in All States and All Federal results in 769 hits as of July 2, 2018 at 1:15 p.m.

and/or coma involving Midazolam (the majority of which, they conceded, involve other drugs, including fentanyl). Based on these reports, the experts concluded that larger doses of Midazolam would be fatal (and thus, for some reason, would render an inmate insensate prior to death). They also relied on package inserts, which include a warning that coma is possible. Their "science" is significantly less rigorous than that rejected in *Newton* and *Nozinch*. Ultimately, they simply speculated about the possible impact of large doses of Midazolam; they did not engage in any scientific methodology at all (unless extrapolating that "more must mean stronger" qualifies as science); the data upon which they relied is anecdotal; and their conclusions were thus fatally flawed and should have been found to be inadmissible.

VIII. We cannot "wantonly and freakishly" impose a method of execution on inmates prior to deliberative appellate review of a fulsome trial record; to do so violates Due Process, the Law of the Land and the promise of *Gregg v. Georgia*.

In *Gregg v. Georgia* the United States Supreme Court asserted the crucial role that "meaningful appellate review" would play in assuring that death sentences would not be imposed in a "freakish" manner. *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S. Ct. 2909 (1976). In *Lewis v. Jeffers,* we were reminded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be…wantonly and…freakishly imposed." *Lewis v. Jeffers,* 497 U.S. 764, 774, 110 S. Ct. 3092 (1990). However, it appears that the determination of whether inmates may constitutionally suffer a torturous death will be made on a time schedule more suited for the small claims

courts of General Sessions. Affording so little time for deliberative process and legal analysis, inevitably will lead to violation of the 14th Amendment and Article I, § 8.

a. The record is over 15,000 pages in length; this Honorable Court has virtually no time available to review it, while counsel for appellants (and appellees) have too-little time to prepare helpful and thoughtful briefings.

The publicly available Technical Record, including transcripts, is 11,718 pages long. I to LI. There are another 2,804 bate-stamped pages of exhibits. Exhibits Vol. 1-19. Additionally, there are 92 pages of underseal pleadings and orders, and 956 pages of underseal technical record. This totals well-over 15,000 pages of information that this Honorable Court has only been able to review (without benefit of any briefing), beginning August 22, 2018. Briefing that will illuminate this record will be completed on September 28, 2018, five-days before oral argument, and less than two-weeks prior to the next scheduled execution.

The first brief (this brief) is due September 6, 2018, a mere two-weeks after the filing of the 15,000+ page record, and only six-weeks after the issuance of the 49-page Order that is the primary (but not only) subject of appeal. Appellees have two-weeks to file a responsive briefing, and then appellants will have only one-week to correct any errors or misstatements made by appellee.[137]

Thus, the briefing that this Honorable Court will turn to for legal analysis and factual development will have been prepared on an incredibly rushed schedule.

[137] On this compressed time-schedule, it would seem inevitable that both sides will find errors, typos, omissions and mistakes in the opposition pleadings.

Appellants' counsel sincerely hope that their late night efforts have produced a well-reasoned and beneficial legal product, but the reality is that—even if this brief is factually compelling and legally illuminating—it would have been better (and much more concise) had time pressures not been so pressing. The greatest harm will be the argument that was overlooked, or assigned to three lawyers and finished by none, or inadvertently dropped in the rush of late-night edits.

This schedule can be compared to the traditional schedule afforded litigants in less complex litigation: a full 30-days are permitted simply to file appeal.[138] *Tenn.R.App.P. 4*. Ideally the record is then filed in 45-days (though, as we are all aware extensions are frequently requested and granted). *Tenn.R.App.P. 25(a)*. The appellant's first brief is then due 30-days thereafter, appellee's response 30-days more, and appellant's reply after 14-days—again if the inevitable extensions are not requested and granted. *Tenn.R.App. 29.* On that traditional schedule, the first brief would not have been due until early November, at the earliest, and briefing would not have been finished until early 2019. Oral argument would have been in the Spring of 2019. Instead, our oral argument is scheduled before the record would have been filed in a traditional case. Crucially, this Honorable Court would have been given months following oral argument to consider arguments, review the applicable law, and study the evidentiary record. *E.g. West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017) (lethal injection challenge argued October 6, 2016, opinion issued

[138] Due to responsibility to living plaintiffs whose executions are imminent, appellants could not wait those 30-days before filing notice.

March 28, 2017). Sadly, if an opinion is to be issued prior to the next execution, this Honorable Court will have all of one-week to complete that crucially important precedent.

b. *Gregg v. Georgia* ended the ban on executions mandated by *Furman*, however, *Gregg* relied on the promise that appropriate due process protections would ensure that "death sentences are not imposed…in a freakish manner."

For the reasons that have been set-forth many times previously, Tennessee's present method of execution is plainly "freakish."[139] The United States Supreme Court in *Gregg v. Georgia* attempted to remove such freakishness from the execution process, and to bring a manner of rationality and dignity to such proceedings. *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S. Ct. 2909 (1976). One factor that the *Gregg* court examined was whether a "further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." *Id.* Moreover, *Gregg* reiterated that methods of execution "must not involve the unnecessary and wanton infliction of pain." *Id.* at 173 (citing *Furman v. Georgia*, 408 U.S. 238, 392-93, 92 S. Ct. 2726 (1972)).

Yet, here, the determination of whether Tennessee's three-drug protocol will cause the wanton infliction of pain will be made in roughly the same time that this

[139] On this compressed time-schedule, appellants' counsel has not fully researched the legal meaning of "freakish." Rather, appealing to common-sense word usage, it is suggested that an execution process that is akin to drowning someone in blood, burying them alive, and then setting them on fire would not only be torturous and barbaric (and inhumane and sadistic), but freakish as well.

Court usually takes to issue an order in response to a two-page motion to expand the record. This violates the spirit of *Gregg* and devalues human life.

c. Meaningful appellate review is constitutionally required.

This Honorable Court has long asserted that meaningful appellate review is constitutionally required, pursuant to the 14th Amendment and Article I, § 8. *State v. Trent*, 533 S.W.3d 282, 295-96 (Tenn. 2017) ("record must be sufficient for meaningful appellate review"); *Am. Heritage Apartments, Inc. v. Hamilton Cty. Water & Wastewater Treatment Auth.,* 494 S.W.3d 31, 50 (Tenn. 2016) (trial court decision lacked "sufficient specificity to allow for meaningful appellate review); *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999) (need for meaningful appellate review when determining eligibility for diversion); *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995) (a full and fair hearing includes meaningful appellate review)

In *Parker v. Dugger*, the United States Supreme Court reaffirmed the principal of *Gregg*: "[w]e have emphasized repeatedly the crucial role of meaningful appellate review in ensuring the death penalty is not imposed arbitrarily or irrationally. 498 U.S. 308, 321, 111 S. Ct. 731 (1991). In *Dugger* the Court condemned the Supreme Court of Florida's affirmance of a death penalty when Florida's decision was "neither based on a review of the individual record in this case nor in reliance on the trial judge's findings based on that record, but in reliance on some other nonexistent findings." *Id.*

The United States Supreme Court has repeatedly held that, in civil cases, the Due Process clause requires meaningful appellate review of punitive damage

awards. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420, 114 S. Ct. 2331 (1994); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 20 111 S.Ct. 1032 (1991). The Supreme Court's reasoning was best articulated by Justice Breyer (joined by O'Connor and Souter) in *BMW of North America:*

> The reason flows from the Court's emphasis in *Haslip* upon the constitutional importance of legal standards that provide "reasonable constraints" within which "discretion is exercised," that assure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages," and permit "appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." …
>
> This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion…Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587–88, 116 S. Ct. 1589 (1996) (Breyer, J, concurring).

Appellants' counsel do not disagree that BMW and Honda Motors should be entitled to meaningful appellate review of any punitive damages assessed against them. Counsel simply ask that their clients be afforded the same level of constitutional due process.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' request this Court, at a minimum:

1) reverse the judgment of the Chancery court; and/or

2) find that the July 5, 2018 lethal injection protocol violates the 8th amendment to the United States Constitution and/or Article 1, §16 of the Tennessee Constitution because it constitutes cruel and unusual punishment; and/or

3) find that the Chancery Court erred in failing to consider Plaintiffs' second alternative lethal injection protocol: a two-drug protocol which eliminates the paralytic; and/or

4) find Defendants waived the pleading requirement of a known, feasible, and readily available alternative by refusing to produce the only source of information regarding Defendants' efforts to obtain Pentobarbital; and/or

5) find that the July 5, 2018 lethal injection protocol violates the 8th amendment to the United States Constitution and/or Article 1, §16 of the Tennessee Constitution because it constitutes torture; and/or

6) find that the conduct of Defendants in choosing to use midazolam as a part of three-drug protocol violates Plaintiffs' substantive due process rights under the United States and/or Tennessee Constitutions; and/or

7) find the Chancery Court erred, based on an erroneous interpretation of state secrecy laws related to executions, by denying discovery requests that were designed to discover evidence of the availability of Pentobarbital to the State of Tennessee where it is known that the states of Texas and Georgia continue to use Pentobarbital in executions; and/or

8) find that Tennessee's secrecy statute excuses Plaintiffs from the burden to establish the availability of an alternative lethal injection protocol; and/or

9) find that the denial of a telephone, visual access, and a second attorney in the observation room during an execution will prevent Plaintiffs from accessing the court, and that e the TDOC's general counsel's admission that the reason for the denial of telephone access is to prevent the inmates from calling the courts because the court might interrupt the execution violates Plaintiffs' federal and state constitutional rights to access the courts; and/or

10) find that the chancery court erred in dismissing Plaintiffs' claim that the Protocol violates their right to dignity because it does not reflect evolving standards of decency as required by Article 1, § 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

11) find that the chancery court erred in dismissing Plaintiffs' claim that the Protocol violates the dignity of man by using lethal injection chemicals that are prohibited by state statutes for use in non-livestock animal euthanasia in violation of Article 1, § 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution; and/or

12) find that the Chancery Court erred in denying Plaintiffs' pre-trial motion to amend their complaint to add an as-applied challenge to the use of the secret Drug Supplier who was unlicensed to compound Midazolam and therefore unqualified to provide instruction on how to prepare and store compounded Midazolam; and/or

13) find that the Chancery Court erred in reconsidering her order excluding the testimony of Dr. Feng Li who Defendants engaged knowing that he would be out of town during the trial and whose late testimony delayed the adjudication of the trial where Defendants had been on notice for months that the protocol would be challenged and in fact knew three months before Plaintiffs that they were going to use this highly problematic protocol; and/or

14) find that the Chancery Court erred in failing to exclude Defendants' witnesses under *McDaniel v. CSX Transportation Inc.*, 955 S.W.2d 257 (Tenn. 1997); and/or

15) enter final judgment in favor of the plaintiffs. Alternatively,

16) vacate the execution date of Edmund Zagorski and reset the appellate schedule in this matter to permit new briefing and a more deliberative appellate process; and/or

17) if this Court finds that the Chancery Court failed to make sufficient fact findings, remand the case for directions for further proceedings.

Respectfully Submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

2010 NOV 29 PM 4:04

APPELLATE COURT CLERK
NASHVILLE

STATE OF TENNESSEE V. STEPHEN MICHAEL WEST

Circuit Court for Union County
No. 415A

No. M1987-000130-SC-DPE-DD[1]

ORDER

On November 6, 2010, this Court reset the execution date for Stephen Michael West to November 30, 2010, pending an evidentiary hearing and ruling in a declaratory judgment action filed by Mr. West challenging the constitutionality of Tennessee's three-drug protocol for lethal injection. On November 22, 2010, the trial court entered an order granting a declaratory judgment to Mr. West. To date, no appeal has been lodged.

Also on November 22, 2010, Mr. West filed in this Court a "Motion to Vacate or Further Modify Court's Order Scheduling Mr. West's Execution." A transcript of the trial court's ruling was included with the filing, but not a transcript of the evidence. On November 24, 2010, the State filed a response in opposition to Mr. West's Motion and attached to the response a copy of a revised protocol. Later that same day, this Court denied Mr. West's motion to vacate or further modify his execution date because the revised protocol appeared to address the basis of the trial court's conclusion that the previous protocol was unconstitutional. However, we specified that the denial of Mr. West's motion was without prejudice to his ability to seek further relief in this or any other court.

On November 26, 2010, Mr. West filed in this Court a motion to reconsider or in the alternative a renewed motion to vacate or further modify the order scheduling his execution for November 30, 2010. Mr. West forcefully asserts that reconsideration is warranted because he was not afforded an opportunity to reply to the State's response and to address

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[1]Mr. West styled his motion *Stephen Michael West et al. v. Gayle Ray et al.*, and referred to the number of the declaratory judgment action pending in the Chancery Court for Davidson County. As previously stated, to date no appeal has been lodged in the declaratory judgment action. Because Mr. West's motion asks this Court to modify a scheduled execution, it is more properly filed under the style of the order initially setting Mr. West's execution, listed above.

the trial court on the issues of whether the revised protocol eliminates the constitutional deficiencies in the prior protocol and whether the revised protocol is constitutional. In support of his motion, Mr. West has submitted the transcript of the testimony presented at the two-day hearing in the trial court. This Court has now received and fully reviewed the motion and the transcript.

The evidence presented in this case differs from the evidence presented in *Abdur'Rahman v. State*, 181 S.W.3d 292 (Tenn. 2005). The inmate's primary challenge to the three-drug protocol in *Abdur'Rahman* was that the inclusion of pancuronium bromide in the three-drug protocol rendered the protocol unconstitutional. We determined that the use of the pancuronium bromide did not undermine the constitutionality of the protocol because it was preceded by the administration of a dose of sodium thiopental sufficient to render the inmate unconscious. *Abdur'Rahman v. State*, 181 S.W.3d at 307-08. The inmate in *Abdur'Rahman* did not produce evidence that the required dose of sodium thiopental would fail to render the inmate unconscious.

Proper administration of an adequate amount of sodium thiopental is essential to the constitutionality of Tennessee's three-drug protocol. Chief Justice Roberts has noted that "[i]t is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze v. Rees*, 553 U.S. 35, 53 (2008). Echoing Chief Justice Roberts, the trial court in this case found that Tennessee's lethal injection protocol was unconstitutional because it "allows . . . death by suffocation while the prisoner is conscious." Following this finding, the trial court also determined feasible and readily available alternative procedures existed to insure unconsciousness and to negate any objectively intolerable risk of severe suffering or pain.[2]

After the trial court's findings and conclusions, on November 24, 2010, the State revised its three-drug execution protocol to include a process to assess the consciousness of the inmate following the administration of the sodium thiopental and to provide for the administration of additional sodium thiopental should the inmate be conscious following the administration of the first dose of the drug.

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[2]The trial court stated:
It appears to this Court that there are feasible and readily available alternative procedures which could be supplied at execution to insure unconsciousness and negate any objectively intolerable risk of severe suffering or pain. This Court should not say or find which of those it would recommend, but I think the Court's finding of fact regarding the ways – the various ways that unconsciousness can be checked should be left to the State.

The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision. Mr. West is correct that the trial court has not been given the opportunity to consider in the first instance whether the revised protocol eliminates the constitutional deficiencies the trial court identified in the prior protocol and whether the revised protocol is constitutional.

Upon due consideration, Mr. West's Motion is GRANTED, and his November 30, 2010 execution is stayed. Additionally, the State is directed to file a motion in the trial court presenting for determination in the first instance the issues of whether the revised protocol eliminates the constitutional deficiencies the trial court identified in the prior protocol and whether the revised protocol is constitutional. *See* Tenn. R. Civ. P. 52.02; 59.04. The trial court shall afford the parties an opportunity to submit argument or evidence on the revised protocol. The trial court shall render its final, appealable judgment expeditiously, but in no event later than ninety (90) days from the date of the entry of this Order.

In any proceedings on remand, the standards enunciated in the plurality opinion in *Baze v. Rees*, 553 U.S. 35, 51 (2008) apply. The burden is on Mr. West to prove that the revised protocol creates an "objectively intolerable risk of harm that qualifies as cruel and unusual." *Baze v. Rees*, 553 U.S. at 52. In order to carry this heavy burden, he must demonstrate that the revised protocol imposes a substantial risk of serious harm, *and* he must either propose an alternative method of execution that is feasible, readily implemented, and which significantly reduces the substantial risk of severe pain, *Baze v. Rees*, 553 U.S. at 52-53, or demonstrate that no lethal injection protocol can significantly reduce the substantial risk of severe pain.

The stay granted herein shall remain in effect throughout the pendency of any appeal of the trial court's final judgment in the declaratory judgment action and until the State files a motion to reset the execution date pursuant to Tennessee Supreme Court Rule 12.4.

The final resolution of the issues in this case impacts the scheduled executions of Billy Ray Irick, Edmund Zagorski, and Edward Jerome Harbison. Accordingly, entered contemporaneously herewith are orders staying the executions of Mr. Irick, Mr. Zagorski, and Mr. Harbison.

It is so ORDERED.

PER CURIAM

Timeline of Indifference

- April 19, 2000 — (TN) Robert Glen Coe execution
- June 1, 2003 — *Abdur'Rahman v. Sundquist*– (Ex. 106):
  - "The State cop-catted," using what the majority of other states were doing."
  - "[T]he State's use of [a paralytic] is 'gilding of the lily" or, stated in legal terms, arbitrary." (p.13)
- June 28, 2006 — (TN) Sedley Alley execution
- Feb. 1, 2007 — Executive Order- cut and paste job
- April 30, 2007 — New 3-drug protocol adopted (after 1-drug protocol was recommended)

Timeline of Indifference

- May 9, 2007 (TN) Philip Workman execution
- September 19, 2007 *Harbison v. Little* - Hon. Judge Trauger (Ex. 108):
  - holding 3-drug protocol using sodium thiopental as first drug unconstitutional because (1) there is a substantial risk inmate will not be unconscious when second and third drugs are administered; (2) there was no consciousness check; (3) executioners were not adequately trained; (4) administration of the drugs was not adequately monitored; (5) the State knowingly disregarded an excessive risk by failing to follow the Tennessee Protocol Committee's recommendation of using a one-drug protocol using sodium thiopental, adequately training executioners, and implementing appropriate safeguards.
- Sept. 12, 2007 (TN) Daryl Holton execution

Timeline of Indifference

- Feb. 4, 2009 (TN) Steve Henley execution
- Dec. 2, 2009 (TN) Cecil Johnson execution
- November 22, 2010 *West v. Ray* – Chancellor Bonneyman (Ex. 109)
  - holding 3-drug protocol using sodium thiopental as first drug unconstitutional because it "allows suffocation while the prisoner is conscious" (p.10)
  - finding that the State had not incorporated a consciousness check even though the "protocol committee appears to have been well aware of the necessity" for it (pp. 21-26)
  - "[T]his Court cannot find a justification for not checking on . . . unconsciousness." (p.38)
- November 24, 2010 Revised lethal injection protocol

Timeline of Indifference

- September 27, 2013 — Revised lethal injection protocol
- Jan. 16, 2014 — (OH) Dennis McGuire execution
- Feb. 26, 2014 — (FL) Paul Howell execution (Sonya Rudenstine; Ex. 22)
- April 29, 2014 — (OK) Clayton Lockett execution (Dean Sanderford; Ex. 36)
- July 23, 2014 — (AZ) Joseph Wood execution (Dale Baich, Julie Hall, Robin Konrad, Ex. 27)
- June 25, 2015 — Revised lethal injection protocol

Timeline of Indifference

- Jan. 21, 2016 — (AL) Christopher Brooks execution (Terri Alang, Leslie Smith)
- Dec. 8, 2016 — (AL) Ronald Bert Smith execution (Spencer Hahn)
- Jan. 18, 2017 — (VA) Ricky Gray execution (Elizabeth Peiffer)
- April 27, 2017 — (AR) Kenneth Williams execution (Eric Motylinski)
- July 26, 2017 — (OH) Ronald Phillips execution (Carol Wright, Ex. 24)
- Sept. 13, 2017 — (OH) Gary Otte execution (Carol Wright, Ex. 24)

Timeline of Indifference

- Oct. 19, 2017 — (AL) Torrey McNabb execution (Christine Freeman)
- Jan. 8, 2018 — Revised lethal injection protocol (Ex. 1)
- July 5, 2018 — Revised lethal injection protocol (Ex. 2)

EXHIBIT 191

EXHIBIT 191

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, Ph.D., M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier in his official capacity,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNT OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE ,

Respondents.

and

ALVOGEN, INC.; and HIKMA PHARMACEUTICALS USA INC.,

Real Parties in Interest.

Supreme Court Case No: 76485

District Court No: A-18-777312-B

SANDOZ INC.'S MOTION FOR LEAVE PURSUANT TO NRAP 29 TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF REAL PARTIES' IN INTEREST

EXHIBIT 8

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 103
ACQUISITION AND PREPARATION OF DRUGS FOR LETHAL INJECTION

Effective Date: **06/11/2018**

CONFIDENTIAL IN UN-REDACTED FORMAT: NO

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

103.01 LETHAL INJECTION PROTOCOL

A. Lethal drugs are to be used in the execution. Although the combination of drugs and doses listed below are lethal for most individuals, individual differences do exist. It shall be the responsibility of the Director to consult with the Chief Medical Officer in order to ensure that the selected lethal drug or combination of drugs and their dosages to be used in the execution are sufficient to cause death. The Director shall then select the drug, combination of drugs and dosages to be used for the execution. This information will not be withheld from the inmate or the public.

   1. The NDOC Public Information Officer (PIO) will prepare and produce a statement on behalf of the Nevada Department of Corrections.

B. The Director will provide the condemned inmate with written notice of the drug or combination of drugs that will be used for the execution after a final decision has been made and no less than seven (7) calendar days prior to the first day of the week (i.e. Monday), as designated by the district court, that the judgment of death is to be executed.

   1. If at any time after written notice of the drug or combination of drugs to be used for the execution has been provided to the condemned inmate, the Director determines that it is necessary to change the Lethal Injection Protocol identified and provided in CEM 110.02, a written notice of the Director's determination, which identifies the necessary changes to the Lethal Injection Protocol and an explanation as to the basis for such changes, will be immediately provided to both the condemned inmate and the condemned inmate's counsel of record.

C. The drug amounts specified below are designed for the execution of persons weighing 500 pounds or less. The drug amounts will be reviewed and revised, as necessary, for a condemned inmate exceeding 500 pounds.

103.02 ACQUIRING LETHAL DRUGS AND EQUIPMENT

A. After the Director makes the final decision as to the drug or combination of drugs that will be used for the scheduled execution, the designated Deputy Director/designated Warden will be responsible for:

1. Confirming that the equipment and materials necessary to properly conduct the execution is on site, immediately available for use and functioning properly.

2. Ensuring all medical equipment, including a backup cardiac monitor is on site, immediately available for use and functioning properly.

3. Ensuring that the drugs identified are acquired, arrive at Ely State Prison (ESP) no later than the day of execution and are properly stored. The drugs shall be stored in a secured locked area that is temperature regulated and monitored to ensure compliance with manufacturer specifications, under the direct control of the designated Warden.

103.03 PREPARATION OF LETHAL DRUGS

A. At the appropriate time, approximately two hours prior to the scheduled execution, the designated Warden shall transfer custody of the drugs to two members of the Security Team who have been selected by the designated Deputy Director as the Drug Administrators. The Drug Administrators will be two individuals who, based upon their years of experience and proven performance within the corrections industry, are uniquely trusted to perform the sensitive and critical tasks of properly preparing the lethal drugs for the execution, and then injecting the lethal drugs into the condemned inmate per these instructions when so ordered.

B. The quantity of the lethal drugs may not be changed without prior approval of the Director.

C. It is the responsibility of the Drug Administrators to prepare the lethal drugs. An Attending Physician or other properly trained and qualified medical professional will observe the Drug Administrators as they prepare the lethal drugs.

1. Both Drug Administrators shall complete detailed written reports describing the preparation and labeling of the lethal drugs.

   a. The Drug Administrators shall be responsible for preparing and labeling the assigned syringes in a distinctive manner identifying the specific lethal drug contained in each syringe by (1) lethal drug name, (2) lethal drug amount and (3) assigned number. This information shall be preprinted on a label, with one label affixed to each syringe to ensure a label remains visible.

   b. The syringes for each lethal drug by name will then be placed in an individual tray marked for all the syringes of that lethal drug. The labels for each tray and each syringe it contains will be colored to match: red in color for Midazolam, white in color for Fentanyl and blue in color for Cis-atracurium.

   c. The drugs and their doses are to be prepared and labeled as follows:

i. Tray-1: Midazolam (labels to be red in color)

		DRUG	CONCENTRATION	SYRINGE	TOTAL
1.	#1-1	Midazolam	5mg/cc	10ml	50mg
2.	#1-2	Midazolam	5mg/cc	10ml	50mg
3.	#1-3	Midazolam	5mg/cc	10ml	50mg
4.	#1-4	Midazolam	5mg/cc	10ml	50mg
5.	#1-5	Midazolam	5mg/cc	10ml	50mg
6.	#1-6	Midazolam	5mg/cc	10ml	50mg
7.	#1-7	Midazolam	5mg/cc	10ml	50mg
8.	#1-8	Midazolam	5mg/cc	10ml	50mg
9.	#1-9	Midazolam	5mg/cc	10ml	50mg
10.	#1-10	Midazolam	5mg/cc	10ml	50mg

11. In the unlikely event that it is deemed necessary (see protocol in EM 110), additional syringes of Midazolam may be ordered by the Director, and then prepared and injected by the Drug Administrators. If ordered, additional syringes will be similarly labeled and numbered next in sequence, for example the next syringe would be numbered #1-11, then #1-12 and so on.

ii. Tray-2: Fentanyl (labels to be white in color)

		DRUG	CONCENTRATION	SYRINGE	TOTAL
1.	#2-1	Fentanyl	50mcg/cc	10ml	500mcg
2.	#2-2	Fentanyl	50mcg/cc	10ml	500mcg
3.	#2-3	Fentanyl	50mcg/cc	10ml	500mcg
4.	#2-4	Fentanyl	50mcg/cc	10ml	500mcg
5.	#2-5	Fentanyl	50mcg/cc	10ml	500mcg
6.	#2-6	Fentanyl	50mcg/cc	10ml	500mcg
7.	#2-7	Fentanyl	50mcg/cc	10ml	500mcg

8.	#2-8	Fentanyl	50mcg/cc	10ml	500mcg
9.	#2-9	Fentanyl	50mcg/cc	10ml	500mcg
10.	#2-10	Fentanyl	50mcg/cc	10ml	500mcg
11.	#2-11	Fentanyl	50mcg/cc	10ml	500mcg
12.	#2-12	Fentanyl	50mcg/cc	10ml	500mcg
13.	#2-13	Fentanyl	50mcg/cc	10ml	500mcg
14.	#2-14	Fentanyl	50mcg/cc	10ml	500mcg
15.	#2-15	Fentanyl	50mcg/cc	10ml	500mcg

16. In the unlikely event that it is deemed necessary (see protocol in EM 110), additional syringes of Fentanyl may be ordered by the Director, and then prepared and injected by the Drug Administrators. If ordered, additional syringes will be similarly labeled and numbered next in sequence, for example the next syringe would be numbered #2-16, then #2-17 and so on.

iii. Tray-3: Cis-atracurium (labels to be blue in color)

		DRUG	CONCENTRATION	SYRINGE	TOTAL
1.	#3-1	Cis-atracurium	2mg/1ml	10ml	20mg
2.	#3-2	Cis-atracurium	2mg/1ml	10ml	20mg
3.	#3-3	Cis-atracurium	2mg/1ml	10ml	20mg
4.	#3-4	Cis-atracurium	2mg/1ml	10ml	20mg
5.	#3-5	Cis-atracurium	2mg/1ml	10ml	20mg
6.	#3-6	Cis-atracurium	2mg/1ml	10ml	20mg
7.	#3-7	Cis-atracurium	2mg/1ml	10ml	20mg
8.	#3-8	Cis-atracurium	2mg/1ml	10ml	20mg
9.	#3-9	Cis-atracurium	2mg/1ml	10ml	20mg
10.	#3-10	Cis-atracurium	2mg/1ml	10ml	20mg

11. In the unlikely event that it is deemed necessary (see protocol in EM 110), additional syringes of Cis-atracurium may be ordered by the Director, and then prepared and injected by the Drug Administrators. If ordered, additional syringes will be similarly labeled and numbered next in

sequence, for example the next syringe would be numbered #3-11, then #3-12 and so on.

2. One Drug Administrator will prepare and label the lethal drug syringes. The second Drug Administrator will observe, verify the preparation, dosage and labeling of each syringe. The second Drug Administrator will then place the syringes in their correct trays for use.

3. The Drug Administrators shall prepare the designated lethal drugs and syringes so that the correct number of syringes are prepared and placed in each correctly labeled tray.

   a. To prepare each syringe for use, the Drug Administrator will draw the appropriate amount of supplied drug solution into each syringe so that the specified dose of each drug is made ready in each syringe.

      i. Midazolam will be used at a concentration of 5 milligrams per milliliter. For this drug, the specified doses to be prepared are 50 milligrams in 10 milliliter syringes. In order to achieve those doses, the Drug Administrator will draw ten (10) milliliters of the supplied solution into each 10 milliliter syringe labeled to contain Midazolam.

      ii. Fentanyl will be used at a concentration of 50 micrograms per milliliter. For this drug, the specified doses to be prepared are 500 micrograms in each 10 milliliter syringe. In order to achieve those doses, the Drug Administrator will draw ten (10) milliliters of the supplied solution into each 10 milliliter syringe labeled to contain Fentanyl.

      iii. Cis-actracurium will be used at a concentration of 2 milligrams per milliliter. For this drug, the specified doses to be prepared are 20 milligrams in each 10 milliliter syringe. In order to achieve those doses, the Drug Administrator will draw ten (10) milliliters of the supplied solution into each 10 milliliter syringe labeled to contain Cis-atracurium.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

EXHIBIT 192

EXHIBIT 192

NEOJ

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DISTRICT COURT

CLARK COUNTY, NEVADA

SCOTT RAYMOND DOZIER,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

Case No. 05C215039
Dept. No. IX

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ENJOINING THE NEVADA DEPARTMENT OF CORRECTIONS FROM USING A PARALYTIC DRUG IN THE EXECUTION OF PETITIONER** was entered in the above-entitled matter on the 27th day of November, 2017, a copy of which is attached hereto.

DATED this 14th day of December, 2017.

ADAM PAUL LAXALT
Attorney General

By: */s/ Jordan T. Smith*
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2017, service of the foregoing **NOTICE OF ENTRY OF ORDER** was made this date by electronic filing to:

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EXHIBIT A

EXHIBIT A

DISTRICT COURT

CLARK COUNTY, NEVADA

SCOTT RAYMOND DOZIER, Petitioner, v. STATE OF NEVADA, Respondents.	Case No. 05C215039 Dept. No. IX (Death Penalty Habeas Corpus Case)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ENJOINING THE NEVADA DEPARTMENT OF CORRECTIONS FROM USING A PARALYTIC DRUG IN THE EXECUTION OF PETITIONER

Upon Petitioner's Motions for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner and for Leave to Conduct Discovery, and this matter having come before the Court for multiple hearings, including an evidentiary hearing conducted on November 3, 2017, and the Court having heard expert testimony and oral argument presented by respective counsel for both parties, and having reviewed and considered the parties' pleadings and supporting exhibits admitted into the record, and with good cause appearing therefor, this Court issues the following findings of fact, conclusions of law, and order:

BACKGROUND

1. Petitioner Scott Raymond Dozier is an inmate on death row in the custody of the Nevada Department of Corrections ("NDOC"). In October of 2016, by letter to this Court, Petitioner expressed his desire to waive or discontinue his legal proceedings so that his sentence of execution could be carried out. Various proceedings transpired in which Petitioner was made to appear and present his wishes before this Court and eventually subject himself to a competency examination by a court-appointed mental health expert. In a July 2017 lengthy and thorough report, Michael S. Krelstein, M.D., determined that Petitioner was competent to waive his post-conviction and appellate proceedings. Premised on this determination, at another hearing in July 2017, Dozier and the Clark County District Attorney's Office agreed to stay Dozier's habeas corpus action provided NDOC had the ability to conduct the execution. This Court later signed an execution warrant presented by the Clark County District Attorney's Office, scheduling Petitioner's execution by lethal injection to take place the week of October 16, 2017.

2. Thereafter, on August 15, 2017, Petitioner filed Motions for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner and for Leave to Conduct Discovery. At that time, Petitioner's motions were based on constitutional concerns regarding NDOC's unknown execution protocol for carrying out his scheduled execution. On the same date, the Clark County District

Attorney's Office filed oppositions to Petitioner's motions arguing, in part, that the motions were improperly served upon it.

3. On August 17, 2017, at the request of the Clark County District Attorney's Office, Mr. Dozier's execution was rescheduled for the week of November 13, 2017.

4. On August 23, 2017, NDOC filed a Notice in Advance of Status Check to set a briefing schedule on Petitioner's motions. Attached to NDOC's Notice was Exhibit A disclosing the lethal injection drugs (Diazepam, Fentanyl and Cisatracurium) that NDOC intended to use for the execution of Mr. Dozier. On September 5, 2017, NDOC disclosed an execution manual dated the same day ("September 5th manual"). On September 6, 2017, NDOC filed an Opposition to Petitioner's motions. On September 7, 2017, Petitioner filed Objections to NDOC's disclosure of the protocol under seal.

5. In response to NDOC's Opposition, and upon consultation regarding the execution protocol with a retained expert in anesthesiology, Petitioner filed a Reply on September 25, 2017, followed by a Declaration from its expert in anesthesiology, David B. Waisel, M.D., dated October 4, 2017. Dr. Waisel asserted in his Declaration that he interpreted the American Board of Anesthesiology's rules "as preventing [him] from advocating an alternative form of execution." He did not believe that he could "take any position that a reasonable person could interpret as advocating for a particular method of execution." Accordingly, in his Reply, Petitioner proffered, as a known and available alternative execution procedure

pursuant to federal constitutional precedent in *Baze v. Rees*, 553 U.S. 35, 61 (2008) and *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015), that NDOC utilize a two-drug version of the protocol, via administration of the drugs Diazepam and Fentanyl, as already provided for in NDOC's draft protocol but in higher doses, and eliminate the use of the third paralytic drug (Cisatracurium).

6. At the Court's request, NDOC submitted a Declaration by John M. DiMuro, D.O., the former Chief Medical Officer of the State of Nevada,[1] dated October 20, 2017. NDOC also submitted revised protocol provisions, also dated October 20, 2017, within the Execution Manual (EM) for Sections 103 and 110. The October 20, 2017 revisions addressed titration and entailed significant increases in the dosage of the three drugs to be used under the protocol. NDOC's revised protocol retained all three of the drugs as set forth in its earlier version of the protocol, and

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[1] Nevada law requires the Director for the Department of Corrections to consult with the State's Chief Medical Officer ("CMO") regarding the selection of the drug or combination of drugs to be used for executions. NRS 176.355. In addition, provisions of NDOC's execution protocol require the CMO be consulted regarding the drugs' dosages to ensure they cause death, and further require that the CMO, or his designee, direct the preparation of the execution drugs. EM 100.02, 103.01 and 103.03.

Dr. DiMuro resigned as the State's Chief Medical Officer effective October 30, 2017. At the close of a status hearing conducted on October 31, 2017, during which this Court scheduled the November 3, 2017 evidentiary hearing, NDOC announced Dr. DiMuro's resignation and submitted a Declaration signed by Dr. DiMuro in which he stated that his resignation was "completely unrelated to the scheduled execution of Scott Dozier" and that he stood by his opinions contained in his earlier Declaration of October 20, 2017. *See* NDOC's Notice of Supplemental Declaration of John M. DiMuro, D.O., on November 1, 2017, Ex. A. At a post-evidentiary hearing on November 6, 2017, NDOC announced that Dr. DiMuro had been replaced by a new acting CMO, Leon Ravin, M.D., whose background is in psychiatry. NDOC also announced that Dr. John Scott, M.D. would serve as Dr. Ravin's designee for purposes of Dozier's execution. The manual requires that the CMO or his designee oversee the preparation of the lethal injections drugs.

thus issues surrounding the use of the paralytic drug became the primary focal point of the litigation.

7. This Court then scheduled an evidentiary hearing on November 3, 2017, for purposes of receiving expert testimony. NDOC continually objected to the appropriateness and necessity of this hearing because, in its view, Dozier had not properly plead or presented a "known and available" alternative method of execution as required by *Baze* and *Glossip*. At the evidentiary hearing, Petitioner's expert Anesthesiologist, Dr. Waisel, testified about his concerns regarding NDOC's revised protocol and in particular regarding NDOC's proposed use of a paralytic in the execution. NDOC cross-examined Dr. Waisel. This Court, over Petitioner's hearsay objection, admitted as evidence the October 20, 2017, Declaration of Dr. DiMuro, that was requested earlier by this Court.

8. At a follow-up hearing conducted on November 6, 2017, this Court accepted into evidence, this time over NDOC's objection, a second Declaration of Dr. Waisel signed that same date.[2] On November 8, 2017, NDOC submitted further revisions to EM 103 and 110. On November 9, 2017, NDOC filed a signed and adopted execution manual.

FINDINGS OF FACT

9. The fundamental question presented to this Court for resolution, once NDOC submitted its three-drug execution protocol on September 5, 2017, followed by two subsequent revisions to EM 103 and 110 of the protocol on October 20, 2017,

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[2] *See* Petitioner's November 6, 2017 Supplemental Errata, Ex. 38.

and November 8, 2017, concerns NDOC's use of a paralytic agent as the third and lethal drug in its lethal injection protocol. Specifically, the issue is whether NDOC's proposed use of the paralytic drug (Cisatracurium) presents a violation of Petitioner's constitutional rights under either Article 1, Section 6 of the Nevada Constitution and/or the Eighth Amendment to the United States Constitution. The Court finds that NDOC's proposed use of the paralytic drug in the execution of Petitioner Scott Dozier presents a substantial risk of harm to Petitioner in violation of his state and federal constitutional rights, based upon the untested protocol of NDOC, and the limited medical evidence presented by NDOC.

A. Known and Available Alternative

10. NDOC opposes Petitioner's position regarding elimination of the paralytic agent on essentially two grounds. First, NDOC argues that Petitioner failed, in accordance with the requirements of *Baze* and *Glossip*, to plead or show a known and available alternative method of execution. Yet Petitioner, through his defense team, and specifically in his Reply, did provide a known and available alternative. To the extent NDOC's position is that the defense's expert anesthesiologist did not himself offer the alternative, the Court finds NDOC's argument unpersuasive. The argument is based on a technicality, a fine line without a distinction, as Petitioner's expert was ethically obligated to couch his testimony in a particular way while not offering the best way to kill someone based on his anesthesiology experience. Based upon the totality of the testimony of the expert and his declarations, the Court finds NDOC's position that the Petitioner did

not pose a known and available method to be an oversimplification. This Court can properly consider Dr. Waisel's testimony in conjunction with the proffered alternative by the defense.

11. The United States Supreme Court requires that the proffered alternative be known, feasible, and readily implementable. *Baze*, 553 U.S. at 52. The Petitioner's proposed alternative here is feasible according to the testimony of Dr. Waisel. The alternative is available according to NDOC's representations that they have access to 15,000 micrograms of Fentanyl and also have sufficient amounts of Diazepam. In addition, NDOC's argument that the alternative proffered is not "known" is of no help to NDOC because the alternative is actually contained within the State's protocol. Additionally, the extent to which the alternative is unknown is equally attributable to the State's own protocol. Nothing is "known" about NDOC's untested protocol in this particular case. However, the only cross-examined testimony of any medical expert here is that the protocol proposed by Petitioner will in fact kill Petitioner without risk of suffering air hunger or awareness of suffocation. The Court therefore finds that the Petitioner has met his burden of proffering a known and available alternative method of execution.

B. Substantial Risk of Harm

12. In opposing Petitioner's request to remove the paralytic drug, NDOC argues he cannot establish that its use of the paralytic is unconstitutional under the standard announced by the Supreme Court in *Baze* and *Glossip*. Under those decisions, Petitioner must show that, absent removal of the paralytic agent, he is

being subjected to a "substantial risk of serious harm." *Glossip*, 135 S Ct. at 2737; *Baze*, 553 U.S. at 50. NDOC relies on the *Baze* decision, in which the Supreme Court determined the use of a paralytic agent in a three-drug protocol was not unconstitutional on the basis that the *Baze* petitioners were unable to demonstrate use of the paralytic presented the requisite risk of harm. This Court has reviewed *Baze* in detail and is fully aware that the decision makes it very difficult to mount a lethal injection challenge based upon the language of the case.

13. This Court recognizes and appreciates that an inmate sentenced to death is not entitled to a perfect execution. *See Baze*, 553 U.S. at 48 ("the Constitution does not demand the avoidance of all risk of pain in carrying out executions."). In addition, there will always be some risk of movement – twitching or fist clenching – by the condemned inmate. That is to be expected.

14. This Court finds, however, that the circumstances presented in this instance are distinguishable from the circumstances presented in *Baze*, for numerous reasons.

15. First, the protocol proposed by NDOC, unlike Kentucky's protocol in *Baze*, is untested. Kentucky was using a well-established three-drug protocol (consisting of sodium thiopental, pancuronium bromide and potassium chloride), that had a history of use in Kentucky and in many executions by many other death penalty states. Further, the Supreme Court observed in *Baze* that of the thirty-six death penalty states at that time, thirty of the states were using the same protocol with the exact same drugs. *Baze*, 553 U.S. at 44. Here, there is no such similarity

among the states: the protocol proposed by NDOC has never been used in any state in the United States and has never previously been reviewed by any court.

16. Second, the Supreme Court in *Baze* referenced a number of studies and periodicals supporting the use of the three-drug protocol utilized by Kentucky. *See, e.g., Baze,* 553 U.S. at 107-111 (concurring opinion of Breyer, J.). These included studies regarding the adequacy of the first drug anesthetic (Sodium Thiopental), and the potential for awareness of the inmate during the lethal injection process. *Id.* It is notable that Justice Breyer concluded that it could not be found, either in the record or in readily available literature, that there were grounds to believe that Kentucky's lethal injection method created a significant risk of unnecessary suffering. Here, however, there are no such studies because the Court is examining a protocol that has no similarity and has never been used in any state.

17. Unlike in *Baze*, here the only studies presented and that this Court can rely upon are those presented by Petitioner's expert Anesthesiologist, Dr. Waisel, showing that when Fentanyl is administered, awareness can occur even with high doses. *See* November 3, 2017 hearing, Petitioner's Exs. H, I and J.[3] This presents a serious concern. Dr. Waisel's testimony was clear that the condemned inmate could be not breathing yet still be aware, and that the inmate could be unable to respond to stimuli yet still be aware. *See infra* Paragraphs 19-23.

18. Unlike the record in *Baze*, here all that has been presented to the Court in terms of live testimony is the testimony of Petitioner's expert. This Court

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[3] *See also* November 3, 2017 Hearing, State's Exs. 10 and 11.

finds Dr. Waisel to be a very credible witness. Dr. Waisel testified regarding the risk presented by the proposed use of the Cisatracurium, specifically concerning the risk of the inmate suffering "air hunger," and the risk of being aware yet paralyzed and suffocating to death. The Court did not hear any other significant concern except for "air hunger" or awareness during the administration of Cisatracurium. For example, the Court heard no evidence about pain in the extremities or anything else.

19. Dr. Waisel testified that his concern about the risk of air hunger and awareness is premised upon an error in the administration of the protocol. If the protocol is followed as written, and Mr. Dozier receives the maximum dosages of Diazepam and Fentanyl as described in the protocol, Dr. Waisel stated there is no risk of air hunger or awareness. Dr. Waisel acknowledged that as long as the protocol is followed correctly, there is not a substantial risk of pain from the Cisatracurium.

20. Further, Dr. Waisel stated that, *if* the first two drugs are delivered successfully as written in the protocol, removing the Cisatracurium is not a slight or marginally better alternative method of execution. Dr. Waisel also testified that the Cisatracurium provides no additional benefit. Dr. Waisel testified that Cisatracurium increases the risk of inhumane treatment rather than decreases the risk. He stated that in medicine, a doctor would never take a risk that does not provide a benefit.

21. Dr. Waisel testified that it is extremely unlikely to the point of medical certainty that there would be a substantial risk of pain or suffering if Mr. Dozier was executed using 100 mg of Diazepam and 7500 mcg of Fentanyl (without the Cisatracurium).

22. Additionally, Dr. Waisel testified that it is unlikely that Mr. Dozier will experience air hunger or panic after the initial loading doses of diazepam and fentanyl, if the drugs are actually successfully delivered. Just on the loading doses themselves, if the protocol is carried out as written and intended, Dr. Waisel testified there was no need to worry about awareness, air hunger, or pain. Dr. Waisel's opinion here was predicated upon the assumption that the drugs were fully and successfully delivered and an experienced person correctly made the assessments of lack of response to both verbal and tactile stimuli. Dr. Waisel testified that even a surgeon who had been to medical school would not necessarily be able to reliably assess awareness. He testified that there was no objectively ascertainable definition of a medical grade pinch, which is the critical time period where the execution team decides to administer the Cisatracurium.

23. Dr. Waisel testified that there was always more of a potential risk if only the initial loading doses were administered versus the maximum doses of 100 mg of Diazepam and 7,500 mcg of Fentanyl.

24. Dr. Waisel also testified that use of the two drugs, Diazepam and Fentanyl, would work, would not be painful, and would cause Mr. Dozier's death. His testimony is unrebutted.

25. Mr. Dozier's execution will be the first execution in Nevada in eleven years in a new and unused execution chamber. Thus, beyond other concerns about NDOC's untested protocol, it is unknown how the delivery or administration of the drugs will go, i.e., whether it will proceed smoothly, given the absence of any recent experience in carrying out lethal injection executions by the prison staff and other participants involved. This adds to the risks presented.

26. While this Court admitted the Declaration of Dr. DiMuro, despite the fact that NDOC did not present his live testimony, the Declaration presents little to counter the opinions of Petitioner's expert. There is little contained in the Declaration in the way of debate or anticipatory rebuttal of the testimony provided by Dr. Waisel. While the Court does have Dr. DiMuro's Declaration, provided at the Court's request, that is all that the Court has from the State. The Court has NDOC's stated purpose of the paralytic, but has very little if anything to contravene the testimony of Petitioner's expert except for written materials presented by the State relating to packaging inserts for Diazepam and Fentanyl and some additional study information. This is in stark contrast to the State of Kentucky and the *Baze* case where the Court was confronted with a known protocol with numerous supporting studies.

27. Here, the specific rationale offered by Dr. DiMuro to justify use of the Cisatracurium - that the inmate could attempt to move the diaphragm muscle to

initiate a breath[4] - constitutes a "masking" event. In accordance with the testimony of Petitioner's expert, this rationale serves as a reason why the Cisatracurium should not be used. It is widely recognized that a major complaint regarding use of a paralytic agent in an execution is that the paralytic serves to "mask" any signs of distress, pain or suffering being experienced by the condemned inmate. This concern was mentioned multiple times by the various justices in the *Baze* opinions. *See Baze*, 553 U.S. at 57 (Roberts, C.J., announcing judgment of the Court, joined by Kennedy, J., and Alito, J.) (Petitioner's contend Kentucky should omit the pancuronium bromide "because it serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of the first drug"), *id.* at 71 (Stevens, J., concurring in the judgment) ("Because it *masks* any outward sign of distress, pancuronium bromide creates a risk that the inmate will suffer excruciating pain before death occurs"), *id.* at 111 (Thomas, J., joined by Scalia, J., concurring in the judgment) ("Petitioners argued . . . that Kentucky should eliminate the use of a paralytic agent, such as pancuronium bromide, which could, by preventing any outcry, *mask* suffering an inmate might be experiencing because of inadequate administration of the anesthetic"), and *id.* at 122 (Ginsburg, J., joined by Souter, J., dissenting) ("Kentucky's use of pancuronium bromide to paralyze the inmate means he will not be able to scream after the second drug is injected, no matter how much pain he is experiencing.").

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[4] October 20, 2017 Declaration of John M DiMuro, D.O., p. 3.

28. While the Supreme Court in *Baze* observed that use of the paralytic serves the purpose of preserving the dignity of the execution, there has been nothing submitted to this Court indicating its use is to serve that purpose here. No medical evidence has been presented that the Cisatracurium is necessary to preserve the dignity of the proceeding or that the request to take out the paralytic is, in the words of Justice Thomas, being offered by the defense to disgrace the death penalty. *Id.* at 107. This Court simply has not heard any argument or seen any evidence of that being the purpose of the paralytic in this protocol.

29. Finally, Petitioner additionally raised arguments pursuant to the *Glossip* and *Baze* decisions regarding the adequacy of the qualifications and training of prison officials and staff to reliably carry out an execution. This Court finds that NDOC has done a reasonable and appropriate job in having enough personnel under the new protocol to carry out Petitioner's execution. The Court does not find that there is any evidence of improperly trained staff based upon the signed protocol. Other than those specifically addressed in this Order, this Court does not find persuasive Petitioner's numerous other alleged failures in the protocol or staffing. NDOC has put together a comprehensive execution protocol in this regard. This finding is provided some support by the opinion of Petitioner's expert, whose testimony the Court has already found to be very credible, that the execution protocol will work without use of a paralytic.

CONCLUSIONS OF LAW

30. For the above stated reasons, and based on the evidence presented, this Court finds that NDOC's proposed use of a paralytic agent in the execution of Petitioner Scott Dozier presents an unconstitutional "substantial risk of serious harm," and an "objectively intolerable risk of harm" in violation of the Eighth Amendment to the United States Constitution and Article 1, Section 6 of the Nevada Constitution. *Baze*, 553 U.S. at 50. This Court further finds that Petitioner has identified an alternative method of execution that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 52. Thus, this Court hereby enjoins NDOC from use of a paralytic agent in carrying out the planned execution of Scott Raymond Dozier.

31. The action taken by this Court in response to Petitioner's filings regarding the lawfulness of his planned execution rests upon the Court's inherent authority to inquire into the lawfulness of its own order, here the Court's signing and entry of a warrant of execution for Petitioner Scott Dozier. *See Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007); *cf.* NRS 1.210(3). In particular, this Court has the "inherent power to prevent injustice," *Halverson*, 123 Nev. at 261-62, 163 P.3d at 440, and to tailor the scope of its orders to avoid constitutional concerns. *See, e.g., Jordan v. State ex rel. Dep't of Motor Vehicles and Public Safety*, 121 Nev. 44, 60, 110 P.3d 30, 42 (2005) (orders regarding vexatious litigants must be narrowly tailored to avoid violation of constitutional right of access to the courts). Counsel for the NDOC has noted on the record that the Court

has the inherent authority to review the execution procedure, but has maintained it must do so within the parameters of case law as established in *Baze* and *Glossip*.

ORDER

IT IS HEREBY ORDERED that Petitioner's August 15, 2017 Motion for Determination of the Lawfulness of Scott Dozier's Execution, and his corresponding request[5] to eliminate use of a paralytic drug and to restrict NDOC's execution protocol to the first two drugs (Diazepam and Fentanyl) in NDOC's November 7, 2017, execution manual, is HEREBY GRANTED, and NDOC IS ENJOINED from use of a paralytic agent in carrying out the execution of Scott Raymond Dozier.

IT IS FURTHER ORDERED that Petitioner's Motion for Leave to Conduct Discovery is otherwise DENIED as MOOT.

DATED this 21st day of November, 2017

Jennifer P. Togliatti

JENNIFER P. TOGLIATTI
DISTRICT JUDGE

[5] *See* Petitioner's 9-25-17 Reply at 10.

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system to:

Ann M. McDermott
Jordan T. Smith, Esq.
Thomas A. Ericsson, Esq.
Lori C. Teicher, Esq.
David Anthony, Esq.
Jonathan E. Vanboskerck, Esq.

Diane Sanzo

DIANE SANZO, Judicial Assistant

EXHIBIT 193

EXHIBIT 193

Declaration of Cassondrus Ragsdale

I, Cassondrus Ragsdale, hereby declare as follows:

1. I am an investigator in the Capital Habeas Unit of the Office of the Federal Public Defender, District of Nevada. As part of my duties, I routinely conduct criminal background checks of witnesses connected to the cases I am assigned.

2. I was assigned to assist in the capital habeas amended petition of Donte Johnson. I have conducted several searches into the background of individuals connected to Johnson's case.

3. As part of my responsibilities in Donte Johnson's petition I conducted criminal background searches on Todd A. Armstrong, Brian C. Johnson, Ace R. Hart and Charla C. Severs. This was accomplished by using various government and proprietary databases, as well as reviewing arrest records that were present in prior trial counsel files. I have discovered the following arrest histories:

4. Todd A. Armstrong -

   - 1996: Drive with suspended license (Nevada)
   - 1996: Hit and run (Nevada)

5. Ace R. Hart –

   - 1998: Possession of stolen property (Nevada)
   - 1997: Auto burglary (Nevada)

6. Brian C. Johnson -

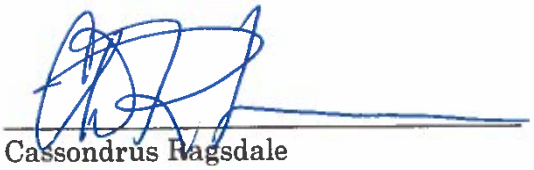
   - 1999: DUI liquor, open container in vehicle, minor in consumption of liquor and minor in possession of liquor (Nevada)

- 1998: Driving on suspended license (Nevada)
- 1998: Open container in vehicle, minor in consumption of liquor and minor in possession of liquor (Nevada)
- 1998: Reckless driving (Nevada)
- 1998: DUI liquor (Nevada)

7. Charla C. Severs -

- 1999: Possession of false ID (Nevada)
- 1999: Possession of stolen vehicle (Nevada)
- 1997,1998: Soliciting for purposes of prostitution (Nevada)
- 1997: Obstructing a police officer (Nevada)
- 1997: Loitering for purposes of prostitution and lewd lascivious act (Nevada citation)

4. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, and that this declaration was executed in Clark County, Nevada, on December 18, 2018.



Cassondrus Ragsdale

EXHIBIT 194

EXHIBIT 194

I, DAVID B. WAISEL, declare as follows:

1. I am a practicing anesthesiologist at Boston Children's Hospital and an Associate Professor of Anaesthesia, Harvard Medical School. I have been practicing clinical anesthesiology, primarily pediatric anesthesiology, for approximately 24 years.

2. I have been asked by the attorneys who represent Scott Dozier to provide an expert medical and scientific opinion about whether there is a substantial risk of harm that the Nevada Department of Corrections' proposed use of a three-drug protocol utilizing diazepam, fentanyl, and cisatracurium will cause Mr. Dozier severe pain or conscious suffering during his execution.

3. Terminology

a. "Awareness" is being cognizant of an experience while it is happening.

b. "Recall" is consciously remembering that experience later.

c. "Amnesia" is not consciously remembering that experience later.

d. A "paralytic agent" (like cisatracurium) prevents movement of skeletal muscle such as breathing, moving one's hands, blinking etc, which prevents the person receiving the paralytic from indicating distress. Paralytics "hide" the individual's experience.

e. "Blood oxygen level" is, simply, the amount of blood in the arterial blood system. It is typically 95-100 mmHg.

4. It is my understanding that the State of Nevada intends to execute Mr. Dozier by injections of 15 mg of diazepam, followed by 500 mcg of fentanyl, and, if he is still breathing, an additional 500 mcg of fentanyl will be administered, followed by 25 mg cisatracurium.

5. The protocol is unclear in ways that pose significant risk of unnecessary pain and suffering to Mr. Dozier. In EM-110, page 5 of 6, sections B.4.c and B.4.d both describe the initial diazepam and the following fentanyl to be administered. In B.4.e and B.4.e.1, the protocol describes monitoring for breathing and the additional 500 mcg of fentanyl that will be given. The protocol assumes this dose will stop Mr. Dozier's breathing, stating "The contents of the syringe [#1-3, 500 mcg of fentanyl] will then be slowly administered over one minute until the spontaneous breathing of the condemned inmate stops." The protocol does not call for an assessment of breathing over a period of time (such as described in B.4.e), and it does not instruct the executioners to give any additional diazepam or fentanyl. In fact, the protocol directs the executioners to give the paralytic agent, cisatracurium. B.4.f states "A Drug Administrator will then insert the needle of the forth [sic] syringe of lethal drug set number one (marked #1-4-cisatracurium, 25 mg) into the injection port." Following the protocol will result in cisatracurium being given after the second 500 mcg dose of fentanyl but before anything else, such as the dosages available in Set-2, which is conceptually opposite of the intent of B.4.e, which is to wait until breathing has stopped before administering cisatracurium. There are problems with these assumptions of the timing on assessing breathing and that not breathing is the same as not being aware (as described in paragraphs 16-20 below). According to

the protocol, the Set-2 is to be used if the inmate remains conscious or shows signs of life after the injection of the first set (Set-1) of lethal drugs, which means after the paralytic cisatracurium has already been administered. Assuming the cisatracurium reaches the blood stream, Mr. Dozier will be paralyzed and thus unable to indicate awareness – i.e., will not be observed as remaining conscious or showing signs of life to trigger the administration of Set-2. This means that Set-2 is only relevant if the Set-1 drugs do not reach the blood stream; Set-2, by the protocol, is not available even if an assessment were made (which, again, is not called for in the protocol) after the second 500 mcg of fentanyl that Mr. Dozier needed more diazepam and fentanyl.

6. This protocol is a sea change from every other protocol of which I am aware. The drug that kills Mr. Dozier is the paralytic cisatracurium. Other protocols have employed one of two mechanisms to cause death. The first protocol, the more traditional one, has been to give (1) an anesthetic agent, (2) a paralytic agent, and (3) the killing drug potassium chloride, which stops the heart very quickly. The second, which has become more common due to legitimate, increasing concerns about awareness with the paralytic, uses medications that either stop the patient from breathing or cause cardiovascular collapse but do not paralyze the muscles. This was initially known as the "single drug" technique, which used sodium thiopental or pentobarbital, in which the mechanism of death was either stopping breathing or cardiovascular collapse. It then became a 2-drug technique using benzodiazepines and opioids, and the presumed mechanism of death is the stopping

of breathing through anesthesia. But in these techniques, paralytics are not given, so the inmate cannot be aware while paralyzed.

7. In the current protocol, however, the killing agent is the paralytic of cisatracurium, which kills by preventing your ability to breathe, not through drugs that anesthetize (thereby ensuring an unconscious person during the process), but through drugs that paralyze muscles. This means that Mr. Dozier has a substantial risk of being paralyzed and awake as he dies of suffocation. The horror of being awake and unable to move is beyond description. But try to imagine, if you can, that you are awake yet unable to breathe, open your eyes, or move your hands. You are lying in complete isolation, unable to communicate the intense distress you are feeling. By way of one example, one patient aware and paralyzed reported that she "desperately wanted to scream or even move a finger to signal to the doctors that she was awake." The article concerning this example points out that it was not the surgery that was bothering her, it was being awake and unable to move. Landau E., Awake during surgery: 'I'm in Hell'. CNN May 17, 2010. http://www.cnn.com/2010/HEALTH/05/17/general.anesthesia/index.html).

8. Nevada's current protocol is practically designed to ensure substantial harm of 1) air hunger following the injections of diazepam and fentanyl and 2) awareness while being paralyzed after the cisatracurium injection.

9. Diazepam is an older benzodiazepine rarely used for sedation or anesthesia. Miller's Anesthesia, the most prominent anesthesia textbook in the United States, instructs that 15 mg for a 93 kg person is well under the dose needed for induction of anesthesia – loss of consciousness. Reves J.G., Intravenous

Anesthetics, In: Miller R.D., Miller's Anesthesia. Philadelphia, PA: Elsevier; 2010 p. 738-740.

10. The amnestic effect of diazepam is irrelevant in the execution context. Just because a person does not remember suffering upon waking up does not mean the person did not experience the agony and suffering as it happened.

11. The risk of air hunger is substantial after administration of the diazepam and fentanyl. The Ohio execution of Dennis McGuire (see, e.g., D:\z Personal\z Leg Rsrch Hab Corpus\z LI\OH EmailsRevealWorriesProblmtcExcutn.mht) demonstrates the problem. Mr. McGuire received 10 mg of midazolam and 40 mg of hydromorphone. Mr. McGuire experienced obstruction of his airway (the soft tissues in the mouth blocked his ability to breathe, such as what occurs in obstructive sleep apnea, where people who are asleep stop breathing because of the soft tissue obstruction). The normal response to experience this obstruction is to sit up, relieving the obstruction. But because Mr. McGuire could not sit up, he could not relieve the obstruction despite his repeated attempts observed as bucking or fighting the straps holding him down[1], meaning that he suffocated to death, akin to the experience of water boarding. This process, and his fighting the air hunger, has been reported to have occurred for 15-20 minutes. The sedation midazolam and hydromorphone given in the McGuire case

[1] Mr. McGuire's son, who attended the execution, described it thusly: "I watched his stomach heave, I watched him trying to sit up against the straps on the gurney, I watched him repeatedly clench his fist[.] [It] appeared to me he was fighting for his life while suffocating." D:\z Personal\z Leg Rsrch Hab Corpus\z LI\OH EmailsRevealWorriesProblmtcExcutn.mht