IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	No. M1987-00131-SC-DPE-DD
v.	)	**DEATH PENALTY**
	)	
BILLY RAY IRICK	)	
	)	

MOTION TO ALTER, AMEND OR MODIFY ORDER SETTING EXECUTION DATE OF OCTOBER 7, 2014

Comes Defendant, Billy Ray Irick ("Irick"), by and through counsel, and pursuant to Rule 59.04 of the *Tennessee Rules of Civil Procedure* moves this Honorable Court to alter, amend or modify its December 11, 2013 Order ("December Order") setting his execution for October 7, 2014. As grounds for this Motion, Mr. Irick would show that the declaratory judgment action, *West et al. v. Schofield, et al.* No. 13-1627-I, which challenges the constitutionality of Tennessee's lethal injection protocol is still pending before the Chancery Court for Davidson County, Part I, 20th Judicial District ("the Chancery Court action"). In fact and as more fully explained below, as of the filing of this Motion, the procedural posture of the Chancery Court action is substantially similar to when Irick filed his Motion to Alter, Amend or Modify Order Setting Execution Date and exhibits or about December 5, 2013 ("December 5, 2013 Motion"). Currently, the parties are awaiting a decision from the Tennessee Court of Appeals regarding a discovery dispute over producing the names and identities of the John Doe Defendants. As a consequence, the parties have been unable to proceed in the litigation and are still seven to eight months away from a trial court judgment.

Pursuant to Rule 10 of the *Tennessee Rules of Civil Procedure*, Irick incorporates by reference his previously filed December 5, 2013 Motion and all exhibits thereto. In further support of this motion, Irick would show the following:

***Procedural History*:**

1. The State of Tennessee issued its new lethal injection protocol ("protocol") on Friday, September 7, 2013. Less than a week later, on October 3, 2013, Irick administratively grieved the State's newly issued protocol. After following the grievance appeals process, the Legal Department for the Department of Corrections fully and finally denied the grievance on Wednesday, November 13, 2013. Irick and the other Plaintiffs promptly filed the Chancery Court action on November 20, 2013 alleging that the protocol was unconstitutional on numerous grounds.

2. On October 3, 2013 (the same day that Mr. Irick initiated his administrative grievance), the State filed a Motion to Reset Irick's execution date.

3. On October 22, 2013, "at a point when [this Court] could not take into account the fact of a Tennessee constitutional challenge to the protocol," this Court entered an Order setting Irick's execution date for January 15, 2014.

4. On November 27, 2013, pursuant to Chancellor Bonnyman's instructions, the parties to the Chancery Court action submitted their respective Proposed Scheduling Orders to the court. On that same date and in a good faith effort to expedite the litigation, Plaintiffs submitted interrogatories to the state seeking the identification of the John Doe defendants involved in the execution protocol.

5. On December 2, 2013, counsel for the parties to the Chancery Court action participated in a teleconference with Chancellor Bonnyman for the purpose of establishing a Scheduling Order

in the Chancery Court action. Discussions included the entry of a protective order and the state's responses to the pending interrogatories. (See, Transcript, Exhibit 1).

6. On December 3, 2013, Chancellor Bonnyman entered a scheduling order providing, in part: (1) written discovery to be completed by April 30, 2014; (2) identification of experts by May 1, 2014; (3) depositions to be completed by June 1, 2014; (4) a pretrial conference on June 16, 2014; and (5) trial dates of July 7-9, 2014. (See, Exhibit 2).

7. On December 4, 2014, an Agreed Protective Order[1] negotiated between the parties in the previous days was filed in Chancery Court. (See Exhibit 3). The intent, as well as the plain meaning, of the protective order required the state to divulge the identification information requested in plaintiffs' interrogatories discussed above. The Order provided, in part: "The parties shall not reveal the identities of the 'John Doe' defendants except to the extent essential to conduct the proceedings at issue in this case." Confidential information was restricted to plaintiffs' attorneys – being withheld even from the plaintiffs themselves. (Id. at B. ¶1, p. 2).

8. Nevertheless also on December 4, 2014, the state filed its responses to plaintiffs' first set of interrogatories refusing to divulge the identification information which was the subject of the Protective Order. (See, Exhibit 4).

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[1] The State's attorneys drafted the Protective Order at issue and circulated it to counsel for Plaintiffs on Wednesday, November 27, 2013. *See* ***Exhibit 1***, p. 6, ll. 1-6 (wherein the Court acknowledges that "neither party disagreed to a protective order solution [to the issue of disclosing John Doe Defendants' identities]."); p. 17, ll. 1-14 (wherein the State's attorney acknowledges that he "e-mailed [a draft protective order] over for review at 2:10 on Wednesday [November 27, 2013]."); p. 18, ll. 7-14 (wherein the State's attorney acknowledges that "the protective order [is] something [the State] can do regardless of [the time frame within which the State could respond to Plaintiffs' interrogatories]," and informing the Court and counsel that the State "would like the protective order in place before … respond[ing] to the interrogatories.").

9. On December 6, 2013, Irick filed his Motion to Alter, Amend, or Modify his January 15, 2014 execution date seeking to reset his execution date following the resolution of the Chancery Court action.

10. On December 11, 2013, this court granted Irick's motion to alter/amend and set a new execution date of October 7, 2014. (The "December Order").

11. On December 13, 2013, Plaintiffs filed a motion to compel responses their interrogatories which the state had refused to answer.

12. On January 8, 2014, Judge Bonnyman entered an Order compelling discovery.

13. On January 13, 2014, the state filed a motion for authorization of Rule 9 interlocutory appeal. (See, Exhibit 5).

14. On January 14, 2014, Chancellor Bonnyman entered an order staying discovery until a decision on an interlocutory appeal had been rendered. (See, Exhibit 6).

15. On February 11, 2014, the Chancery Court granted the state's motion for interlocutory appeal.

16. On August 11, 2014 after the filing of briefs, the Tennessee Court of Appeals heard oral argument on the state's interlocutory appeal. As of the filing of this pleading, the Court of Appeals had not rendered a decision.

17. On August 21, 2014, the Plaintiffs filed an amended complaint for declaratory judgment in the Chancery Court action adding seven counts attacking the constitutionality of electrocution as a means of execution under state and federal law. (See, Exhibit 7).

18. On September 12, 2014, Judge Bonnyman heard oral argument regarding the plaintiffs' motion to amend its complaint attacking the constitutionality of electrocution. A decision is expected on Tuesday, September 16, 2014.

DISCUSSION

In granting Irick's first motion to alter and amend, this court drew upon one of its earlier decisions and quoted the following passage from *State v. Stephen Michael West*, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010):

> 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 develop a 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.

Order, December 11, 2013, *State of Tennessee v. Billy Ray Irick*, No. M1987-00131-SC-DPE-DD.

The same reasons that justified this court's December Order still pertain. Through no fault of Irick, or any of the other plaintiffs, their cause of action has yet to be heard. In fact, given the discovery dispute regarding the identity of the John Doe Defendants, which is still pending in the Court of Appeals, the procedural posture of the Chancery Court action, as of the filing of this Motion, is substantially similar, if not functionally identical to the procedural posture on December 5, 2013. Accordingly, plaintiffs' have been refused the opportunity to "develop the facts that have a bearing on the constitutionality of the challenged provision" because the state, having once agreed to provide the identifying information for John Doe defendants pursuant to a protective order that it drafted and to which it agreed, has reneged and appealed the Chancery Court's order compelling disclosure. The state's actions, whether deliberate and/or in good faith or not, have prevented the plaintiffs from developing the facts that they believe will allow them to prevail in their Chancery Court action.

In *U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co.*, 410 S.W.3d 820, 827 (Tenn. Ct. App. 2012), appeal denied (May 8, 2013), the Western Division of the Tennessee Court of

Appeals articulated the consensus standard for considering motions to alter or amend, stating that "[a] motion to alter or amend should 'be granted when [a] the controlling law changes before the judgment becomes final; [b] when previously unavailable evidence becomes available; [c] or to correct a clear error of law *or to prevent injustice*.'" *Id.* (emphasis added) (quoting *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005)). These three elements are discussed separately below.

a. **Controlling law.** The Chancery Court action challenges the constitutionality of a newly enacted lethal injection protocol. Thus, there is no controlling law on this subject. *See December Order*, p. 2 ("currently, there is no controlling law in Tennessee on the constitutionality of the use of the single drug, Pentobarbital, to execute a death row inmate."). Although, technically the "controlling law" has not changed, the manner in which the controlling law is carried out has changed. Therefore, just as it was in December 2013, an Order modifying the December Order setting Irick's date of execution is warranted in order to allow him to present facts and supporting evidence to be tested and weighed in the Chancery Court action so that the controlling law can be developed, if not changed.

Similarly, Irick's electrocution claim requires an assessment of evolving standards of decency. In the near quarter century since *State v. Black* 815 S.W.2d 166 (Tenn. 1991), every single state (including Tennessee until now) has abandoned involuntary use of the electric chair. No other country uses the electric chair. Further, two state supreme courts have now declared the electric chair unconstitutional. See, *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (citation omitted) ("Examined under modern scientific knowledge, 'electrocution has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein in the death chamber' of state prisons") *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001) ("death by electrocution, with its

spector of excruciating pain and it's certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment"). In any event, the three judge observation in *Black* is dicta based on a record devoid of evidence, written in response to an issue not raised by Black, but by the two judge dissent. The decedent noted that there was "no evidence" in the record regarding electrocution. Id. at 199.

b. **Previously unavailable evidence.** In this case, the state has withheld all critical details relating to drug compounding and procurement process that Irick needs to fully and fairly litigate his claims. *See, e.g., Complaint*, Count VI at pp. 66 through 74. As discussed above, the state's litigation posture has, in fact, only hardened since December 2013 leading to avoidable delays and the missing of the agreed upon trial date. Had the state kept its promise to provide the John Doe identification information pursuant to the Protection Order, there is good reason to believe that the litigation could have been concluded on schedule, at least at the trial court level.

Assuming Irick and the other plaintiffs are allowed to pursue discovery, previously withheld and unavailable evidence will become available to allow their Chancery Court action to proceed. Thus, an order modifying the December Order setting Irick's date of execution is warranted in order to allow him to discover previously unavailable evidence, develop it appropriately, and present it to the Chancery Court to be tested and weighed in order to determine the constitutionality of the protocol.

As to electrocution, more evidence of the cruelty it inflicts is now currently available through advanced medical techniques and/or expertise. Plaintiffs to the Chancery Court action intended to call on medical experts to provide such testimony to be considered, for the first time, by this court.

c. **Prevent injustice.** As in *West v. Ray*, No. M2010-02275-SC-R11-CV, the issues raised by Irick in the Chancery Court action are "profoundly important and sensitive" as they implicate, among other issues, the Bill of Rights' prohibition against cruel and unusual punishment under both the State (*Tenn. Const.*, Art. I, § 16)[2] and Federal Constitutions (*U.S. Const.*, amend. VII). The Chancery Court action is a legitimate constitutional challenge to the State's lethal injection protocol and electrocution. In the Chancery Court's Scheduling Order, Chancellor Bonnyman stated: "It does appear likely there are merits to be reached[,]" and explained "why a shortened trial schedule is not workable if the Court hopes to reach the merits." Exhibit 2, Order, p. 3. As noted by Plaintiff Zagorski, the apparently meritorious issues at stake in the Chancery Court action include:

> (a) The first challenge of its kind to Tennessee's new lethal injection protocol which uses a new drug, pentobarbital;
>
> (b) The first challenge in Tennessee to creating execution drugs through compounding (a process we have all recently learned is fraught with dangers); and
>
> (c) The first challenge of its kind in Tennessee to the procurement and use of execution drugs in violation of various state and federal laws.

State v. Zagorski, No. M1996-00110-SC-DPE-DD, Supplement to Response to Motion to Set Execution Date, p. 1.[3]

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[2] The fundamental right to not have "cruel and unusual punishments inflicted," (Tenn. Const., Art. I, § 16), is inviolate. *Tenn. Const.*, Art. 11, § 16 ("The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.").

[3] Mr. Miller's Supplement to Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation couches the issues in suit as follows:

> In his Chancery Court declaratory judgment action, Miller has presented novel issues that require careful fact development and discovery before a final merits ruling, including, *inter alia*:
>
> > (a) Challenging Tennessee's new lethal injection protocol which uses only pentobarbital, a drug never before used in a Tennessee execution;
> > (b) Challenging Tennessee's creation of execution drugs through compounding; and
> > (c) Challenging Tennessee's procurement and use of execution drugs in violation of various state and federal laws.

The Plaintiffs' positions on both the current lethal injection protocol and electrocution will be supported by expert witness testimony. The action was not filed and does not seek to prevent the State from executing any of the Plaintiffs, but rather to ensure that their execution is carried out in a constitutional manner. The purpose of the action is not to delay justice, but to ensure it. "Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing," *West*, No. M2010-02275-SC-R11-CV, p. 2, and should be "considered in light of a fully developed record addressing the specific merits of the challenge." *State v. West*, No. M1987-130-SC-DPE-DD, p. 3. "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." *Id.*

It also should be noted that a modification of the December Order setting Irick's execution date for October 7, 2013, while likely preventing an execution in violation of multiple constitutional prohibitions, does not preclude the State from executing its judgment and enforcing the criminal laws governing and protecting the populous. Such an order would merely reset the date of Irick's execution to ensure that the State does not execute a man in an unconstitutional manner on October 7, 2013. Certainly, protecting one of the essential liberties afforded to all United States citizens in the Tennessee and Federal Constitution's Bill of Rights and ensuring adherence the constitutional protections we hold most dear is worth a relatively minor delay in the execution of the judgment against Irick.[4]

State v. Miller, (No. E1982-00075-SC-DDT-DD), Miller's Supplement to Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation, p. 2.

[4] To this end, it is also worth noting that Chancellor Bonnyman's Scheduling Order originally setting a trial date just over seven months after the Chancery Court action was filed, was an expedited time frame when compared to other

Certainly, the execution of a man in violation of the Constitution would constitute an injustice. However, this Court can prevent such an injustice by modifying its December Order to reset Irick's execution for a future date in order to allow him sufficient time to present a "fully developed record addressing the specific merits of [his] challenge" to the constitutionality of the lethal injection protocol and electrocution for the Chancery Court's consideration and any necessary appellate review. *State v. West*, *supra* at p. 3).

WHEREFORE, Petitioner, Billy Ray Irick respectfully requests that this honorable Court enter an Order altering, amending, or modifying its December Order setting Irick's execution for October 7, 2014 and to reset the scheduled execution on a date that will allow Irick to fully and fairly litigate his claims in the Chancery Court action allowing sufficient time for expected and essential appellate review.

Respectfully submitted,

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

By: _____

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declaratory judgment actions in Davidson County. ***See Exhibit 1***, Transcript, p. 10, l. 24 through p. 11, l. 4 ("The timetable the plaintiffs propose is otherwise reasonable and in fact shortens the time for litigation of civil lawsuits of this complexity. Most declaratory judgment actions in Chancery Court in Davidson County are resolved within one year. Some declaratory Judgment Actions require 18 months."). The Court's decision to expedite the trial of these issues was premised, in large part, upon the State's representation to the Court and counsel that it would adhere to its promise to disclose the identities of the John Doe Defendants pursuant to the scheduling order that it drafted and to which it agreed. ***See Exhibit 3***, p. 2, ¶ 3 ("***counsel for the plaintiffs and the defendants*** ... ***agree that*** given the time limitation imposed by the nature of this action, the issues presented, and the interests at stake, ***the assertion and litigation of issues of confidentiality and privilege will unduly delay, and thereby prejudice, the proper investigation, presentation, and resolution of the claims and defenses by the parties and the Court.***"). Thus, it is the State's refusal to live up to its promise to the Court and counsel that has caused the delay in the Chancery Court action, and thereby necessitated this particular Motion.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing **MOTION TO ALTER, AMEND OR MODIFY ORDER SETTING EXECUTION DATE** has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

Linda D. Kirken
Scott C. Sutherland
Assistant Attorneys General
Criminal Justice Division
425 Fifth Ave. North
Nashville, TN 37243

This 12 day of Sept., 2014.

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

By: _____

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CHANCERY COURT PART I FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT
NASHVILLE AND DAVIDSON COUNTY

STEPHEN MICHAEL WEST, BILLY RAY IRICK, NICHOLAS TODD SUTTON, DAVID EARL MILLER, and OLEN EDWARD HUTCHINSON,

Plaintiffs,

EDMUND ZAGORSKI, ABU-ALI ABDUR'RAHMAN, CHARLES WRIGHT, DON JOHNSON, and LEE HALL, (formerly known as Leroy Hall, Jr.,

Intervening Plaintiffs,

(Appearances continued on the Next page)

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2013 DEC -3 PM 2:54

Case No. 13-1627-I

PARTIAL TRANSCRIPT OF TELEPHONE CONFERENCE

JUDGE'S ORDERS

Before: Hon. Claudia Bonnyman, Chancellor

December 2, 2013

EXHIBIT
1

CLEETON DAVIS COURT REPORTERS
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Nashville, Tennessee 37217
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APPEARANCES (Continued)

v.

DERRICK D. SCHOFIELD, in his official capacity as Tennessee's Commissioner of Corrections, WAYNE CARPENTER, in his official capacity as Warden of Riverbend Maximum Security Institution, TONY MAYS, in his official capacity as Deputy Warden of Riverbend Maximum Security Institution, JASON WOODALL, in his official capacity as Deputy Commissioner of Operations, TONY PARKER, in his official capacity as Assistant Commissioner of Prisons, JOHN DOE PHYSICIANS 1-100, JOHN DOE PHARMACISTS 1-100, JOHN DOE MEDICAL EXAMINERS 1-100, JOHN DOE MEDICAL PERSONNEL 1-100, JOHN DOE EXECUTIONERS 1-100,

Defendants.

APPEARANCES (By speakerphone):

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Also Present:
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Greg Nies, Esq.
Staff Attorney

(Proceedings held, reported but not transcribed.)

The Court convened a conference on December 2nd, 2013, after the parties submitted proposed schedules for pretrial and trial events in this case.

And now off the record just a second.

(Proceedings held off the record.)

THE COURT: Now we're back on the record for the bench ruling.

The Court had initially announced that because of the January 15, 2014, execution date, the declaratory judgment decision must be issued by December 31 at the latest to allow for appellate review before an execution date arises. The Court was mindful of the inadequacy of time that the December 31st, 2013, deadline would allow, both the trial and appellate phase of the litigation. But the deadline appeared to be necessary given the orders issued by the criminal court and the Tennessee Supreme Court regarding the plaintiff, Mr. Irick. Neither the plaintiffs nor the State were able to propose a schedule fitting within this Court's initial plan.

The plaintiff seeks a trial date of July 7, starting July 7, 2014. And I think, gentlemen that

and ladies, that July 6, I think that's a Sunday, so we're talking about starting on July 7, 2014. That's the date that the plaintiffs seek, while the defendants scheduled the trial date for January 6, 2014.

The January 15, 2014, execution date, which so constrains the parties and the Court, would set -- appears to have been set shortly after the State-reviewed execution protocol was issued but at a point when the Supreme Court could not take into account the fact of a Tennessee constitutional challenge to the protocol now pending before this Court.

And as for the issues in the case, the State complains that the -- that the plaintiffs delayed their lawsuit unreasonably when they filed their complaint 60 days after the protocol was issued rather than filing the complaint earlier. The plaintiffs contend they were not allowed access to public records deemed confidential by the state legislature at T.C.A Section 10-7-104 and thus could not discover matters essential to their lawsuit such as identity of the pharmacy to track the compounds of the lethal drug used in the execution.

The plaintiffs contend that they sought these

public records before the protocol -- some of the public records before the protocol was issued. The Court notes that the parties did not discuss the protective order for the confidential material until the week the complaint was filed, even though neither party disagreed to a protective order solution. Further, as regards delay, although it can be said that the plaintiffs should have been ready to challenge the new protocol earlier, when the Court became involved, the State was unable to accept service of the complaint on numerous defendants, even those who were probably state employees. In other words, the State could not advise the Court whether certain defendants were employed by the State or were subcontractors.

By the time the State filed its proposed schedule on November 27th, the State was authorized to accept service of process on behalf of all defendants. By the time of the December 2nd conference, the State was aware of its preference for an expert witness but was unable to reveal the identity of the expert because of some administrative matters.

The plaintiffs contend that the State has all the information and they, the plaintiffs, have been

dependent on the recalcitrant State for many actual allegations and background and such.

Whatever the comparative effect of the delays recounted here, the combined impact was relatively small. The fact that no one is to blame for the present scheduling dilemma does not make the problem less serious for the Court, however.

At the conference, the plaintiffs discussed Tennessee discovery rules which contains the built-in delay such as the manner in which expert witness information is revealed. The State contends that its -- contends that its proposal that experts be addressed along with Rule 26.02 disclosures the week of December 16 is doable, and it appears that the State does not contemplate depositions for the experts but will make decisions about its proof from the formal written disclosures provided by the plaintiffs while the plaintiffs instead built in time for depositions of the opposing expert.

And now I am going to briefly discuss the principles of law that I'm looking at so that I can think about how to schedule this case in light of the execution constraints. And I am reciting first or reading first from the November 6, 2010, order from the Supreme Court in the -- the first entry, West

case, Case No. -- Chancery No. 10-1675, Part I. And the Supreme Court number is M2010-02275 scr 11 cv. And from that order, the following is taken. And this should be in quotes, please.

"Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, admitted, and weighed in an adversarial hearing such as the one that was held by the U.S. District Court for the Middle District of Tennessee in Harbison v. Little, Middle District of Tennessee, July 12, 2010. The current record in this case contains no such evidence. Accordingly, we have determined that both Mr. West and the State of Tennessee should be afforded an opportunity to present evidence supporting their respective positions to the chancery court and that the chancery court should be afforded an opportunity to make findings of fact, conclusions of law with regard to the issues presented by the parties." And then -- and that's end of the quote.

Then taken from the November 29, 2010, order in the same chancery court case -- ~~no, I'm sorry,~~ this was filed in the circuit court for Union County, No. M1987, Supreme Court DPE-DD. And the Supreme

Court states, "The principles of constitutional adjudication and procedural fairness require" -- and if I didn't say this before, this needs to be in quotes, please. "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, has a bearing on the constitutionality of the challenge 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 a prior protocol of whether the revised protocol is constitutional." And that's -- and that's the end of the quote.

And now as to a separate section of this decision, the ~~defendants'~~ State's (3) proposal implicitly concedes that it is impossible by January 15, 2014, for the parties to conduct necessary discovery to bring the case to trial in time for the Court to

deliberate, issue a ruling, and still allow even minimal time for considered appellate review. The schedule that the ~~defendants~~ State propose contemplates discovery and trial preparation that will extend past December 31, 2013. And, lawyers, remember, I didn't say this has to be done, you have to present a schedule that matches December 31, 2013, but I did state at our earlier conference, the trial court did state at the earlier conference that I did not see how this Court, whether they -- did not see how there could be appellate review of any decision or fact-finding this Court makes without having the trial before or on December 31, 2013.

The time the ~~defendants~~ State would allot for discovery and trial preparation is too short to develop and present complex factual issues that must be decided. Yet even that allotment of time is impracticably long, because it forces a reduction in an already inadequate amount of time for this Court and the appellate court to consider the merits and issue their ruling.

The plaintiffs proposed a trial schedule that, in light of the execution date, is even more unworkable. The timetable the plaintiffs propose is otherwise reasonable and in fact shortens the time

for litigation of civil lawsuits of this complexity. Most declaratory judgment actions in chancery court in Davidson County are resolved within one year. Some declaratory judgment actions require 18 months.

The plaintiffs' schedule -- adoption of the plaintiff's schedule would be more fair to other litigants whose cases have long been scheduled for trial over the next month but who will now lose their places or could lose their places on the Court's schedule to make way for hurried disposition of this case. Because the plaintiffs' schedule is objectively more reasonable, the Court adopts ~~its~~ their plan, ~~its~~ their schedule, with the notice from the trial court that the schedule will be adhered to absent a different directive from the Supreme Court or a different schedule.

And I'm going to dictate this schedule into this order so that any review can be done in this one document. The schedule adopted by the Court is, initial interrogatory, start by November 27, 2013; response -- response by December 2nd, 2013. Answer to complaint, December 11, 2013. And this is the one provision that both parties agree to. And their schedule, that is, the answer to complaint, will be filed on December 11, because that's when the

State stated it could file its answer (90) ~~answer the parties' discovery~~. Written interrogatories or requests for production of documents will be served January 10, 2014, response to production by January 31, 2014. Nonparties' discovery request of production of documents served by February 10, 2014, production by March 1, 2014. Parties' and nonparties' discovery, requests for production, inspection, copying, testing, or sampling of things, and entry upon land for inspection and other purposes, supplemental interrogatories and/or requests for production of documents, requests for admissions served by March 10, 2014, completed by April 3, 2013. Parties' identification of experts May 1, 2014, depositions completed by June 1, 2014. Pretrial conference on June 16, 2014, with the trial date to begin on Monday, July 7, 2014. And the Court is setting aside July 6, 7, and 8 in case those three days are needed.

And, lawyers, let me stop here and look at my notes to see if there's something else that I need to add.

July 7th 8th (90) will ~~would~~ be the trial dates.

Lawyers, is there anything else that I need

to address besides how the transcript should be managed?

MR. PASSINO: No, your Honor. And we've got the court reporter, Mr. Ratekin, here. We have asked him about how fast he could get this to you. And based on my past experience, you have liked to have the transcript with you when you enter the order or to attach it to the order. So it's now in his hands.

THE COURT: Okay. Do we know how quickly such an expedited matter could be managed? Can we ask our court reporter that?

MR. PASSINO: He is looking at -- he is working right now, and he is looking at the speaker. What do you think?

THE COURT REPORTER: Two days.

MR. PASSINO: Is two days fast enough for the Court? How about if we call back --.

THE COURT: How about just -- you know, it doesn't have to be -- my dictation is not perfect. It doesn't have to be perfect.

MR. PASSINO: What about this? Because there may be some misunderstanding on my part. What about just the transcription of her order? How fast could you get that?

THE COURT REPORTER: Tomorrow.

THE COURT: Yeah. I think that's more -- that would be what I would expect. I'm sorry I made you think -- I don't need the -- I do not need the transcript of the hearing.

MR. PASSINO: Right.

THE COURT: I might want to get it later, but I don't need it.

MR. PASSINO: Okay. All right.

THE COURT: It was not a hearing, anyway; it was a conference. If you wanted the transcript of the conference, of course, that would be up to you. But I don't need it to enter the order.

MR. PASSINO: I understand, and it was my misunderstanding. So tomorrow sometime.

THE COURT: Okay. So the cover order will just say that the Court adopted the plaintiffs' trial schedule, and the transcript of the bench ruling is incorporated into this order, and I will sign it. And then everybody can do with it what they need to do.

MR. PASSINO: And we will have the court reporter, then, e-mail it, if that's not inappropriate, to the Court and all parties, the

transcript of your --

THE COURT: Well, let me ask you this. I don't anticipate any problems, because I just rarely see anybody stand on formalities. But don't you have to have a page from the court reporter saying that it is accurate?

MR. SMITH: Right.

MR. PASSINO: Yes.

THE COURT: So you're probably going to need that, and so that kind of makes e-mailing it -- I don't think that works.

MR. PASSINO: Okay. All right. We can get it hand-delivered to the Court and e-mailed to the parties if everybody is agreeable.

THE COURT: Okay. That will work.

MR. SMITH: That works.

MR. PASSINO: Okay.

THE COURT: Okay. You know what I'm saying about the order and the court reporter and everything is based on the fact that we don't have automated filing. If we did, what I'm stating to you wouldn't matter. But since we don't, you know, we will have -- I will look forward to receiving that document tomorrow. It will be entered tomorrow -- I'll sign it tomorrow, it will be entered tomorrow,

and I will have my office manager fax it to everybody with stamped dates and the time and everything.

MR. PASSINO: Oh, good. Good.

THE COURT: Okay. Any other need that anybody has?

MR. SMITH: Your Honor, the one issue that the State would present is, this order being entered tomorrow issues an interrogatory deadline of today on the State. The State would seek some relief from that given the pending order adopted and the time we were proposed with the interrogatory. We would just request relief from that..

THE COURT: I'm sorry; I didn't even see that. I didn't even think about it.

MR. KISSINGER: Your Honor, those were the interrogatory sets, were sent in terms of -- that were sent for the very limited purpose of identifying the Joe Doe defendants.

THE COURT: Oh, okay.

MR. SMITH: The State understands the purpose of that was to get them served, which the State has now adopted service on. But irrespective, the State didn't receive them until the closing of business Tuesday afternoon and just can't respond to that in any detail today.

THE COURT: Okay. So it looks like interrogatories have to do with -- do they ask for the identity of these people?

MR. SMITH: Yes.

MR. KISSINGER: That's correct, your Honor.

THE COURT: And when does the State think they can provide that along with a protective order?

MR. SMITH: The parties have been discussing a protective order. I emailed one over for review at 2:10 on Wednesday afternoon and have not heard a final position from the opposing parties yet.

My understanding is that we think we have an agreement in principle, at least. But I'm waiting on a response back from petitioners.

MR. PASSINO: Can we agree that if you'll give Mr. Kissinger and our office and the other plaintiffs' counsel 45 minutes, I can give you or Mr. Kissinger can give you a call and maybe e-mail you a proposed final draft?

MR. KISSINGER: Or maybe someone over there at your office can do that, Mike. 45 minutes puts us kind of late in the day.

MR. PASSINO: Okay. I apologize. How about first thing tomorrow morning?

MR. KISSINGER: Yeah. That works.

MR. PASSINO: Okay.

MR. KISSINGER: If it works for the State, of course.

MR. SMITH: The State does not -- there still may be some objections to the interrogatories based on how they are worded and the state of the proceedings. But as far as the protective order, that's something we can do I think regardless of our interrogatory responses. We would like the protective order in place before we respond to the interrogatories.

MR. PASSINO: Absolutely, and understood. What we'll do is, we'll get together, the plaintiffs, immediately after this call, and then we will get something to you the first of the morning tomorrow on the protective order.

MR. SMITH: And I would ask the Court if we have Wednesday to issue a response to this initial round of interrogatories. We have a meeting with the Department of Corrections tomorrow.

MR. PASSINO: Oh, that's absolutely fine with us. I can't speak for Mr. Kissinger.

MR. KISSINGER: Oh, that's no problem at all.

THE COURT: What should I put in here, anything? Because what I can do when I get the transcript is just strike through that subject matter.

MR. PASSINO: We would prefer that you would draft it with the modifications just discussed, that the parties will enter an -- a protective order or submit a protective order sometime tomorrow to the Court for its approval, review and approval, and that Mr. Smith will have until Wednesday at the close of business to respond to interrogatories or to present objections.

MR. KISSINGER: How does that work? I mean, that's fine. That's fine with me. How does that work for you, Andrew?

MR. SMITH: I think I can do that.

THE COURT: Wednesday, December 4?

MR. KISSINGER: Yes.

MR. SMITH: That's correct, your Honor.

THE COURT: Okay. All right. I will make that change when I get the transcript.

MR. KISSINGER: Okay. Good. And I'll get that to you first thing tomorrow, Andrew, the

protective order, proposed protective order.

THE COURT: Okay. I'm going to get off now, and you-all can talk, if you want to.

MR. PASSINO: Thank you.

MR. SMITH: Thank you, your Honor.

MS. HENRY: Thank you, your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Brian V. Ratekin, Registered Diplomate Reporter and Notary Public for the State of Tennessee, do hereby certify that I recorded to the best of my skill and ability by machine shorthand the proceedings contained herein, that same was reduced to computer transcription by myself, and that the foregoing is a true, accurate and complete transcript of the portion of proceedings requested in this cause.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

Dated this 3rd day of December, 2013.

Brian V. Ratekin
LCR No. 057; Exp. 6/30/14

My Commission Expires:
May 28, 2017

BRIAN V. RATEKIN
STATE OF TENNESSEE
NOTARY PUBLIC
ROBERTSON COUNTY

Clerk and Master of Davidson County
Chancery Court, Part I
Twentieth Judicial District
Metropolitan Historic Courthouse, Room 308
Nashville, Tennessee 37201

Julie Spencer, Deputy Clerk and Master
Calendar Clerk for Part I

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Fax Cover

DATE: 12/3/13 Number of Pages: 26 pages including cover page

RE: *STEPHEN MICHAEL WEST, et al., vs. DERRICK SCHOFIELD, in his official capacity as Tennessee's Commissioner of Corrections, et al,* Case No. 13-1627-I

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IN THE CHANCERY COURT PART I, FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, NASHVILLE AND DAVIDSON COUNTY

STEPHEN MICHAEL WEST, BILLY RAY IRICK, NICHOLAS TODD SUTTON, DAVID EARL MILLER, AND OLEN EDWARD HUTCHINSON,

Plaintiffs,

and

EDMUND ZAGORSKI, ABU-ALI ABDUR'RAHMAN, CHARLES WRIGHT, DON JOHNSON, and LEE HALL (formerly knows as Leroy Hall, Jr.),

Intervening Plaintiffs,

v.

DERRICK D. SCHOFIELD, in his official capacity as Commissioner, Tennessee Department of Correction (TDOC), WAYNE CARPTENTER, in his official capacity as Warden, Riverbend Maximum Security Institution (RMSI), TONY MAYS, in his official capacity as Deputy Warden RMSI, JASON WOODALL, in his official capacity as Deputy Commissioner TDOC, TONY PARKER, in his official capacity as Assistant Commissioner TDOC, JOHN DOE PHYSICIANS 1-100, JOHN DOE PHARMACISTS 1-100, JOHN DOES MEDICAL PERSONNEL 1-100, and JOHN DOE EXECUTIONS 1-100,

Defendants.

No. 13-1627-I

ORDER

Pursuant to this Court's November 26, 2013 Case Management Order, schedules submitted by counsel on November 27, 2013, and for the reasons stated in the attached transcript of this Court's bench order pursuant to a lengthy telephone conference on December 2, 2013, this

Court enters the following schedule for the proceedings in this case. The Agreement is incorporated by reference. (SJ)

SCHEDULE

Initial Interrogatories	Served by November 27, 2013 Response by December 4, 2013
Answer To Complaints	December 11, 2013
Party Discovery: Written Interrogatories & Requests For Production Of Documents (Tenn.R.Civ.P. 33 & 34)	Served by January 10, 2014 Response/Production by January 31, 2014
Non-Party Discovery: Requests For Production Of Documents (Tenn.R.Civ.P. 34.03, 45)	Served by February 10, 2014 Production by March 1, 2014
Party & Non-Party Discovery: Requests For Production, Inspection, Copying, Testing Or Sampling Of Things & Entry Upon Land For Inspection And Other Purposes; Supplemental Interrogatories And/Or Requests For Production Of Documents; Requests For Admission (Tenn.R.Civ.P. 33, 34, 36 & 45)	Served by March 10, 2014 Completed by April 30, 2014[1]
Parties' Identification Of Experts	May 1, 2014
Depositions (Tenn.R.Civ.P. 30 & 45)	Completed by June 1, 2014
Pretrial Conference	June 16, 2014
Hearing Date	July 7-9, 2014

[1]Trans. date of 4/3/13 and hearing dates corrected .

Based on representations of counsel in telephone conferences on November 26, 2013 and December ~~2~~ (3) (CB), 2013, this Court anticipates the submission of an agreed protective order shortly, so that this matter may proceed expeditiously.

ENTERED this 3rd day of December 2013.

Order Proposed by Michael Passino (CB)

CLAUDIA C. BONNYMAN, CHANCELLOR
CHANCERY COURT, PART 1

The date for the first scheduled event has passed. Lawyers on both sides indicate that the interrogatories first addressed, ask the identities of the unknown defendants. Even with the protective order, the State has objections. Of course, valid objections should be made.

The exchange describing a temporary discovery dispute over the interrogatories illuminates why a shortened trial schedule is not workable if the Court hopes to reach the merits. It does appear likely there are merits to be reached. (CB)

FAXED 12/3/13

MAILED 12/3/13

CERTIFICATE OF SERVICE

Kelley J. Henry, counsel for intervening plaintiffs Abdur'Rahman, Johnson, Wright and Zagorski, hereby certifies that on December 3, 2013 a true and correct copy of the foregoing proposed ORDER and transcript of bench ruling was served via United States Mail, first-class, postage pre-paid to the following:

Stephen Kissinger
Susanne Bales
Asst. Federal Public Defenders
Federal Public Defender Services of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929

Eugene Shiles
801 Broad Street, 6th Floor
Chattanooga, Tennessee 37402

Kelly Gleason
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530 Church Street, Suite 600
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Nashville, Tennessee 37203-3861

Andrew Smith
Nicolas Spangler
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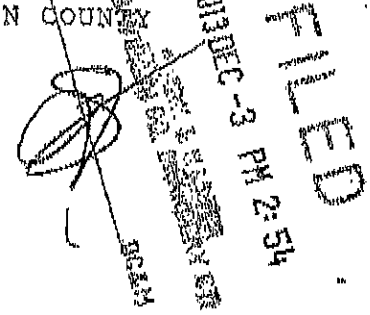
425 Fifth Avenue North
Post Office Box 20207
Nashville, Tennessee 37202-0207

Kelley J. Henry

CHANCERY COURT PART I FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT
NASHVILLE AND DAVIDSON COUNTY



STEPHEN MICHAEL WEST, BILLY RAY IRICK, NICHOLAS TODD SUTTON, DAVID EARL MILLER, and OLEN EDWARD HUTCHINSON,

Plaintiffs,

EDMUND ZAGORSKI, ABU-ALI ABDUR'RAHMAN, CHARLES WRIGHT, DON JOHNSON, and LEE HALL, (formerly known as Leroy Hall, Jr.,

Intervening Plaintiffs,

(Appearances continued on the Next page)

Case No. 13-1627-I

PARTIAL TRANSCRIPT OF TELEPHONE CONFERENCE

JUDGE'S ORDERS

Before: Hon. Claudia Bonnyman, Chancellor

December 2, 2013

CLEETON DAVIS COURT REPORTERS
402 BNA Drive, Suite 108
Nashville, Tennessee 37217
(615) 726-2737
www.cleetondavis.com

APPEARANCES (Continued)

v.

DERRICK D. SCHOFIELD, in his official capacity as Tennessee's Commissioner of Corrections, WAYNE CARPENTER, in his official capacity as Warden of Riverbend Maximum Security Institution, TONY MAYS, in his official capacity as Deputy Warden of Riverbend Maximum Security Institution, JASON WOODALL, in his official capacity as Deputy Commissioner of Operations, TONY PARKER, in his official capacity as Assistant Commissioner of Prisons, JOHN DOE PHYSICIANS 1-100, JOHN DOE PHARMACISTS 1-100, JOHN DOE MEDICAL EXAMINERS 1-100, JOHN DOE MEDICAL PERSONNEL 1-100, JOHN DOE EXECUTIONERS 1-100,

Defendants.

APPEARANCES (By speakerphone):

For Plaintiffs Stephen Michael West, Nicholas Todd Sutton, David Earl Miller, and Olen Edward Hutchison:
Stephen Kissinger, Esq.
Susanne Bales, Esq.
Assistant Federal Community Defenders
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929

For Plaintiff Billy Ray Irick:
Carl Gene Shiles, Jr., Esq.
William J. Rieder, Esq.
Shiles, Spears, Moore, Rebman & Williams
Post Office Box 1749
Chattanooga, Tennessee 37201

APPEARANCES (Continued):

For Intervening Plaintiffs Edmund Zagorski, Charles Wright, Don Johnson, and Abu-Ali Abdur'Rahman:
Michael J. Passino, Esq.
Kelley J. Henry, Esq.
Paul Bottei, Esq.
Assistant Federal Public Defenders
Office of the Federal Public Defender
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Nashville, Tennessee 37203-3861

For Intervening Plaintiff Lee Hall:
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Assistant Post-Conviction Defender
Office of the Post-Conviction Defender
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Post Office Box 198068
Nashville, Tennessee 37219-8068

For the Defendants:
Andrew H. Smith, Esq.
Nicolas White Spangler, Esq.
Assistant Attorneys General
425 Fifth Avenue, North
Post Office Box 20207
Nashville, Tennessee 37202-0207

Also Present:
Jason Steinle, Esq.
Tennessee Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, Tennessee 37219

Greg Nies, Esq.
Staff Attorney

(Proceedings held, reported but not transcribed.)

The Court convened a conference on December 2nd, 2013, after the parties submitted proposed schedules for pretrial and trial events in this case.

And now off the record just a second.

(Proceedings held off the record.)

THE COURT: Now we're back on the record for the bench ruling.

The Court had initially announced that because of the January 15, 2014, execution date, the declaratory judgment decision must be issued by December 31 at the latest to allow for appellate review before an execution date arises. The Court was mindful of the inadequacy of time that the December 31st, 2013, deadline would allow, both the trial and appellate phase of the litigation. But the deadline appeared to be necessary given the orders issued by the criminal court and the Tennessee Supreme Court regarding the plaintiff, Mr. Irick. Neither the plaintiffs nor the State were able to propose a schedule fitting within this Court's initial plan.

The plaintiff seeks a trial date of July 7, starting July 7, 2014. And I think, gentlemen that

and ladies, that July 6, I think that's a Sunday, so we're talking about starting on July 7, 2014. That's the date that the plaintiffs seek, while the defendants scheduled the trial date for January 6, 2014.

The January 15, 2014, execution date, which so constrains the parties and the Court, would set -- appears to have been set shortly after the State-reviewed execution protocol was issued but at a point when the Supreme Court could not take into account the fact of a Tennessee constitutional challenge to the protocol now pending before this Court.

And as for the issues in the case, the State complains that the -- that the plaintiffs delayed their lawsuit unreasonably when they filed their complaint 60 days after the protocol was issued rather than filing the complaint earlier.

The plaintiffs contend they were not allowed access to public records deemed confidential by the state legislature at T.C.A Section 10-7-104 and thus could not discover matters essential to their lawsuit such as identity of the pharmacy to track the compounds of the lethal drug used in the execution.

The plaintiffs contend that they sought these

public records before the protocol -- some of the public records before the protocol was issued. The Court notes that the parties did not discuss the protective order for the confidential material until the week the complaint was filed, even though neither party disagreed to a protective order solution. Further, as regards delay, although it can be said the plaintiffs should have been ready to challenge the new protocol earlier, when the Court became involved, the State was unable to accept service of the complaint on numerous defendants, even those who were probably state employees. In other words, the State could not advise the Court whether certain defendants were employed by the State or were subcontractors.

By the time the State filed its proposed schedule on November 27th, the State was authorized to accept service of process on behalf of all defendants. By the time of the December 2nd conference, the State was aware of its preference for an expert witness but was unable to reveal the identity of the expert because of some administrative matters.

The plaintiffs contend that the State has all the information and they, the plaintiffs, have been

dependent on the recalcitrant State for many actual allegations and background and such.

Whatever the comparative effect of the delays recounted here, the combined impact was relatively small. The fact that no one is to blame for the present scheduling dilemma does not make the problem less serious for the Court, however.

At the conference, the plaintiffs discussed Tennessee discovery rules which contains the built-in delay such as the manner in which expert witness information is revealed. The State contends that its -- contends that its proposal that experts be addressed along with Rule 26.02 disclosures the week of December 16 is doable, and it appears that the State does not contemplate depositions for the experts but will make decisions about its proof from the formal written disclosures provided by the plaintiffs while the plaintiffs instead built in time for depositions of the opposing expert.

And now I am going to briefly discuss the principles of law that I'm looking at so that I can think about how to schedule this case in light of the execution constraints. And I am reciting first or reading first from the November 6, 2010, order from the Supreme Court in the -- the first entry, West

case, Case No. -- Chancery No. 10-1675, Part I. And the Supreme Court number is M2010-02275 scr 11 cv. And from that order, the following is taken. And this should be in quotes, please.

"Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, admitted, and weighed in an adversarial hearing such as the one that was held by the U.S. District Court for the Middle District of Tennessee in Harbison v. Little, Middle District of Tennessee, July 12, 2010. The current record in this case contains no such evidence. Accordingly, we have determined that both Mr. West and the State of Tennessee should be afforded an opportunity to present evidence supporting their respective positions to the chancery court and that the chancery court should be afforded an opportunity to make findings of fact, conclusions of law with regard to the issues presented by the parties." And then -- and that's end of the quote.

Then taken from the November 29, 2010, order relating to the same chancery court case -- ~~no, I'm sorry;~~ this was filed in the circuit court for Union County, No. M1987, Supreme Court DFA-DD. And the Supreme

Court states, "The principles of constitutional adjudication and procedural fairness require" -- and if I didn't say this before, this needs to be in quotes, please. "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, has a bearing on the constitutionality of the challenge 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 a prior protocol of whether the revised protocol is constitutional." And that's -- and that's the end of the quote.

And now as to a separate section of this decision, the ~~defendants~~ State's (13) proposal implicitly concedes that it is impossible by January 15, 2014, for the parties to conduct necessary discovery to bring the case to trial in time for the Court to

deliberate, issue a ruling, and still allow even minimal time for considered appellate review. The schedule that the ~~defendants~~ State proposes contemplates discovery and trial preparation that will extend past December 31, 2013. And, lawyers, remember, I didn't say this has to be done, you have to present a schedule that matches December 31, 2013, but I did state at our earlier conference, the trial court did state at the earlier conference that I did not see how this Court, whether they -- did not see how there could be appellate review of any decision or fact-finding this Court makes without having the trial before or on December 31, 2013.

The time the ~~defendants~~ State would allot for discovery and trial preparation is too short to develop and present complex factual issues that must be decided. Yet even that allotment of time is impracticably long, because it forces a reduction in an already inadequate amount of time for this Court and the appellate court to consider the merits and issue their ruling.

The plaintiffs proposed a trial schedule that, in light of the execution date, is even more unworkable. The timetable the plaintiffs propose is otherwise reasonable and in fact shortens the time

for litigation of civil lawsuits of this complexity. Most declaratory judgment actions in chancery court in Davidson County are resolved within one year. Some declaratory judgment actions require 18 months.

The plaintiffs' schedule -- adoption of the plaintiff's schedule would be more fair to other litigants whose cases have long been scheduled for trial over the next month but who will now lose their places or could lose their places on the Court's schedule to make way for hurried disposition of this case. Because the plaintiffs' schedule is objectively more reasonable, the Court adopts ~~its~~ their plan, ~~its~~ their schedule, with the notice from the trial court that the schedule will be adhered to absent a different directive from the Supreme Court or a different schedule.

And I'm going to dictate this schedule into this order so that any review can be done in this one document. The schedule adopted by the Court is, initial interrogatory, start by November 27, 2013; response -- response by December 2nd, 2013. Answer to complaint, December 11, 2013. And this is the one provision that both parties agree to. And their schedule, that is, the answer to complaint, will be filed on December 11, because that's when the

State stated it could file its answer ~~answer the parties' discovery~~. Written interrogatories or requests for production of documents will be served January 10, 2014, response to production by January 31, 2014. Nonparties' discovery request of production of documents served by February 10, 2014, production by March 1, 2014. Parties' and nonparties' discovery, requests for production, inspection, copying, testing, or sampling of things, and entry upon land for inspection and other purposes, supplemental interrogatories and/or requests for production of documents, requests for admissions served by March 10, 2014, completed by April 3, 2013. Parties' identification of experts May 1, 2014, depositions completed by June 1, 2014. Pretrial conference on June 16, 2014, with the trial date to begin on Monday, July 7, 2014. And the Court is setting aside July 6, 7, and 8 in case those three days are needed.

And, lawyers, let me stop here and look at my notes to see if there's something else that I need to add.

July 7th and 8th, 2014, would be the trial dates.

Lawyers, is there anything else that I need

to address besides how the transcript should be managed?

MR. PASSINO: No, your Honor. And we've got the court reporter, Mr. Ratekin, here. We have asked him about how fast he could get this to you. And based on my past experience, you have liked to have the transcript with you when you enter the order or to attach it to the order. So it's now in his hands.

THE COURT: Okay. Do we know how quickly such an expedited matter could be managed? Can we ask our court reporter that?

MR. PASSINO: He is looking at -- he is working right now, and he is looking at the speaker. What do you think?

THE COURT REPORTER: Two days.

MR. PASSINO: Is two days fast enough for the Court? How about if we call back --.

THE COURT: How about just -- you know, it doesn't have to be -- my dictation is not perfect. It doesn't have to be perfect.

MR. PASSINO: What about this? Because there may be some misunderstanding on my part. What about just the transcription of her order? How fast could you get that?

THE COURT REPORTER: Tomorrow.

THE COURT: Yeah. I think that's more -- that would be what I would expect. I'm sorry I made you think -- I don't need the -- I do not need the transcript of the hearing.

MR. PASSINO: Right.

THE COURT: I might want to get it later, but I don't need it.

MR. PASSINO: Okay. All right.

THE COURT: It was not a hearing, anyway; it was a conference. If you wanted the transcript of the conference, of course, that would be up to you. But I don't need it to enter the order.

MR. PASSINO: I understand, and it was my misunderstanding. So tomorrow sometime.

THE COURT: Okay. So the cover order will just say that the Court adopted the plaintiffs' trial schedule, and the transcript of the bench ruling is incorporated into this order, and I will sign it. And then everybody can do with it what they need to do.

MR. PASSINO: And we will have the court reporter, then, e-mail it, if that's not inappropriate, to the Court and all parties, the

transcript of your --

THE COURT: Well, let me ask you this. I don't anticipate any problems, because I just rarely see anybody stand on formalities. But don't you have to have a page from the court reporter saying that it is accurate?

MR. SMITH: Right.

MR. PASSINO: Yes.

THE COURT: So you're probably going to need that, and so that kind of makes e-mailing it -- I don't think that works.

MR. PASSINO: Okay. All right. We can get it hand-delivered to the Court and e-mailed to the parties if everybody is agreeable.

THE COURT: Okay. That will work.

MR. SMITH: That works.

MR. PASSINO: Okay.

THE COURT: Okay. You know what I'm saying about the order and the court reporter and everything is based on the fact that we don't have automated filing. If we did, what I'm stating to you wouldn't matter. But since we don't, you know, we will have -- I will look forward to receiving that document tomorrow. It will be entered tomorrow -- I'll sign it tomorrow, it will be entered tomorrow,

and I will have my office manager fax it to everybody with stamped dates and the time and everything.

MR. PASSINO: Oh, good. Good.

THE COURT: Okay. Any other need that anybody has?

MR. SMITH: Your Honor, the one issue that the State would present is, this order being entered tomorrow issues an interrogatory deadline of today on the State. The State would seek some relief from that given the pending order adopted and the time we were proposed with the interrogatory. We would just request relief from that..

THE COURT: I'm sorry; I didn't even see that. I didn't even think about it.

MR. KISSINGER: Your Honor, those were the interrogatory sets, were sent in terms of -- that were sent for the very limited purpose of identifying the Joe Doe defendants.

THE COURT: Oh, okay.

MR. SMITH: The State understands the purpose of that was to get them served, which the State has now adopted service on. But irrespective, the State didn't receive them until the closing of business Tuesday afternoon and just can't respond to that in any detail today.

THE COURT: Okay. So it looks like interrogatories have to do with -- do they ask for the identity of these people?

MR. SMITH: Yes.

MR. KISSINGER: That's correct, your Honor.

THE COURT: And when does the State think they can provide that along with a protective order?

MR. SMITH: The parties have been discussing a protective order. I emailed one over for review at 2:10 on Wednesday afternoon and have not heard a final position from the opposing parties yet.

My understanding is that we think we have an agreement in principle, at least. But I'm waiting on a response back from petitioners.

MR. PASSINO: Can we agree that if you'll give Mr. Kissinger and our office and the other plaintiffs' counsel 45 minutes, I can give you or Mr. Kissinger can give you a call and maybe e-mail you a proposed final draft?

MR. KISSINGER: Or maybe someone over there at your office can do that, Mike. 45 minutes puts us kind of late in the day.

MR. PASSINO: Okay. I apologize. How about first thing tomorrow morning?

MR. KISSINGER: Yeah. That works.

MR. PASSINO: Okay.

MR. KISSINGER: If it works for the State, of course.

MR. SMITH: The State does not -- there still may be some objections to the interrogatories based on how they are worded and the state of the proceedings. But as far as the protective order, that's something we can do I think regardless of our interrogatory responses. We would like the protective order in place before we respond to the interrogatories.

MR. PASSINO: Absolutely, and understood. What we'll do is, we'll get together, the plaintiffs, immediately after this call, and then we will get something to you the first of the morning tomorrow on the protective order.

MR. SMITH: And I would ask the Court if we have Wednesday to issue a response to this initial round of interrogatories. We have a meeting with the Department of Corrections tomorrow.

MR. PASSINO: Oh, that's absolutely fine with us. I can't speak for Mr. Kissinger.

MR. KISSINGER: Oh, that's no problem at all.

THE COURT: What should I put in here, anything? Because what I can do when I get the transcript is just strike through that subject matter.

MR. PASSINO: We would prefer that you would draft it with the modifications just discussed, that the parties will enter an -- a protective order or submit a protective order sometime tomorrow to the Court for its approval, review and approval, and that Mr. Smith will have until Wednesday at the close of business to respond to interrogatories or to present objections.

MR. KISSINGER: How does that work? I mean, that's fine. That's fine with me. How does that work for you, Andrew?

MR. SMITH: I think I can do that.

THE COURT: Wednesday, December 4?

MR. KISSINGER: Yes.

MR. SMITH: That's correct, your Honor.

THE COURT: Okay. All right. I will make that change when I get the transcript.

MR. KISSINGER: Okay. Good. And I'll get that to you first thing tomorrow, Andrew, the

protective order, proposed protective order.

THE COURT: Okay. I'm going to get off now, and you-all can talk, if you want to.

MR. PASSINO: Thank you.

MR. SMITH: Thank you, your Honor.

MS. HENRY: Thank you, your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Brian V. Ratekin, Registered Diplomate Reporter and Notary Public for the State of Tennessee, do hereby certify that I recorded to the best of my skill and ability by machine shorthand the proceedings contained herein, that same was reduced to computer transcription by myself, and that the foregoing is a true, accurate and complete transcript of the portion of proceedings requested in this cause.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

Dated this 3rd day of December, 2013.

Brian V. Ratekin
LCR No. 067; Exp. 6/30/14

My Commission Expires:
May 28, 2017

BRIAN V. RATEKIN
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY

IN THE CHANCERY COURT PART I, FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, NASHVILLE AND DAVIDSON COUNTY

STEPHEN MICHAEL WEST, BILLY RAY IRICK, NICHOLAS TODD SUTTON, DAVID EARL MILLER, AND OLEN EDWARD HUTCHINSON,

Plaintiffs,

and

EDMUND ZAGORSKI, ABU-ALI ABDUR'RAHMAN, CHARLES WRIGHT, DON JOHNSON, and LEE HALL (formerly knows as Leroy Hall, Jr.),

Intervening Plaintiffs,

v.

DERRICK D. SCHOFIELD, in his official capacity as Commissioner, Tennessee Department of Correction (TDOC), WAYNE CARPTENTER, in his official capacity as Warden, Riverbend Maximum Security Institution (RMSI), TONY MAYS, in his official capacity as Deputy Warden RMSI, JASON WOODALL, in his official capacity as Deputy Commissioner TDOC, TONY PARKER, in his official capacity as Assistant Commissioner TDOC, JOHN DOE PHYSICIANS 1-100, JOHN DOE PHARMACISTS 1-100, JOHN DOES MEDICAL PERSONNEL 1-100, and JOHN DOE EXECUTIONS 1-100,

Defendants.

MP

No. 13-1627-I

ORDER

Pursuant to this Court's November 26, 2013 Case Management Order, schedules submitted by counsel on November 27, 2013, and for the reasons stated in the attached transcript of this Court's bench order pursuant to a lengthy telephone conference on December 2, 2013, this

Court enters the following schedule for the proceedings in this case. The Arrangement is incorporated by reference. (83)

SCHEDULE

Initial Interrogatories	Served by November 27, 2013 Response by December 4, 2013
Answer To Complaints	December 11, 2013
Party Discovery: Written Interrogatories & Requests For Production Of Documents (Tenn.R.Civ.P. 33 & 34)	Served by January 10, 2014 Response/Production by January 31, 2014
Non-Party Discovery: Requests For Production Of Documents (Tenn.R.Civ.P. 34.03, 45)	Served by February 10, 2014 Production by March 1, 2014
Party & Non-Party Discovery: Requests For Production, Inspection, Copying, Testing Or Sampling Of Things & Entry Upon Land For Inspection And Other Purposes; Supplemental Interrogatories And/Or Requests For Production Of Documents; Requests For Admission (Tenn.R.Civ.P. 33, 34, 36 & 45)	Served by March 10, 2014 Completed by April 30, 2014[1]
Parties' Identification Of Experts	May 1, 2014
Depositions (Tenn.R.Civ.P. 30 & 45)	Completed by June 1, 2014
Pretrial Conference	June 16, 2014
Hearing Date	July 7-9, 2014

[1]Trans. date of 4/3/13 and hearing dates corrected.

Based on representations of counsel in telephone conferences on November 26, 2013 and December 3, 2013, this Court anticipates the submission of an agreed protective order shortly, so that this matter may proceed expeditiously.

ENTERED this 3rd day of December 2013.

Order Prepared by Michael Passino

CLAUDIA C. BONNYMAN, CHANCELLOR
CHANCERY COURT, PART 1

The date for the first scheduled event has passed. Lawyers are to be mindful that the interrogatories, first addressed, asked the identities of the Tennessee defendants. Even with the protective order, the State has objections. Of course, valid objections should be made.

The Chancellor declines a temporary decision over the interrogatories pertaining to a shortened trial schedule as not workable for the Court hopes to resolve the matter. However, it is very likely there are matters to be resolved.

FAXED 12/3/13

-3-

MAILED 12/3/13

CERTIFICATE OF SERVICE

Kelley J. Henry, counsel for intervening plaintiffs Abdur'Rahman, Johnson, Wright and Zagorski, hereby certifies that on December 3, 2013 a true and correct copy of the foregoing proposed ORDER and transcript of bench ruling was served via United States Mail, first-class, postage pre-paid to the following:

Stephen Kissinger
Susanne Bales
Asst. Federal Public Defenders
Federal Public Defender Services of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929

Eugene Shiles
801 Broad Street, 6th Floor
Chattanooga, Tennessee 37402

Kelly Gleason
Asst. Post-Conviction Defender
Office of the Post-Conviction Defender
530 Church Street, Suite 600
PO Box 198068
Nashville, Tennessee 37203-3861

Andrew Smith
Nicolas Spangler
Kyle Hixon
425 Fifth Avenue North
Post Office Box 20207
Nashville, Tennessee 37202-0207

Kelley J. Henry

STEPHEN WEST, et al., Plaintiffs, vs. DERRICK SCHOFIELD, et al., Defendants.	)	No. 13-1627-I Chancellor Bonnyman

AGREED PROTECTIVE ORDER

Upon agreement of counsel of record of the parties, as reflected by the signatures of counsel below, this Court hereby enters a protective order limiting the disclosure of confidential information, as set out below.

A. PURPOSE OF ORDER

In furtherance of this agreed protective order counsel for the parties have agreed generally as follows:

1. The Defendants assert that certain information pertaining to the allegations in the complaints in the action, or information likely to lead to the discovery of relevant information, is confidential and not subject to disclosure or review. The defendants do not waive any protection, privilege or defense afforded by Tenn. Code Ann. § 10-7-504(h) by agreement to this protective order.

2. Counsel for the various plaintiffs dispute the assertion of confidentiality or any other privilege however denominated by Defendants, and further assert that whatever the basis of the asserted confidentiality or privilege, such restrictions cannot operate as a barrier to the proper presentation and resolution of the substantial issues raised by the complaints or defenses presented in the Answer, which has yet to be filed.

3. Despite these differences counsel for the plaintiffs and the defendants, and without waiving or intending to waive their respective positions, agree that given the time limitation imposed by the nature of this action, the issues presented, and the interests at stake, the assertion and litigation of issues of confidentiality and privilege will unduly delay, and thereby prejudice, the proper investigation, presentation, and resolution of the claims and defenses by the parties and the Court. For the reasons described here, and in paragraphs A.1 and A.2, above, counsel agree that a protective order is necessary and appropriate.

B. SCOPE AND OPERATION OF ORDER

It being agreed by undersigned counsel for all present parties to this action that pursuant to Tenn. R. Civ. P. 26.03, that this order shall enter sealing the depositions and all other discovery and evidence in the instant case containing confidential information. Such parties, through counsel, further agree this Court has and retains jurisdiction for the purpose of resolving any dispute that may arise in relation to this agreement and to be bound by protections and restrictions ordered by the Court as follows:

1. The parties shall not reveal the identities of the "John Doe" defendants except to the extent essential to conduct the proceedings at issue in this case. In the event revealed, the deponents' identity, testimony or information regarding their identity or the identity of any other person or entity in connection with their involvement with the performance of lethal injections or production, distribution or receipt of pentobarbital, and all such identifying information obtained through discovery by any means in the above-styled matter, shall be deemed to be confidential.

2. Said confidential information shall not be disclosed to any person other than counsel of record, staff, and any experts consulted or retained by a party who will be informed of, provided with and shall be bound by the terms of this Court's protective order.

3. No other person shall have access to the confidential information without the written approval of the party producing such confidential information or without an order from the Court.

4. Counsel of record will not, directly or indirectly, disclose or permit the disclosure of the confidential information, or any portion thereof, to anyone else.

5. The confidential information shall be used by Plaintiffs' counsel of record for the sole purpose of representing the interests of the plaintiffs in this litigation and for no other purposes. Confidential information shall not be given, shown, made available, discussed or otherwise communicated for any purpose other than the litigation of this action, and then only in accordance with the agreed terms above and conditions of this Court's protective order.

6. All confidential information and copies or extracts thereof shall be maintained in the custody of counsel of record for the parties in a manner that limits access to qualified persons.

7. If any portion of a submission to this Court contains confidential information, the portion containing the confidential information shall be filed under seal in a sealed envelope on which shall be affixed the caption of this case, a general description of the nature of the contents that does not disclose any confidential information, the word "CONFIDENTIAL" and a statement substantially in the following form:

> THIS ENVELOPE CONTAINS MATERIALS SUBJECT TO A PROTECTIVE ORDER ENTERED IN THIS CASE. IT IS NOT TO BE OPENED, NOR ARE THE CONTENTS TO BE DISPLAYED, REVEALED OR MADE PUBLIC, EXCEPT BY ORDER OF THE COURT.

8. Unless otherwise ordered by the Court, appropriate steps shall be taken to preserve the confidentiality of confidential information which may be referred to or disclosed.

9. Any person in possession of confidential information who receives a request or a subpoena or other process for confidential information from any nonparty to this action shall promptly give notice by telephone and written notice by overnight delivery and/or telecopier to counsel for the parties in this case, enclosing a copy of the request, subpoena or other process. In no event shall production or other disclosure pursuant to the request, subpoena or other process be made except upon order of this Court after notice and hearing.

10. The Court's protective order, which reflects the parties' agreement, is intended to provide a mechanism for the handling of confidential information. It shall not be deemed to be a waiver by any of the parties of any objections as to admissibility, relevancy, materiality, or discoverability, or a waiver of any right or protection otherwise afforded by the TENNESSEE RULES OF CIVIL PROCEDURE relating to discovery or the TENNESSEE RULES OF EVIDENCE or otherwise afforded by state law.

11. Counsel for the parties agree that this protective order shall govern all proceedings up to, but not including, any hearing on the merits of this cause. Prior to the hearing, the parties will meet and address the confidentiality issues as they affect the hearing and present any amendments they may have, or differences to the Court for resolution, should this be necessary. The parties contemplate that the Court will enter a new or superseding protective order governing the confidentiality of issues relating to the hearing of this cause.

12. Signatory counsel for any party may approach the Court at any time for a modification of this protective order or an interpretation of its application, should the need arise.

13. Within ten (10) days of the final termination of this case, whether by settlement or at the end of trial or hearing and/or any appeals, all confidential information and copies or

extracts thereof which are in the custody of Plaintiffs' counsel and counsels' staff shall be returned to counsel for the Defendants.

It is so ORDERED.

Enter this ___ day of _____, 20013.

CLAUDIA BONNYMAN
CHANCERY COURT, PART I

/s/ Stephen M. Kissinger/ Susanne Bales /ahs
Mr. Stephen M. Kissinger
Ms. Susanne Bales
Federal Defender Services of Eastern, Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
Counsel for Plaintiffs West, Irick, Sutton, Miller and Hutchison

/s/ Kelley Henry/ Michael J. Passino/ Paul Bottei/ahs
Ms. Kelley Henry
Mr. Michael J. Passino
Mr. Paul Bottei
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37202
Counsel for Plaintiffs Zagorski, Abdur'Rahman, Wright and Johnson

faxed
12/5/18

/s/ Kelly Gleason/ahs
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Counsel for Plaintiff Hall

Mr. C. Gene Shiles, Jr.
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Counsel for Plaintiff Irick

Andrew H. Smith
Mr. Nicholas Spangler
Mr. Kyle A. Hixson
Office of the Tennessee Attorney General
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Counsel for Defendants

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, PART I
TWENTIETH JUDICIAL DISTRICT, STATE OF TENNESSEE

STEPHEN WEST, et al.,	)	
	)	
Plaintiffs,	)	
vs.	)	No. 13-1627-I
	)	
DERRICK SCHOFIELD, et al.,	)	Chancellor Bonnyman
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

The defendants hereby respond to the petitioner's November 27, 2013, *First Set of Interrogatories* as follows:

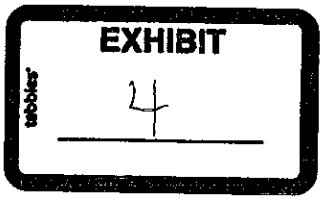
INSTRUCTIONS AND DEFINITIONS

The defendants object to the plaintiffs' instructions and definitions to the extent they seek to place additional obligations on the defendant beyond those required by the Tenn. R. Civ. P. 26 and 33.

1. INTERROGATORY NO. 1

Identify each John Doe Physician known to Defendants described in paragraphs 26, 27, 29, 37, 68, 75, 76, 77, 88, 89, 90, 91, 98, 252, 276, 298, 303, 305, 306, 307, 308, 309, 310, and 367 of the Amended Complaint. If the John Doe Physician is not employed by the State of Tennessee, identify the business address where service of the summons may be had.

RESPONSE: Objection. The identity of the individual described in this interrogatory is neither relevant nor material to the plaintiffs' ability to challenge the protocol employed in executing a sentence of death and is specifically deemed confidential under state law. *See* Tenn.



Code Ann. 10-7-504(h); Tenn. R. Civ. P. 26.02(1). Such information is also subject to redaction "wherever possible" pursuant to Tenn. Code Ann. § 10-7-504(h)(2). The State's interest in maintaining the confidentiality of persons directly involved in the execution process thus outweighs the plaintiffs' need for the discovery as requested. In lieu of personal identifying information, defendants would agree to identify each "John Doe" by position title and a description of education, training, and employment.

INTERROGATORY NO. 2

Identify each John Doe Pharmacist known to Defendants described in paragraphs 28, 37, 48, 111, 120, 132, 133, 134, 139, 277, 298, 304, 306, 307, and 308 of the Amended Complaint. If the John Doe Pharmacist is not employed by the State of Tennessee, identify the business address where service of the summons may be had.

RESPONSE: Objection. The identity of the individual described in this interrogatory is neither relevant nor material to the plaintiffs' ability to challenge the protocol employed in executing a sentence of death and is specifically deemed confidential under state law. *See* Tenn. Code Ann. 10-7-504(h); Tenn. R. Civ. P. 26.02(1). Such information is also subject to redaction "wherever possible" pursuant to Tenn. Code Ann. § 10-7-504(h)(2). The State's interest in maintaining the confidentiality of persons directly involved in the execution process thus outweighs the plaintiffs' need for the discovery as requested. In lieu of personal identifying information, defendants would agree to identify each "John Doe" by position title and a description of education, training, and employment.

INTERROGATORY NO. 3

Identify each John Doe Medical Examiner known to Defendants described in paragraph 29, 77, and 90 of the Amended Complaint. If the John Doe Medical Examiner is not employed by the State of Tennessee, identify the business address where service of the summons may be had.

RESPONSE: Objection. The identity of the individual described in this interrogatory is neither relevant nor material to the plaintiffs' ability to challenge the protocol employed in executing a sentence of death and is specifically deemed confidential under state law. *See* Tenn. Code Ann. 10-7-504(h); Tenn. R. Civ. P. 26.02(1). Such information is also subject to redaction "wherever possible" pursuant to Tenn. Code Ann. § 10-7-504(h)(2). The State's interest in maintaining the confidentiality of persons directly involved in the execution process thus outweighs the plaintiffs' need for the discovery as requested. In lieu of personal identifying information, defendants would agree to identify each "John Doe" by position title and a description of education, training, and employment.

INTERROGATORY NO. 4

Identify each John Doe Medical Personnel known to Defendants described in paragraph 30 of the Amended Complaint. If the John Doe Medical Personnel is not employed by the State of Tennessee, identify the business address where service of the summons may be had.

RESPONSE: Objection. The identity of the individual described in this interrogatory is neither relevant nor material to the plaintiffs' ability to challenge the protocol employed in

executing a sentence of death and is specifically deemed confidential under state law. *See* Tenn. Code Ann. 10-7-504(h); Tenn. R. Civ. P. 26.02(1). Such information is also subject to redaction "wherever possible" pursuant to Tenn. Code Ann. § 10-7-504(h)(2). The State's interest in maintaining the confidentiality of persons directly involved in the execution process thus outweighs the plaintiffs' need for the discovery as requested. In lieu of personal identifying information, defendants would agree to identify each "John Doe" by position title and a description of education, training, and employment.

INTERROGATORY NO. 5

Identify each John Doe Executioner described in paragraph 31, 60, 73, 74, 193, 208, 214, 218, 219, 224, 225, 235, and 237 of the Amended Complaint. If the John Doe Executioner is not employed by the State of Tennessee, identify the business address where service of the summons may be had.

RESPONSE: Objection. The identity of the individual described in this interrogatory is neither relevant nor material to the plaintiffs' ability to challenge the protocol employed in executing a sentence of death and is specifically deemed confidential under state law. *See* Tenn. Code Ann. 10-7-504(h); Tenn. R. Civ. P. 26.02(1). Such information is also subject to redaction "wherever possible" pursuant to Tenn. Code Ann. § 10-7-504(h)(2). The State's interest in maintaining the confidentiality of persons directly involved in the execution process thus outweighs the plaintiffs' need for the discovery as requested. In lieu of personal identifying information, defendants would agree to identify each "John Doe" by position title and a description of education, training, and employment.

INTERROGATORY NO. 6

Please identify each person who has undertaken, intends to undertake, or will undertake any action in assisting in manufacturing, compounding, distributing, procuring, possessing, storing and/or administering pentobarbital to be used by you in connection with the Tennessee Lethal Injection Protocol (Exhibit A) to the Amended Complaint with respect to any of the Plaintiffs.

RESPONSE: Objection. The identity of the individual described in this interrogatory is neither relevant nor material to the plaintiffs' ability to challenge the protocol employed in executing a sentence of death and is specifically deemed confidential under state law. *See* Tenn. Code Ann. 10-7-504(h); Tenn. R. Civ. P. 26.02(1). Such information is also subject to redaction "wherever possible" pursuant to Tenn. Code Ann. § 10-7-504(h)(2). The State's interest in maintaining the confidentiality of persons directly involved in the execution process thus outweighs the plaintiffs' need for the discovery as requested. In lieu of personal identifying information, defendants would agree to identify each "John Doe" by position title and a description of education, training, and employment.

The defendants also object to the request as seeking information regarding the state of mind of third parties and regarding future events not capable of being known by the defendants.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter

Andrew H. Smith
Assistant Attorney General
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-4349
B.P.R. No. 26594

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing through electronic service on December 4, 2013, and the proposed order referenced herein, on the counsel for the parties as follows:

Mr. Stephen M. Kissinger
Ms. Susanne Bales
Federal Defender Services of Eastern, Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929

Mr. C. Eugene Shiles, Jr.
SPEARS, MOORE, REBMAN & WILLIAMS
P.O. Box 1749
Chatanooga, TN 37401

Andrew H. Smith

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, PART I
TWENTIETH JUDICIAL DISTRICT, STATE OF TENNESSEE

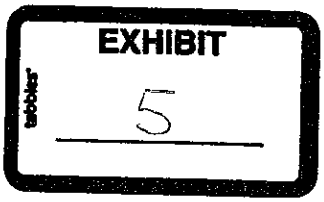
STEPHEN WEST, et al.,	)	
	)	
Plaintiffs,	)	
vs.	)	No. 13-1627-I
	)	
DERRICK SCHOFIELD, et al.,	)	Chancellor Bonnyman
	)	
Defendants.	)	

STATE'S MOTION FOR AUTHORIZATION OF RULE 9 INTERLOCUTORY APPEAL

The defendants, pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, hereby file this motion for permission to file an interlocutory appeal. Interlocutory appellate review is necessary because the trial court has ordered the State to disclose the identities of its execution team, a decision from which the State has no other appellate remedy and which will unnecessarily burden the State's ability to enforce its laws compared to a readily available alternative.

Facts and Procedural Background

On November 26, 2013, the plaintiffs served interrogatories on the defendants requesting the identities of the previously undisclosed members of its execution team. The defendants objected on December 4, 2013, asserting that the information the plaintiffs sought was irrelevant and privileged. On December 5, 2013, this Court entered



a protective order, agreed to by all the parties, providing, *inter alia*, that the identities of the State's execution team shall not be revealed unless essential to the litigation.

Eight days later, the plaintiffs filed a motion to compel the defendants to provide the identities of its execution team, without any explanation in the motion as to why this information was essential to the litigation. The defendants opposed this motion, contending that the information sought was irrelevant, privileged, and protected by both statute and the court's protective order because it was not essential to the litigation. On January 3, 2014, this Court conducted a hearing, at the conclusion of which the Court found the information requested to be relevant and directed the State to reveal it within 20 days. On January 8, 2014, the Court issued an order compelling the defendants to provide the requested discovery on January 23, 2014.

Legal Argument

Interlocutory appellate review is necessary because the State's interest in the enforcement of its laws will be irrevocably hindered should the State be forced to disclose the identities of its execution team.

An interlocutory appeal requires the permission of both the trial court and the appellate court. *See* Tenn. R. App. P. 9(b) and (c). In determining whether to grant interlocutory review, the courts must consider:

> (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration

> to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

Tenn. R. App. P. 9(a); *see State v. McKim*, 215 S.W.3d 781, 789 (Tenn. 2007).

(A) This application should be granted to prevent irreparable injury to the State.

Under this factor, the critical component is typically whether the challenged order would have a "final and irreparable effect on the rights of the parties." *State v. Gawlas*, 614 S.W.2d 74, 75 (Tenn. Crim. App. 1980) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)). Here, the defendants of course respect the Curt's ruling on the motion to compel, but an interlocutory appeal is a necessary avenue for its review. This is because revelation of the identities of the State's execution team will present final and irreparable injury to the State. Once the identities are revealed, they cannot be un-revealed. The State will have no appellate remedy once these identities are disclosed. Interlocutory appeal is thus the only remedy under which the State can obtain appellate review of the Court's decision.

The State has a vital interest in the confidentiality of its execution team, an interest which has both been codified by statute and recognized by the Court of Appeals. *See* Tenn. Code Ann. 10-7-504(h); *Workman v. Campbell*, No. M2001-01445-COA-R3-CV, 2002 WL 869963, at *6 (Tenn. Ct. App. May 7, 2002). Given the State's considerable interest in the protection of this information and the irreparable harm to

the State that will occur should the State be forced to disclose it, an interlocutory appeal is appropriate.

(B) This application is properly granted because the State has a strong likelihood of success on the merits.

The parties' agreed protective order places a high protection on the identities of the execution team, requiring a showing that such information would be "essential" to the proceedings at issue. (*See* Protective Order, Para. B1.) Here, despite repeated requests from the State, the plaintiffs have failed to articulate why it would not be possible to conduct this litigation using the form of redacted identification that the State has offered to provide, a description of the parties' backgrounds, training and education. This procedure would allow the plaintiffs adequate opportunity to explore the respective qualifications of the execution team, and it in fact would provide more information to the plaintiffs than would be provided by the revelation of a mere identity with no additional information. To the extent further information is required it could be obtained by additional discovery. Indeed, this is method to which one counsel for the propounding plaintiffs in this case agreed to in a prior litigation. *See Harbison v. Little*, No. 3:06-cv-1206, D.E. Nos. 26, 92 (M.D. Tenn. 2007).

Similarly, Tenn. Code Ann. § 10-7-504(h) codifies the State's interest in protecting the confidentiality of the State's execution team. Section (h) classifies the information the plaintiffs seek as confidential. Section (h)(2) provides, "information made confidential by this subsection (h) shall be redacted *whenever* possible." (Emphasis

added). Here, the plaintiffs have not met the standard that they agreed should govern this very request. Thus, because it is possible to litigate the constitutionality of the state's lethal injection procedures without revealing the identities of the individuals involved in carrying out the process, the information the plaintiffs seek must be redacted pursuant to the parties agreed protective order and Tenn. Code Ann. § 10-7-504(h)(2).

Moreover, even if the identities sought were not protected by the protective order and statute, the plaintiff's interest in receiving this information is substantially outweighed by the State's interest in protecting it.

There is no sharp line of demarcation that separates the field in which discovery may be freely pursued from that in which it is forbidden, and analyzing whether a discovery request is proper requires the balancing of numerous considerations. *Johnson*, 146 S.W.3d at 605. These considerations include:

> [R]elevancy or reasonable possibility of information leading to discovery of admissible evidence; privilege; protection of privacy, property and secret matters; and protection of parties or person from annoyance, embarrassment, oppression, or undue burden or expense.

Id.

Under the doctrine that has been labeled as both "executive" and "state secret" privilege, federal courts have used a balancing test similar to the one set forth in *Johnson* to determine whether confidential government information is discoverable.[1] Where the State's interest in protecting confidential information outweighs the movant's interest in

[1] As the plaintiffs noted in page 8 of their *Motion to Compel*, the Tennessee Supreme Court frequently looks to comparable federal rules for guidance in interpreting rules of civil procedure. *See Williamson County v. Twin Lawn Dev. Co.*, 498 S.W.2d 317, 320 (Tenn. 1973.)

obtaining the information discovered, the information has been protected. *United States v. Reynolds*, 345 U.S. 1, 11 (1953) ("executive privilege"); *Pack v. Beyer*, 157 F.R.D. 226, 232 (D. N.J. 1994) ("state secret" privilege). In the context of a discovery request, "the Court must balance the public interest in protecting the confidentiality of the information against the need for the discovery sought." *Pack*, 157 F.R.D. at 232 (citing *Reynolds*, 354 U.S. at 11). In *Pack*, the district court denied the plaintiffs' motion to compel production of prison documents related to their placement in a maximum-security setting, finding that the State's interest in the "confidential flow of information" within the prison outweighed the plaintiffs' interest in obtaining the documents. *Pack*, 157 F.R.D. at 223. Thus, the court determined the defendants were not required to provide the requested discovery.

The Tennessee Supreme Court has used this same balancing test set forth in the above-cited cases to determine the government's assertion of secrecy in the context of confidential informants. *See State v. Ostein*, 293 S.W.3d 519, 529 (Tenn. 2009) ("the trial court's decision whether to order the disclosure of a confidential informant calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his [case]"). The Supreme Court noted that although this balancing test has been referred to as "the informer's privilege," this privilege "is in reality the Government's privilege" to withhold from disclosure the identity of persons vital to the enforcement of its laws. *Id.* at 527. "The purpose of the privilege is the

furtherance and protection of the public interest in effective law enforcement." *Id.* (citing *Roviaro v. United States*, 353 U.S. 53, 59 (1957).[2]

Here, as in *Ostein*, the State has a compelling interest in maintaining the secrecy of the identities sought, because the protection of this information is vital to the enforcement of laws. The General Assembly recognized this interest by codifying Tenn. Code 10-7-504(h), which deems the identities of the execution team members to be "confidential." The State's compelling interest in the secrecy of this information is "for the security of the institution and for the safety of the staff members and their families. Members of the execution team and their families may be subject to retaliation and harassment if their identities became known throughout the institution or to the public at large." *Workman*, 2002 WL 869963, at *6 (quoting affidavit of then-Warden). As the Tennessee Court of Appeals observed, "(t)he Warden's concern regarding confidentiality of the execution team finds statutory support" in Tenn. Code. Ann. § 10-7-504(h)(1). *Id.* Thus, the State's interest in the protection of this information has been previously recognized by the Tennessee Court of Appeals and is established as a matter of law.[3]

The plaintiffs contend that the agreed protective order mitigates the State's interest in declining to disclose the identifying information. As previously noted, this

[2] The Court of Appeals has noted the existence of the state-secret privilege. *See Schneider v. City of Jackson*, 2006 WL 1644369 at *13 n.8 (Tenn. Ct. App. Jan. 17, 2006), *overruled on other grounds by Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007). While the Tennessee Court of Appeals has noted the inexactitude of the privilege's nomenclature (*see Schneider*, 2006 WL 1644369, at *13), the balancing test used to determine the discoverability of confidential information remains identical under any formulation, as do the purposes behind its existence.

argument overlooks the language in the protective order protecting identities from disclosure except where essential. Moreover, the plaintiff's argument overlooks that the parties to be identified may choose to discontinue their role in the execution process should their identities be revealed to opposing parties. This concern is particularly strong with regard to the contractors or volunteers directly involved in executing a death sentence or producing or providing chemicals for use in carrying out a death sentence, including the pharmacy or pharmacist providing pentobarbital, a substance not readily available from other sources. Indeed, the plaintiffs have yet to articulate any other interest in obtaining this identity.

Furthermore, the universe of individuals entitled to receive the information addressed within the protective order, which includes the counsel and staff for five different legal offices, as well as any potential court reporters and experts consulted, is not insubstantial. Given the large number of parties and counsel involved in this suit, the chance of an accidental leak of information is foreseeable and its source would be untraceable. While this risk might be acceptable if there were no alternative through which to proceed, the defendants' offer to redact the identifying information of these individuals eliminates these risks without prejudicing the plaintiffs.

Specifically in the area of corrections, courts have consistently recognized the need to give deference to correctional administrators in maintaining the security of their

[3] The defendants request that this Court take judicial notice of the portions of Warden's affidavit recited by the Court of Criminal Appeals in *Workman*, which were originally filed in Part III of this Court. *Workman v. Little*, Davidson County Chancery Court, No. 01-966-III.

institutions. *See, e.g. Turner v. Safely*, 482 U.S. 78, 84 (1987). Other courts have determined that maintaining as confidential the identities of the execution-team members is rationally related to the security needs of correctional institution. *See Thompson v. Department of Corrections*, 18 P.3d 1198, 1207 (Cal. 2001); *Bryan v. State*, 753 So.2d 1244, 1250 (Fla. 2000) (holding exemption of execution team identities from public disclosure laws valid in order to protect security of the prison). Maintaining the confidentiality of the execution-team members is critical to the safety of that team, the State's ability to employ such a team members and thereby carry out the validly enacted laws of the state, and to the security of the correctional institutions.

While the State has a compelling interest in the nondisclosure of its execution team, the plaintiffs have not offered a sufficient basis for the disclosure of identities of the State's execution team, much less a basis greater than the State's interest in non-disclosure. While the training, qualification, and experience necessary to be employed as part of the execution team may be relevant to the petitioner's claims, the identities of the specific individuals carrying out the State's protocol in a given case are not. Indeed, the identities of these individuals are subject to change. Thus, the individuals that may be identified at this time may differ from those individuals who eventually carry them out. This is particularly so where none of the plaintiffs is scheduled for execution within the next nine months. Notwithstanding these considerations, the State has offered to disclose the background, education, and training of each person for whom identifying information is sought, in such a manner that the plaintiffs would not be prejudiced by

lacking the individual identities of the defendants. Thus, there is no weighing of interests to be done under the *Johnson/Ostein* balancing framework because the defendants have shown a substantial risk of harm to its ability to enforce its judgments, whereas the plaintiffs make no showing of a need for the identities in order to adjudicate their claims.

(C) This application should be granted to create a uniform body of law.

Factor three also weighs in favor of an interlocutory appeal. Because this issue is one of first impression in Tennessee, interlocutory appeal would provide the Tennessee Court of Appeals the opportunity to create a uniform body of law regarding the State's assertion of privilege and whether the identities of the State's execution team are protected.

In light of the forgoing, the State respectfully requests that this Court authorize its discretion to grant an interlocutory appeal under Tenn. R. App. P. 9. The possible extensive public policy implications of the Court's decision warrant review from an appellate court, which will be forever denied to the State should permission not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by electronic service, on this the 13th day of January, 2014, to the following:

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IN THE CHANCERY COURT PART I, FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, NASHVILLE AND DAVIDSON COUNTY

STEPHEN MICHAEL WEST, et al.,

Plaintiffs,

v.

DERRICK D. SCHOFIELD, et al.,

Defendants.

Case No. 13-1627-I

FILED
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CLERK & MASTER
DAVIDSON COUNTY CHANCERY COURT
B.C. & M.

ORDER STAYING THE STATE'S DISCOVERY OBLIGATION UNTIL THE MOTION FOR RULE 9 INTERLOCUTORY APPEAL IS HEARD

The defendants, State of Tennessee, filed a Motion for Authorization of Rule 9 Interlocutory Appeal. The State also seeks a stay of its discovery obligations, which are the subject of its proposed appeal.

The State's discovery obligation is stayed until the motion for a Rule 9 Interlocutory Appeal is heard. The State should set its Motion for Authorization of a Rule 9 Interlocutory Appeal as soon as the Local Rules of the Court will allow.

CLAUDIA C. BONNYMAN, CHANCELLOR
CHANCERY COURT, PART I

EXHIBIT
6

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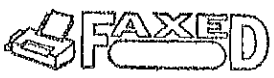

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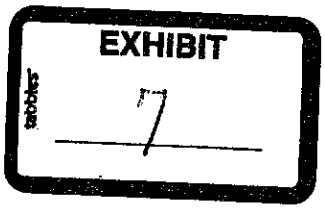
IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 13-1627-I
	)	Chancellor Bonnyman
DERRICK D. SCHOFIELD, *et al.*,	)	Death Penalty Case
	)	
Defendants.	)	

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT



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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST, *et al.*,	)	
	)	
Plaintiffs,	)	
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v.	)	No. 13-1627-I
	)	Chancellor Bonnyman
DERRICK D. SCHOFIELD, *et al.*,	)	Death Penalty Case
	)	
Defendants.	)	

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Come the Plaintiffs, Stephen Michael West, Billy Ray Irick, Nicholas Todd Sutton, David Earl Miller, and Olen Edward Hutchison, and hereby file this Second Amended Complaint against the above-named defendants, showing the Court as follows:

INTRODUCTION

1. Plaintiff, Stephen Michael West, is a condemned inmate under a sentence of death rendered in Union County, Tennessee. He is currently incarcerated at Riverbend Maximum Security Institution in Nashville, Tennessee ("RMSI"). Plaintiff West is confronted with an execution date of February 10, 2015.

2. Plaintiff, Billy Ray Irick, is a condemned inmate under a sentence of death rendered in Knox County, Tennessee. He is currently incarcerated at RMSI. Plaintiff Irick is confronted with an execution date of October 7, 2014.

3. Plaintiff, Nicholas Todd Sutton, is a condemned inmate under a sentence of death rendered in Morgan County, Tennessee. He is currently incarcerated at RMSI. Plaintiff Sutton is confronted with an execution date of November 17, 2015.

4. Plaintiff, David Earl Miller, is a condemned inmate under a sentence of death rendered in Knox County, Tennessee. He is currently incarcerated at RMSI. Plaintiff Miller is confronted with an execution date of August 18, 2015.

5. Plaintiff, Olen Edward Hutchison, is a condemned inmate under a sentence of death rendered in Campbell County, Tennessee. He is currently incarcerated at RMSI. Plaintiff Hutchison is confronted with an execution date of May 12, 2015.

6. Tennessee Code Annotated § 40-23-114 (2014) provides:

> § 40-23-114. Capital punishment; electrocution; lethal injection
>
> (a) For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.
>
> (b) Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection.
>
> (c) The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.
>
> (d) If lethal injection or electrocution is held to be unconstitutional by the Tennessee supreme court under the Constitution of Tennessee, or held to be unconstitutional by the United States supreme court under the United States Constitution, or if the United States supreme court declines to review any judgment holding lethal injection or electrocution to be unconstitutional under the United States Constitution made by the Tennessee supreme court or the United States court of appeals that has jurisdiction over Tennessee, or if the Tennessee supreme court declines to review any judgment by the Tennessee court of criminal appeals holding lethal injection or electrocution to be unconstitutional under the United States or Tennessee constitutions, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution. No sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Tennessee or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

(e) For any person who commits an offense or has committed an offense for which the person is sentenced to the punishment of death, the method of carrying out the sentence shall be by lethal injection unless subdivision (e)(1) or (e)(2) is applicable. If subdivision (e)(1) or (e)(2) is applicable, the method of carrying out the sentence shall be by electrocution. The alternative method of execution shall be used if:

(1) Lethal injection is held to be unconstitutional by a court of competent jurisdiction in the manner described in subsection (d); or

(2) The commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.

7. On September 27, 2013, the Tennessee Department of Correction issued its Execution Procedures for Lethal Injection (hereinafter "Lethal Injection Protocol"). The Lethal Injection Protocol constitutes a substantial change from the previous protocol. The Lethal Injection Protocol provides that Plaintiffs' execution shall be carried out by the injection of a single drug, pentobarbital. A copy of the Lethal Injection Protocol is attached hereto as Plaintiffs' Exhibit A.

8. As to exhaustion of administrative remedies, on October 1, 2013, shortly after Tennessee adopted the Lethal Injection Protocol, Plaintiffs filed a grievance, objecting to the use of the Lethal Injection Protocol for their executions. The grievances were denied and Plaintiffs timely appealed. The appeals were denied.

9. On May 22, 2014, the Tennessee General Assembly passed a law, effective July 1, 2014, providing that if ingredients for a lethal injection execution are unavailable then the method of carrying out an execution shall be by electrocution. 2014 Tenn. Laws Pub. Ch. 1014 (S.B. 2580); Tenn. Code Ann. § 40-23-114(e) (2014). Tennessee's current Electrocution Protocol is attached hereto as Exhibit B.

10. On or around May 28, 2014, Plaintiffs invoked the Tennessee Department of Corrections Inmate Grievance Procedures to assert that any attempt to electrocute them would violate their rights under, among other constitutional provisions: (1) Article I, §§ 8, 16, and 32 of the Tennessee Constitution; and (2) the Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

11. On or around July 16, 2014, the grievance process concluded when the Tennessee Department of Corrections Deputy Commissioner of Operations agreed with prior grievance decisions denying Plaintiffs relief.

12. The Tennessee Attorney General has sought execution dates for all Plaintiffs and Intervening Plaintiffs.

13. Plaintiffs have not elected a method of execution. Accordingly, under Tennessee Code Annotated § 40-23-114(a) and (b), their sentences will be carried out by lethal injection. If the lethal injection chemicals are unavailable, their sentences will be carried out by electrocution. 2014 Tenn. Laws Pub. Ch. 1014 (S.B. 2580); Tenn. Code Ann. § 40-23-114(e) (2014).

JURISDICTION AND VENUE

14. Venue is proper in this Court because Plaintiffs are incarcerated at Riverbend Maximum Security Institution, in this county; the Defendants intend to procure and inject Plaintiffs with pentobarbital, or alternatively, to electrocute Plaintiffs, and thereby execute them in this county. Accordingly, the events giving rise to this Second Amended Complaint have occurred and will occur in this county.

15. This action arises under Tennessee Constitution Article 1, §§ 2, 8, 16, 17, and Article VI, § 2 of the United States Constitution, and, the First, Eighth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and state and federal laws as set forth in Lethal Injection Count V.

16. The Eighth Amendment prohibits cruel and unusual punishment, for example, 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 (1878)); *Gregg*, 428 U.S. at 170.

17. Subjecting individuals to a future risk of harm can qualify as cruel and unusual punishment. *Baze v. Rees*, 553 U.S. 35, 49 (2008). To prevail on an Eighth Amendment claim there must be a "substantial risk of serious harm," or an "objectively intolerable risk of harm." *Baze*, 553 U.S. at 50.

18. The prohibition against cruel and unusual punishments is informed by the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

19. This Court has jurisdiction pursuant to Tenn. Code Ann. §§ 29-14-103, 29-14-113.

PARTIES

20. Plaintiff Stephen Michael West is a United States citizen. He is a death-sentenced prisoner residing in Davidson County at RMSI and in the custody of the Tennessee Department of Correction.

21. Plaintiff Billy Ray Irick is a United States citizen. He is a death-sentenced prisoner residing in Davidson County at RMSI and in the custody of the Tennessee Department of Correction.

22. Plaintiff Nicholas Todd Sutton is a United States citizen. He is a death-sentenced prisoner residing in Davidson County at RMSI and in the custody of the Tennessee Department of Correction.

23. Plaintiff David Earl Miller is a United States citizen. He is a death-sentenced prisoner residing in Davidson County at RMSI and in the custody of the Tennessee Department of Correction.

24. Plaintiff Olen Edward Hutchison is a United States citizen. He is a death-sentenced prisoner residing in Davidson County at RMSI and in the custody of the Tennessee Department of Correction.

25. Defendant Derrick Schofield is the Commissioner of the Tennessee Department of Correction. Plaintiffs sue Commissioner Schofield in his official capacity. Defendant Schofield will oversee the administration of Plaintiffs' executions at RMSI (Plaintiffs' Exhibits A and B). Defendant Schofield is a state actor acting under color of state law, and his actions in seeking to

execute and/or executing Plaintiffs under Exhibits A and B, as described *infra* violate Plaintiffs' constitutional rights, as described *infra*.

26. Defendant Wayne Carpenter is the Warden of RMSI, located in Nashville, Tennessee, in this county and where Plaintiffs' executions will occur. Plaintiffs sue Warden Carpenter in his official capacity. Defendant Carpenter is directly in charge of executing Plaintiffs at RMSI. His role in Plaintiffs' executions is described in the Execution Protocols (Plaintiffs' Exhibits A and B). Defendant Carpenter is a state actor acting under color of state law, and his actions in seeking to execute or executing Plaintiffs under the Execution Protocols as described *infra* violate their constitutional rights, as described *infra*.

27. Defendant Tony Mays is the Deputy Warden of RMSI, located in Nashville, Tennessee, in this county and where Plaintiffs' executions will occur. Plaintiffs sue Deputy Warden Mays in his official capacity. Defendant Mays assists the Warden in performing execution procedures and substitutes for the Warden if he is unable to perform his duties. His role in Plaintiffs' executions is described in the Execution Protocols (Plaintiffs' Exhibits A and B). Defendant Mays is a state actor acting under color of state law, and his actions in seeking to execute or executing Plaintiffs under the Execution Protocols as described *infra* violate their constitutional rights, as described *infra*.

28. Defendant Jason Woodall is the Deputy Commissioner of Operations. Plaintiffs sue Deputy Commissioner Woodall in his official capacity. Defendant Woodall is a state actor acting under color of state law. Defendant Woodall will participate in Plaintiffs' executions, as described in the Execution Protocols (Plaintiffs' Exhibits A and B). Defendant Woodall's

actions in seeking to execute or executing Plaintiffs under the Execution Protocols as described *infra* violate their constitutional rights, as described *infra*.

29. Defendant Tony Parker is the Assistant Commissioner of Prisons. Plaintiffs sue Deputy Commissioner Parker in his official capacity. Defendant Parker is a state actor acting under color of state law. Defendant Parker will work directly with Defendant Schofield in overseeing Plaintiffs' executions and performing assigned duties (Plaintiffs' Exhibits A and B). Defendant Parker's actions in seeking to execute or executing Plaintiffs under the Execution Protocols as described *infra* violate their constitutional rights, as described *infra*.

30. Defendants John Doe Physicians 1-100 are any and all medical doctors involved in the prescription, procurement and/or administration of pentobarbital for use upon Plaintiffs without the purpose to heal and without a legitimate medical reason, but to cause Plaintiffs' deaths. In such capacity, they are state actors acting under color of state law, and their actions in seeking to execute or executing Plaintiffs under the Lethal Injection Protocol as described *infra* violate federal law and/or Plaintiffs' constitutional rights, as described *infra*. They are sued in their official capacity as state actors. Procurement and dispensing of pentobarbital are described in the Lethal Injection Protocol (Plaintiffs' Exhibit A p.36).

31. Defendant John Doe Physician 1 will perform a "cut-down procedure" in a manner within his unlimited discretion in the event a catheter cannot be successfully inserted by an EMT (Plaintiffs' Exhibit A p.41). Defendant John Doe Physician 1, however, also has unlimited discretion to use "a different method to find an IV site" instead of performing a "cut-down procedure." (Plaintiffs' Exhibit A p.67). Defendant John Doe Physician 1 will participate

in Plaintiffs' executions as described in the Lethal Injection Protocol (Plaintiffs' Exhibit A pp.20, 41, 63, 65, 67). Defendant John Doe Physician 1 is a state actor acting under color of state law, and his/her actions in seeking to execute or executing Plaintiffs under the Lethal Injection Execution Protocol as described *infra* violate federal law and/or Plaintiffs' constitutional rights, as described *infra*.

32. Defendants John Doe Pharmacists 1-100 are any and all persons involved in procuring, prescribing, dispensing, and/or compounding pentobarbital for use upon Plaintiffs without the purpose to heal and without a legitimate medical reason, but to cause Plaintiffs' deaths. Procurement and dispensing of pentobarbital are described in the Lethal Injection Protocol (Plaintiffs' Exhibit A p.36). Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Plaintiffs under the Lethal Injection Protocol as described *infra* violate federal law and/or Plaintiffs' constitutional rights, as described *infra*. They are sued in their official capacity as state actors.

33. Defendants John Doe Medical Examiners 1-100 are any and all medical personnel involved in the transportation of Plaintiffs, and/or Plaintiffs' bodies to the State Medical Examiner, and/or the "examination and release" (Plaintiffs' Exhibit A p.66) of Plaintiffs and/or Plaintiffs' bodies after Plaintiffs are pronounced "deceased" by Physician 1 (Plaintiffs' Exhibit A p.65). Such Defendants may include, but are not limited to, Medical Examiner staff and the Medical Examiner who will participate in Plaintiffs' executions as described in the Lethal Injection Protocol (Plaintiffs' Exhibit A pp.65-66). Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Plaintiffs under the Lethal

Injection Protocol as described *infra* violate Plaintiffs' constitutional rights, as described *infra*. They are sued in their official capacity as state actors.

34. Defendants John Doe Medical Personnel 1-100 are any and all medical personnel involved in using, preparing, or otherwise handling Plaintiffs or pentobarbital in any attempt to administer pentobarbital upon Plaintiffs without the purpose to heal and without a legitimate medical reason, but to cause Plaintiffs' deaths. Such Defendants may include, but are not limited to, EMTs who will participate in Plaintiffs' execution as described in the Lethal Injection Protocol (Plaintiffs' Exhibit A pp.32, 40-44, 63-66). Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Plaintiffs under the Lethal Injection Protocol as described *infra* violate Plaintiffs' constitutional rights, as described *infra*. They are sued in their official capacity as state actors.

35. Defendants John Doe Executioners 1-100 are any and all other persons involved in preparing or otherwise handling Plaintiffs, or preparing, handling or using pentobarbital in any attempt to administer pentobarbital upon Plaintiffs. Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Plaintiffs under the Execution Protocol as described *infra* violate Plaintiffs' constitutional rights, as described *infra*. They are sued in their official capacity as state actors.

36. The State of Tennessee, through Defendants, seeks to execute Plaintiffs by lethal injection following the Lethal Injection Protocol as set forth in Plaintiffs' Exhibit A and as described *infra*.

37. The default method of execution prescribed by Tennessee law is lethal injection. Tenn. Code Ann. § 40-23-114 (2014).

38. If ingredients for a lethal injection execution are unavailable, Tennessee law requires execution by electrocution. 2014 Tenn. Laws Pub. Ch. 1014 (S.B. 2580); Tenn. Code Ann. § 40-23-114(e) (2014).

39. There are alternate methods by which Defendants can execute Plaintiffs in a manner that reduces the substantial risk of inflicting unnecessary and serious pain and/or lingering death alleged herein.

40. Alternate methods of execution are known to one or more Defendants.

41. To the extent that Defendants claim that any such method is either not "feasible" or is not "readily implemented," it is because either: (a) Defendants have prioritized considerations not protected by the constitutions of the State of Tennessee and/or the United States above the protections afforded Plaintiffs by Tennessee Constitution Article 1, § 16 and the Eighth and Fourteenth Amendments to the United States Constitution; or, (b) Defendants' carrying out of the executions of the Plaintiffs violates the evolving standards of decency by which the parties to the adoption of the Eighth Amendment to the Constitution of the United States originally intended the definition of the term "cruel and unusual punishment" to be determined.

42. To the extent relevant, each allegation made in this Second Amended Complaint, regardless of where it appears within said Second Amended Complaint, is made as to all causes of action.

LETHAL INJECTION CAUSES OF ACTION

DEFENDANTS' LETHAL INJECTION PROTOCOL[1]

43. The Lethal Injection Protocol (Plaintiffs' Exhibit A) will be used for Plaintiffs' executions.

44. Tennessee's Lethal Injection Protocol consists of administering sequential injections of pentobarbital (Plaintiffs' Exhibit A p.35).

45. Upon information and belief, pentobarbital must be prescribed by a practitioner for a legitimate medical purpose acting in the usual course of his profession and possessing a registration under the Controlled Substances Act.

46. Under the Lethal Injection Protocol, a physician's order will be written by one or more of the Defendant(s) John Doe(s) Physician(s) asking for Defendant(s) John Doe(s) Pharmacist(s) for pentobarbital which Defendants would intend to administer to Plaintiffs to cause their deaths (Plaintiffs' Exhibit A p.36).

47. Such a prescription is not issued for a legitimate medical purpose.

48. The Lethal Injection Protocol specifies that the Plaintiffs are to be injected with 100 ml of the barbiturate, pentobarbital, in a 50 mg/ml solution, for a total of 5 grams of pentobarbital (Plaintiffs' Exhibit A p.35).

49. The Lethal Injection Protocol provides instructions for the set-up and administration of 100 ml of pentobarbital solution (Plaintiffs' Exhibit A pp.38, 43-44).

---

[1]When "he" is used as a pronoun in place of the name of an as yet to be determined Defendant, it is gender neutral and may refer to either a male or female defendant.

50. No instructions are provided regarding the set-up, or administration of either more, or less, than 100 ml of pentobarbital solution.

51. The Lethal Injection Protocol allows "the chemical manufacturer [to] change the concentration of the chemical solution without notification" (Plaintiffs' Exhibit A p.36).

52. The only commercially-available source of pentobarbital is sold under the brand name of Nembutal®.

53. In July of 2011, Lundbeck instituted distribution controls to prevent the legitimate sale of Nembutal® to departments of corrections in states that use lethal injection for capital punishment.

54. In December, 2011, Lundbeck sold its interests in Nembutal® to Akorn Pharmaceuticals ("Akorn").

55. The only current FDA-approved source of Nembutal® is Akorn.

56. Akorn has retained Lundbeck's distribution controls.

57. All stocks of Nembutal® sold prior to the institution of the Lundbeck/Akorn controls have expired.

58. Defendants therefore have no legitimate and/or legal source of Nembutal®.

59. Any pentobarbital to be used in executing Plaintiffs will come from either: (a) the illegal importation of pentobarbital, a Schedule II controlled substance; or, (b) the compounding of pentobarbital by the "licensed pharmacy or pharmacist" set forth in the Lethal Injection Protocol (Plaintiffs' Exhibit A p.36).

60. In the past, Tennessee has obtained illegally-imported drugs for use in lethal injection.

61. On March 22, 2011, Tennessee Department of Correction remitted its entire supply of illegally imported Sodium Thiopental, a barbiturate and Class II controlled substance that it had acquired for the purposes of carrying out Tennessee's then three-drug protocol, to federal law enforcement.

62. On March 27, 2012, the United States District Court for the District of Columbia enjoined the federal Food and Drug Administration from permitting the Tennessee Department of Correction to acquire additional illegally imported Sodium Thiopental. *Beaty, et al. v. Food and Drug Administration, et al.*, No. 1:11-cv-00289-RJL, Docket Entry 24. That decision was affirmed on July 23, 2013. *Cook v. Food and Drug Administration*, 733 F.3d 1 (D.C. Cir. 2013).

63. Accordingly, Defendants cannot lawfully obtain and/or possess illegally imported pentobarbital for use in the Lethal Injection Protocol.

64. It is therefore alleged upon information and belief that Defendants will use compounded pentobarbital to execute Plaintiffs.

65. Compounding rules prohibit the duplication of commercially-available drugs. 21 U.S.C. § 353a.

66. The commercially available source of pentobarbital, Nembutal®, is available in a concentration of 50 mg/ml.

67. The "chemical manufacturer" may change the amount of pentobarbital the Plaintiffs will receive without notice to either the other Defendants (Plaintiffs' Exhibit A p.36) or the Plaintiffs.

68. If Defendants adhere to the Lethal Injection Protocol, there is a substantial risk that Plaintiffs will receive an amount of pentobarbital other than the 5 grams required under the protocol.

69. If Defendants adhere to the Lethal Injection Protocol, there is a substantial risk that Plaintiffs will receive an amount of pentobarbital unknown to Plaintiffs at any meaningful time before the Plaintiffs' executions.

70. The Lethal Injection Protocol does not address an individual prisoner's weight, medical condition and medical history as related to the dosage and/or method of administration of pentobarbital.

71. The Lethal Injection Protocol directs the Defendants to bring the lethal injection chemicals from the armory area to the Lethal Injection Room prior to an execution (Plaintiffs' Exhibit A, p.38).

72. Defendants prepare each chemical for being drawn into syringes (Plaintiffs' Exhibit A p.38).

73. Under the Lethal Injection Protocol, the following lethal injection chemicals are drawn into three syringes:

a.	Syringe 1 (red)	pentobarbital (50cc)
b.	Syringe 2 (red)	pentobarbital (50 cc)
c.	Syringe 3 (red)	saline

(Plaintiffs' Exhibit A pp.38, 44).

74. A second set of syringes (*i.e.*, the "blue" set) is not prepared "unless the primary dose proves insufficient." (Plaintiffs' Exhibit A p.38).

75. No time frame is given regarding administration of the drugs (Plaintiffs' Exhibit A p.44).

76. Under the Lethal Injection Protocol, two IV lines are prepared for simultaneous use. First, the prisoner's arms are securely restrained to the gurney. A tourniquet is placed around the limb or body part above the vein to be used. The Lethal Injection Protocol does not instruct or designate a person to remove the tourniquet.

77. The Defendant Executioners, the IV Team, inserts a catheter into the right arm, in the antecubital fossa area, and attaches a Solution Set line from a sodium chloride bag (located in the lethal injection room) to the catheter (Plaintiffs' Exhibit A pp.41-42).

78. The Lethal Injection Protocol contains other locations for insertion of the catheter if it cannot be inserted into a vein in the antecubital fossa area. The order of the locations is: forearm, wrist, back of the hand, top of the foot, ankle, lower leg, or other locations as determined by the Defendant Executioners, the EMTs (Plaintiffs' Exhibit A p.41).

79. The Lethal Injection Protocol directs that if "none of these veins are usable, the Defendant Physician is called into the Execution Chamber to perform a cut-down procedure" (Plaintiffs' Exhibit A p.41).

80. The Lethal Injection Protocol alleges that a cut-down is "an ultimate and last option" (Plaintiffs' Exhibit A p.20) but also allows the Defendant Physician to "choose[] a different method to find an IV site." (Plaintiffs' Exhibit A p.67).

81. The Lethal Injection Protocol is silent as to the Physician's qualifications, training and experience to perform such functions.

82. The Lethal Injection Protocol does not recommend the shortest possible length for the IV setup.

83. The Solution Sets are 85 inches long but may be purchased longer or shorter; extensions into the first port are 18 to 24 inches in length; extensions are added to each end of the Solution Set until it reaches the desired length; the ends reach from head to toe of the condemned inmate (Plaintiffs' Exhibit A p.40).

84. "The [IV] line is taped to the port (where the syringe is inserted) in place. The remainder of the line is placed out of the ports in the window[]" of the Lethal Injection Room and taped in place (Plaintiffs' Exhibit A p.40).

85. Tegaderm transparent dressing is placed over the catheter and the line is taped in place (Plaintiffs' Exhibit A p.42).

86. Under the Lethal Injection Protocol, the process is repeated for the left arm (Plaintiffs' Exhibit A pp.41-42).

87. Then the inmate's hands are taped in place, palms up, and Defendant IV Team Members leave the Execution Chamber (Plaintiffs' Exhibit A p.43).

88. Under the Lethal Injection Protocol, Defendant Warden is the only person in the Execution Chamber with the condemned prisoner.

89. Under the Lethal Injection Protocol, Defendant Warden gives the signal to proceed with the execution.

90. Defendant Executioner chooses the right or left IV line. The Executioner inserts and twists the first syringe (#1 red) into the extension line (Plaintiffs' Exhibit A p.43). The

Executioner then pushes the plunger of the #1 red with "slow, steady pressure" (Plaintiffs' Exhibit A p.44).

91. Should there be or appear to be swelling around the catheter or if there is resistance to the pressure being applied to the plunger, Defendant Executioner pulls the plunger back. If the extension line starts to fill with blood, the execution may proceed. If there is no blood, Defendant Executioner discontinues with this line. He starts the process on the other line with the back-up set of syringes starting with syringe #1 (blue) (Plaintiffs' Exhibit A p.44).

92. No instructions are provided to Defendant Executioner regarding the injection of the second syringe (#2 red), or the injection of the third syringe (#3 red). However, Defendant IV Team Members are to hand him the syringes and observe as he injects them.

93. After the third syringe has been injected, the Defendant Executioner is to open the line and allow a drop of 1-2 drops/second into the drip chamber (Plaintiffs' Exhibit A p.44).

94. Under the Lethal Injection Protocol, after a five-minute waiting period, Defendant Warden summons Defendant Physician to determine if the prisoner is dead (Plaintiffs' Exhibit A p.65).

95. The Lethal Injection Protocol does not state how Defendant Physician makes this determination, but Plaintiffs are informed and therefore believe that it is done by using a stethoscope to determine whether a heartbeat is present.

96. If Defendant Physician states that the prisoner is not dead, the process is repeated, beginning with preparation of the "blue" set of syringes (Plaintiffs' Exhibit A p.67).

97. If Defendant Physician states that the prisoner is dead, his body is provided to Defendant Medical Examiner and transported to the State Medical Examiner for "examination" and release (Plaintiffs' Exhibit A p.65-66).

98. Although the Lethal Injection Protocol is silent regarding whether the "examination" includes an autopsy, Defendants' past practice is to perform an autopsy of the body shortly after the execution unless an objection has been lodged.

LETHAL INJECTION COUNT I

VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND TENNESSEE CONSTITUTION ARTICLE 1, § 16 THROUGH ADHERENCE TO THE LETHAL INJECTION PROTOCOL

99. Plaintiff incorporates the preceding allegations.

100. The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. Punishments are cruel when they involve torture or a lingering death. *In re Kemmler*, 136 U.S. 436, 447 (1890). "[S]ubjecting individuals to a risk of [substantial,] future harm--not simply actually inflicting pain--can qualify as cruel and unusual punishment." *Baze v. Rees*, 553 U.S. 35, 49 (2008).

101. In *Baze v. Rees*, 553 U.S. at 48, the Supreme Court noted that death by firing squad did not constitute cruel and unusual punishment because it did not involve terror, disgrace or unnecessary ("superadded") pain.

A. Tennessee's Lethal Injection Protocol and Defendants' unwritten practices create a substantial risk of unnecessary pain and suffering in violation of the Eighth and Fourteenth Amendments.

102. Plaintiff incorporates the preceding allegations.

103. The Lethal Injection Protocol calls for two bolus injections of 2.5 grams of the barbiturate pentobarbital in rapid succession.

104. Defendants know or should know that Tennessee's Lethal Injection Protocol causes death by suffocation.

105. Barbiturates, such as pentobarbital, do not act directly to stop the heart, but rather, create a state known as hypoxia that, in turn, will eventually cause the cessation of rhythmic electrical activity in the heart, *i.e.*, death.

106. Two bolus injections of 2.5 grams of barbiturate in rapid succession is likely to cause hypoxia.

107. There is a substantial risk that the period of hypoxia caused by two bolus injections of 2.5 grams of barbiturate in rapid succession will not be sufficiently long to cause the cessation of electrical activity in the heart. In other words, Plaintiffs will not die.

108. The period of time required to cause the cessation of electrical activity in the heart (*i.e.*, death) through hypoxia is extremely difficult to predict.

109. The period of time required to cause the cessation of electrical activity in the heart (*i.e.*, death) through hypoxia can be markedly prolonged.

110. The time required to cause the cessation of electrical activity in the heart (*i.e.*, death) through hypoxia can be, and often is, longer than five minutes.

111. Even when the period of hypoxia is not sufficiently long to cause the cessation of electrical activity in the heart (*i.e.*, death), hypoxia will cause the heart to stop beating.

112. When the period of hypoxia is not sufficiently long to cause the cessation of electrical activity in the heart (*i.e.*, death), but long enough to cause the heart to stop beating, a heartbeat will not be present even though Plaintiffs are alive.

113. There is a substantial risk that, five minutes after the pentobarbital has been administered, Plaintiffs will have experienced hypoxia for a sufficient amount of time to cause the heart to stop beating, yet too short of a time to cause the cessation of electrical activity in the heart (*i.e.*, death).

114. There is a substantial risk that when Defendant Physician checks for Plaintiffs' heartbeat, as required by the Lethal Injection Protocol, the Plaintiffs will have experienced hypoxia for a sufficient amount of time to cause the heart to stop beating, yet too short of a time to cause the cessation of electrical activity in the heart (*i.e.*, death).

115. Under the circumstances described in the preceding paragraph, Defendant Physician will incorrectly declare Plaintiffs "deceased," even though they have not experienced the cessation of electrical activity in the heart and are still alive (Plaintiffs' Exhibit A p.20).

116. According to the Lethal Injection Protocol, should Defendant Physician pronounce Plaintiffs "deceased," they will not receive a second dose of pentobarbital but instead will be removed from the execution chamber and transported to the State Medical Examiner for examination (*i.e.*, autopsy) (Plaintiffs' Exhibit A p.20).

117. If after five minutes Plaintiffs have neither experienced hypoxia for a sufficient amount of time to cause the heart to stop beating, nor for a sufficient amount of time to cause the cessation of electrical activity in the heart (*i.e.*, death), Defendant Physician may detect Plaintiffs' heartbeat.

118. Under the circumstances described in the preceding paragraph, the Lethal Injection Protocol calls for the administration of two additional bolus injections of 2.5 grams of pentobarbital in rapid succession (Plaintiffs' Exhibit A pp.44, 65, 67).

119. Under the Lethal Injection Protocol, the second set of two syringes each containing 2.5 grams of pentobarbital will then be prepared (Plaintiffs' Exhibit A p.38-39).

120. Under the circumstances described in the previous three paragraphs, there is a substantial risk that Plaintiffs will experience hypoxia, but not the cessation of electrical activity in the heart (*i.e.*, death), even after the administration of the second set of syringes.

121. There is a substantial risk that Plaintiffs who have been hypoxic for a period of time sufficient to stop the heart, but not to cause the cessation of electrical activity in the heart (*i.e.*, death), will suffer severe and permanent damage to the brain and other organs.

122. Inflicting severe and permanent, but not immediately fatal, damage to Plaintiffs' brain and/or other organs through a period of hypoxia insufficient to cause the cessation of electrical activity in the heart (*i.e.*, death) violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

123. A Lethal Injection Protocol that causes death over a prolonged period of time by inflicting severe and permanent, but not immediately fatal, damage to Plaintiffs' brain and/or other organs violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

124. A Lethal Injection Protocol that requires the examination (*i.e.*, autopsy) of Plaintiffs who have incorrectly been pronounced "deceased" by Defendant Physician violates the

Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

125. There is a substantial risk that Plaintiffs who have suffered severe and permanent damage to the brain and/or other organs, but have not died, will be rendered incompetent under *Panetti v. Quarterman*, 551 U.S. 930 (2007) and *Ford v. Wainwright*, 477 U.S. 399 (1986), and any subsequent attempt to execute the Plaintiffs, regardless of means, violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

126. Defendant Schofield (and/or one or more other Defendants) knew or should have known each fact alleged in this Count, but has acted with deliberate indifference to the same.

127. The Lethal Injection Protocol therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

128. By adhering to the Lethal Injection Protocol, Defendants will violate the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16, and 42 U.S.C. § 1983.

B. Tennessee's Lethal Injection Protocol and Defendants' unwritten practices cause a lingering death in violation of the Eighth and Fourteenth Amendments.

129. Plaintiff incorporates the preceding allegations.

130. Tennessee's Lethal Injection Protocol calls for two intravenous injections of 2.5 grams of the barbiturate pentobarbital.

131. Defendants know or should know that Tennessee's Lethal Injection Protocol causes death by suffocation.

132. Two injections of 2.5 grams of pentobarbital or compounded pentobarbital will not act directly to stop Plaintiffs' hearts.

133. Two injections of 2.5 grams of pentobarbital will suppress Plaintiffs' breathing, creating a lack of oxygen to their hearts.

134. The lack of oxygen caused by two injections of 2.5 grams of pentobarbital will suppress the beating of Plaintiffs' hearts.

135. Under the Lethal Injection Protocol, after a five-minute waiting period, Defendant Warden summons Defendant Physician to determine if the prisoner is dead (Plaintiffs' Exhibit A p.65). Though the Lethal Injection Protocol does not state how the Physician makes this determination, Plaintiffs are informed and therefore believe that it is done by using a stethoscope to determine whether a heartbeat is present.

136. If a heartbeat is not present, the inmate is pronounced deceased by the Defendant Physician and the time that death is pronounced (Plaintiffs' Exhibit A p.65).

137. After the time of death is pronounced, Defendant Warden or designee announces the following: "The sentence of [the condemned inmate] has been carried out. Please exit." (Plaintiffs' Exhibit A p.65).

138. The average time between the end of the second injection of pentobarbital under Tennessee's Lethal Injection Protocol and the cessation of an inmate's detectable heartbeat will be more than eight minutes.

139. Tennessee Code Annotated § 68-3-501 establishes that death occurs in the State of Tennessee when: "an individual has sustained either: (1) Irreversible cessation of circulatory and

respiratory functions; or (2) Irreversible cessation of all functions of the entire brain, including the brain stem[.]"

140. A substantial percentage of inmates subjected to Tennessee's Lethal Injection Protocol can be successfully resuscitated 30 minutes or more after the cessation of detectable heartbeat.

141. An execution lasting almost 40 minutes or more after the second injection under Tennessee's Lethal Injection Protocol constitutes a lingering death.

142. An execution procedure that creates a substantial risk of producing a lingering death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States. *In re Kemmler*, 136 U.S. at 447. *See also Baze*, 553 U.S. at 100 (Thomas, J. concurring).

143. Defendants know, or should know, that Tennessee's Lethal Injection Protocol causes a lingering death.

144. Tennessee's Lethal Injection Protocol and Defendants' unwritten practices violate Plaintiffs' rights under the Eighth and Fourteenth Amendments.

145. By adhering to Tennessee's Lethal Injection Protocol, Defendants will violate the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

C. Tennessee's Lethal Injection Protocol and Defendants' unwritten practices disgrace a condemned inmate through the treatment of his still living body as if it were dead in violation of the Eighth and Fourteenth Amendments.

146. Plaintiffs incorporate the preceding paragraphs in their entirety.

147. According to Tennessee's Lethal Injection Protocol, after Defendant Warden has declared the prisoner's sentence "carried out," the prisoner is placed in the Medical Examiner's vehicle and taken from prison grounds (Plaintiffs' Exhibit A p.65).

148. In practice, within 30 minutes of the time the prisoner is declared "deceased" by Defendant Physician, when the prisoner is still alive under Tennessee law, he is taken from the execution site and/or subjected to other indignities inconsistent with his continuing life.

149. Treating Plaintiff as though he is dead, when he is alive under Tennessee law, is a form of disgrace prohibited by the Eighth Amendment. It denies his very humanity. *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878). *See also Trop v. Dulles*, 356 U.S. 86, 103-04 (1958) (Eighth Amendment prohibits the denial of citizenship as punishment).

150. Tennessee's Lethal Injection Protocol and Defendants' unwritten practices violate Plaintiffs' rights under the Eighth and Fourteenth Amendments.

151. Tennessee's Lethal Injection Protocol therefore violates the Eighth and Fourteenth Amendments to the United States Constitution, Tennessee Constitution Article 1, § 16, and 42 U.S.C. § 1983.

D. Tennessee's Lethal Injection Protocol and Defendants' unwritten practices deny a condemned inmate necessary medical treatment after his sentence has been carried out in violation of the Eighth and Fourteenth Amendments.

152. Plaintiffs incorporate the preceding paragraphs in their entirety.

153. Under Tennessee's Lethal Injection Protocol, Defendant Warden declares that the condemned inmate's sentence has been carried out when Defendant Physician announces the inmate "deceased."

154. Condemned inmates executed under Tennessee's Lethal Injection Protocol are not dead under Tennessee law when Defendant Warden announces that their executions have been carried out.

155. Condemned inmates subjected to Tennessee's Lethal Injection Protocol can be resuscitated through appropriate medical care.

156. The need for resuscitation of a condemned inmate whose sentence has been completed but who remains alive is a serious medical need.

157. Tennessee's Lethal Injection Protocol contains no provisions for the appropriate medical care of a condemned inmate whose sentence of death has been executed, but who remains alive under Tennessee law.

158. Defendants do not provide appropriate medical care to a condemned inmate whose sentence of death has been carried out in accordance with Tennessee's Lethal Injection Protocol, even though the inmate remains alive under Tennessee law.

159. The refusal to provide appropriate medical care to a condemned inmate whose sentence of death has been carried out violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

160. Tennessee's Lethal Injection Protocol and Defendants' unwritten practices violate Plaintiffs' rights under the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

161. Defendant Schofield (and/or one or more other Defendants) knew or should have known each fact alleged in this Count, but has acted with deliberate indifference to the same.

162. Tennessee's Lethal Injection Protocol therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

163. By adhering to the Lethal Injection Protocol, Defendants will violate the Eighth and Fourteenth Amendments to the United States Constitution, Tennessee Constitution Article 1, § 16, and 42 U.S.C. § 1983.

LETHAL INJECTION COUNT II

VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TENNESSEE CONSTITUTION ARTICLE 1, § 16 THROUGH ADHERENCE TO THE LETHAL INJECTION PROTOCOL WHICH WILL REQUIRE THE USE OF COMPOUNDED PENTOBARBITAL

164. Plaintiffs incorporate the preceding paragraphs in their entirety.

165. The only FDA-approved source of pentobarbital, a Schedule II drug, is sold under the brand name Nembutal®.

166. At all times relevant hereto until December of 2011, the only FDA-approved source of Nembutal® was the pharmaceutical company Lundbeck ("Lundbeck").

167. In July of 2011, Lundbeck instituted distribution controls to prevent the legitimate sale of Nembutal® to departments of corrections in states that use lethal injection for capital punishment.

168. In December, 2011, Lundbeck sold its interests in Nembutal® to Akorn Pharmaceuticals ("Akorn").

169. The only current FDA-approved source of Nembutal® is Akorn. Akorn has retained Lundbeck's distribution controls.

170. All stocks of Nembutal® sold prior to the institution of the Lundbeck/Akorn controls have expired.

171. Defendants therefore have no legitimate and/or legal source of Nembutal®.

172. Any pentobarbital to be used in executing Plaintiffs will come from either: (a) the illegal importation of pentobarbital, a Schedule II controlled substance; or, (b) the compounding of pentobarbital by the "licensed pharmacy or pharmacist" set forth in the Lethal Injection Protocol (Plaintiffs' Exhibit A p.36).

173. In the past, Tennessee has obtained illegally-imported drugs for use in lethal injection.

174. On March 22, 2011, Tennessee Department of Correction remitted its entire supply of illegally imported Sodium Thiopental, a barbiturate and Class II controlled substance that it had acquired for the purposes of carrying out Tennessee's then three-drug protocol federal law enforcement.

175. On March 27, 2012, the United States District Court for the District of Columbia enjoined the federal Food and Drug Administration from permitting the Tennessee Department of Correction to acquire additional illegally imported Sodium Thiopental. *Beaty, et al. v. Food and Drug Administration, et al.*, No. 1:11-cv-00289-RJL, Docket Entry 24. That decision was affirmed on July 23, 2013. *Cook v. Food and Drug Administration*, 733 F.3d 1 (D.C. Cir. 2013).

176. Accordingly, Defendants cannot lawfully obtain and/or possess illegally imported pentobarbital for use under the Lethal Injection Protocol.

177. It is therefore alleged upon information and belief that Defendants will use compounded pentobarbital to execute Plaintiffs.

A. There is a substantial risk that Defendants' will use APIs from non-FDA-approved sources in the compounding of pentobarbital for use in the Lethal Injection Protocol thereby producing pentobarbital that is non-sterile, impure, adulterated, sub-potent, and/or counterfeit.

178. Plaintiffs incorporate the preceding paragraphs in their entirety.

179. Traditional pharmacy compounding is a practice of the profession of pharmacy that uses Active Pharmaceutical Ingredients (APIs) and inactive ingredients obtained from FDA-approved facilities to meet the individual needs of a patient that cannot be met with an FDA-approved product.

180. A substantial percentage of compounding is performed by pharmacists who compound APIs and inactive ingredients obtained from non-FDA-approved facilities. This non-traditional compounding occurs within what is known as the "grey market."

181. Though Defendants have refused to reveal information regarding the source of pentobarbital to be used under the Lethal Injection Protocol, there is a substantial risk that Defendants will use pentobarbital from a source, *i.e.*, Defendant Pharmacist(s), that compounds APIs obtained from non-FDA-approved facilities, *i.e.*, on the grey market.

182. There is a substantial risk that the APIs obtained on the grey market in order to compound pentobarbital for use in the Lethal Injection Protocol are impure, adulterated, sub-potent, and/or counterfeit.

183. There is a substantial risk that grey market APIs will come from plants in China, India, and/or other countries lacking the oversight and control necessary to produce uncontaminated, unadulterated, fully potent, and genuine APIs.

184. Plants in China providing APIs to the grey market have manufactured pesticides using the same equipment that is used to make APIs.

185. Several studies, including a survey conducted by the FDA in 2001, report a high prevalence of quality problems with various pharmacy-compounded drugs, including sub-potency and contamination.

186. A survey of compounded drug products was conducted by the FDA in 2006 to explore these issues further. The results showed that thirty-three percent of the compounded drugs failed analytical testing using rigorously defensible testing methodology.

187. Testing by the Missouri Board of Pharmacy, which is the only state that regularly tests compounded drugs, reveals that compounded drugs fail tests for potency and purity on average around twenty-five percent of the time.

188. Defendants are unable to reduce said substantial risk because: (a) the manufacturer of the APIs are unknown; (b) the impurity profile of the APIs are unknown; and (c) the age, storage, the manufacturing environment, or the manufacturing method of the APIs are unknown.

189. Chemicals that have not have been manufactured in an FDA-registered facility under current Good Manufacturing Practices, have no assurance as to the quality variation from lot to lot or from container to container.

190. Within the grey market, secondary sources of APIs, *e.g.*, wholesalers and/or distributors, frequently use ambiguous and/or false statements in marketing APIs.

191. Statements from such secondary sources provide no reliable assessment of the purity, potency, identity, and/or lack of contamination of grey market APIs.

192. Intrinsic or extrinsic contaminants can be introduced during chemical manufacture or at any point during the chemical's synthesis.

193. There is a substantial risk that, Defendant Pharmacist is not capable of conducting testing to confirm the identity of the chemical and/or to identify the presence of harmful contaminants that pose an immediate safety threat if administered intravenously.

194. Defendants, including, but not limited to, Defendant Pharmacist(s), do not have the ability to trace the APIs back to the original manufacturers for information on quality, packaging, storage, shipment conditions and chains of custody from a chemical's cradle to grave.

195. A compounded drug that is contaminated or is sub-potent, is unpredictable and potentially dangerous increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

B. There is a substantial risk that Defendants will use pentobarbital compounded by a pharmacy producing pentobarbital that is non-sterile, impure, adulterated, and/or sub-potent.

196. Plaintiffs incorporate the preceding paragraphs in their entirety.

197. Pharmacy compounding is a practice by which a licensed pharmacist combines, mixes, or alters ingredients in response to a prescription to create a medication tailored to the medical needs of an individual patient.

198. Compounded drugs are not FDA-approved. This means that the FDA does not verify the quality, safety and effectiveness of compounded drugs. This also means that compounded drugs lack an FDA finding of manufacturing quality.

199. Consumers and health professionals rely on the drug approval process to ensure that drugs are safe and effective.

200. Though Defendants have withheld information regarding the source of pentobarbital to be used under the Lethal Injection Protocol, it is very likely that Defendant Pharmacist(s) will compound pentobarbital in a pharmacy or pharmacies located within the State of Tennessee.

201. Tennessee law regulates the process of compounding by defining what compounding means and requiring licensing. Tenn. Code Ann. §§ 63-10-204(4), 63-10-216; 53-11-301, 53-11-302.

202. Pentobarbital for injections may be compounded only in a "sterile" compounding facility.

203. Sterile compounding pharmacies located within the State of Tennessee are subject to certain federal and state regulations and relevant United States Pharmacopeia guidelines as adopted by the Tennessee Board of Pharmacy by rule or policy. *See, e.g.*, Tenn. Code Ann. § 63-10-216(c). Rules of Tenn. Board of Pharmacy, 1140-07.01 through 1140-07.08.

204. Though Tennessee law requires sterile compounding pharmacies to report all compounding activity, the State of Tennessee currently maintains no list of such pharmacies, nor of their activities.

205. Compounding pharmacies are not regularly inspected.

206. Errors that occur at compounding pharmacies may be caused by factors including: (a) use of substandard or contaminated APIs; (b) use of an incorrect formula to prepare a prescription drug; (c) maintenance of liquid dosages at inappropriately high temperatures, which may lead to chemical changes in the liquid; (d) failure to maintain a sterile facility and/or procedures; (e) failure to maintain manufacturing equipment in a sterile manner; (f) failure to

properly store compounded products; (g) mislabeling medication; and (h) labeling medication with improper dispensing instructions for patient use.

207. When errors occur in compounding sterile preparations, including pentobarbital, harm can result from microbial contamination, excessive bacterial endotoxins, variability in intended strength, unintended chemical and physical contaminants, and ingredients of inappropriate quality.

208. In 2013, the FDA inspected certain pharmacies that were known to have produced high-risk sterile drug products in the past and posed a significant threat to public health from poor sterile drug production practices. The FDA issued inspectional observations of sterile production issues to all 28 pharmacies engaged in sterile compounding that were inspected.

209. The 2013 FDA inspection of two Tennessee pharmacies revealed issues including inadequate sterilization to prevent contamination, a lack of testing of the product for identity, strength, quality and purity, and improper storage to prevent contamination.

210. There is a substantial risk Defendants will obtain compounded pentobarbital from a pharmacy that has issues similar to those described in the above paragraph.

211. A compounded drug that is contaminated or is sub-potent, is unpredictable and potentially dangerous and increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

C. Defendants' use of pentobarbital of a different concentration than required in the Lethal Injection Protocol creates a substantial risk of unnecessary pain and suffering.

212. The Lethal Injection Protocol specifies that the inmate is to be injected with 100 ml of the barbiturate, pentobarbital, in a 50 mg/ml solution, for a total of 5 grams of pentobarbital (Plaintiffs' Exhibit A p.35).

213. Compounding rules prohibit the duplication of commercially-available drugs. 21 U.S.C. § 353a.

214. The commercially available source of pentobarbital, Nembutal®, is available in a concentration of 50 mg/ml.

215. The compounded pentobarbital obtained by Defendants for use in the Lethal Injection Protocol will not have a concentration of 50 mg/ml.

216. The Lethal Injection Protocol permits "the chemical manufacturer [to] change the concentration of the chemical solution without notification" (Plaintiffs' Exhibit A p.36).

217. If Defendants use pentobarbital with a concentration of less than 50 mg/ml, there is a substantial risk that Plaintiffs will be administered less than the amount of pentobarbital set forth in the Lethal Injection Protocol.

218. A compounded drug that is contaminated or is sub-potent, is unpredictable and potentially dangerous and increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

D. Defendants' use of non-sterile, impure, adulterated, sub-potent, and/or counterfeit pentobarbital in the Lethal Injection Protocol creates a substantial risk of unnecessary pain and suffering.

219. Plaintiffs incorporate the preceding paragraphs in their entirety.

i. Bacterial and fungal contamination

220. Both bacteria and fungus are among the impurities commonly found in compounded injectable drugs such as pentobarbital.

221. Bacterial and/or fungal contamination will alter important attributes of the pentobarbital used in Plaintiffs' executions, including final pH.

222. There is a substantial risk that alteration of the final pH of the pentobarbital used in Plaintiffs' executions will create instability and/or incompatibility with human blood.

223. There is a substantial risk that, should the pH of the pentobarbital used in Plaintiffs' executions be incorrect, Plaintiffs will experience a burning sensation as it is being injected.

224. There is a substantial risk that, should the pH of the pentobarbital used in Plaintiffs' executions be incorrect, it could form precipitates, or solid particles, of drug and other substances.

225. Should solid, particulate matter of any kind be present in the pentobarbital used to execute the Plaintiffs, there is a substantial risk that Plaintiffs will suffer unnecessary pain and suffering upon injection of the solution, including, but not limited to, the pain associated with a pulmonary embolism.

226. Bacterial and/or fungal contamination in compounded injectable solution produces endo-toxins and/or exo-toxins.

227. Endo-toxins and/or exo-toxins contained in compounded injectable solution can cause immediate and painful reactions associated with septic shock, including, but not limited to, a sudden rise in body temperature, a precipitous drop in blood pressure and seizure.

228. Bacteria and/or fungi commonly found in compounded injectable solution are growing organisms.

229. The presence of growing organisms accelerates chemical degradation.

230. Chemical degradation decreases the potency of injectable solutions such as pentobarbital.

231. Bacterial and/or fungal contamination in compounded pentobarbital reduces the potency of the pentobarbital used to execute Plaintiffs and increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol. *See* Lethal Injection Count I.

ii. Contamination by particulate matter

232. Contamination with particulate matter is also common in compounded injectable drugs.

233. A compounded drug that is contaminated or is sub-potent, is unpredictable and potentially dangerous and increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

iii. Sub-potency due to moisture

234. Larger than expected moisture content is common in grey market APIs.

235. Larger than expected moisture content results in inaccurate weighing of the API and a smaller amount of the API will be used for the compounding of the pentobarbital for Plaintiffs' executions.

236. Should a smaller amount of the API be used to compound the pentobarbital, there is a substantial risk that the pentobarbital for Plaintiffs' executions will be sub-potent.

237. The substantial risk that the compounded pentobarbital will not be the concentration required under the Lethal Injection Protocol due to the use of APIs obtained from non-FDA-approved facilities increases the already substantial risk of pain and suffering, and it compounds the risk of a lingering death.

238. The Defendants have withheld information under Tennessee Code Annotated § 10-7-504 regarding the source and procurement of the pentobarbital they intend to use to execute Plaintiffs. As set forth *infra*, at Claim VI, the statute, and Defendants' reliance on the statute, denies Plaintiffs their right to meaningful access to the courts under the Constitutions of the United States and the State of Tennessee. Plaintiffs reserve the right to amend this claim following discovery of information regarding the source and procurement of the lethal injection drug(s) they intend to use to execute the Plaintiffs.

239. The Lethal Injection Protocol will require the use of compounded pentobarbital. As a result, it increases the already substantial risk that Plaintiffs will not receive an adequate dose of pentobarbital and increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

240. Defendant Schofield (and/or one or more other Defendants) knew or should have known each fact alleged in this Count and they have acted and/or continue to act, with deliberate indifference to the same.

241. Tennessee's Lethal Injection Protocol therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

242. By adhering to Tennessee's Lethal Injection Protocol, Defendants will violate the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16 and 42 U.S.C. § 1983.

LETHAL INJECTION COUNT III

VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT AND TENNESSEE CONSTITUTION ARTICLE 1, § 16 THROUGH ADHERENCE TO THE LETHAL INJECTION PROTOCOL WHICH FAILS TO PROVIDE ADEQUATE QUALIFICATIONS AND TRAINING OF PERSONNEL TO MINIMIZE THE KNOWN RISKS INVOLVED IN EXECUTION BY LETHAL INJECTION

243. Plaintiffs incorporate the preceding paragraphs in their entirety.

244. Defendants' selection, education, and training of persons directly involved in the lethal injection process as set forth in the Lethal Injection Protocol does not render them capable of carrying out their duties. The use of such persons creates and/or increases the risk of unnecessary pain and suffering, increases the risk of a lingering death; does not conform with evolving standards of decency; and evinces deliberate indifference to minimizing known risks. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

245. The Lethal Injection Protocol states "[t]he Execution Team simulates Day 3 (Execution Day) . . . for at least one (1) hour each month" (Plaintiffs' Exhibit A p.33).

246. After the one-drug Lethal Injection Protocol was adopted, Defendants simulated the old, three-drug protocol.

247. Defendants' failure to simulate the current Lethal Injection Protocol constitutes a substantial risk of serious harm to Plaintiffs.

248. Defendants' failure to follow the Lethal Injection Protocol constitutes a substantial risk of serious harm to Plaintiffs.

249. The Lethal Injection Protocol fails to describe the members of the IV Team, however, it designates seven members of the Execution Team as "specialized" and as having "specific requirements." *See* Plaintiffs' Exhibit A p.32. Five such members have specific roles in administering pentobarbital to the condemned inmate. They are hereinafter referred to as the "IV Team."

250. The five members of the IV team are:

a. Two (2) EMTs - Paramedic - Certified Emergency Medical Technician[s] (hereinafter "EMTs"); and,

b. Three (3) Correctional Officers - Received IV training through the Tennessee Correction Academy by qualified medical professionals (hereinafter "Executioners").

(Plaintiffs' Exhibit A p.32).

251. The State of Tennessee has three levels of "certification" for EMTs/Paramedics, each with different requirements, to wit:

EMT IV

1. Must submit a completed application for licensure.
2. Must be at least eighteen (18) years of age.
3. Must be able to read, write, and speak the English language.
4. Must possess an academic high school diploma or a general equivalency diploma (G.E.D.).
5. Must have no history within the past three years of habitual intoxication or personal misuse of any drugs or the use of intoxicating liquors, narcotics, controlled substances, or other drugs or stimulants in such manner as to adversely affect the person's ability to practice as an emergency medical technician.
6. Must present evidence to the Division of Emergency Medical Services of a medical examination certifying physical health sufficient to conduct activities associated with patient care, including, but not limited to, visual acuity, speech and hearing, use of all extremities, absence of

musculoskeletal deformities, absence of communicable diseases, and suitable emotional fitness to provide for the care and lifting of the ill or injured. This information shall be provided on a form approved by the Board and shall be consistent with the provisions of the Americans with Disabilities Act and the requirements of National Registry of Emergency Medical Technicians. Must successfully complete an EMS Board approved Emergency Medical Technician Basic IV course.

7. Must achieve a passing score on a EMS Board approved written examination.
8. Must successfully complete an EMS Board approved practical examination.
9. Must complete a criminal background check from the State approved vendor.
10. Must pay all required application and license fees.
11. Must complete entire license process within two years of course completion.

Paramedic

1. Must submit a completed application for Licensure.
2. Must meet all the Emergency Medical Technician IV licensure requirements.
3. Must have successfully completed an EMS Board approved EMT Paramedic course.
4. Must achieve a passing score on a Board approved written examination.
5. Must have successfully completed an EMS Board approved practical examination.
6. Must complete a criminal background check from the State approved vendor.
7. Must pay all required application and license fees.
8. Must complete entire license process within two years of course completion.

Paramedic Critical Care

1. Must submit a completed application for Licensure.
2. Must be currently licensed as paramedic in good standing in Tennessee.
3. Must have successfully completed an EMS Board approved Critical Care Paramedic Program.
4. Must achieve a passing score on an EMS Board approved examination.
5. Must complete entire license process within two years of course completion.
6. Individuals completing a Critical Care Paramedic Course prior to effective date of this rule may make application for endorsement. Individuals must show documentation of completion of a Critical Care Paramedic Course

> and must achieve a passing score on an EMS Board approved examination. Individuals will have two (2) years to complete the examination requirements before being required to repeat the course.

(https://health.state.tn.us/EMS/personnellicensure.htm)

252. The Lethal Injection Protocol fails to indicate which, if any, of such certifications are required for the EMTs.

253. The Lethal Injection Protocol fails to indicate medical training, education, or licensing the EMTs must possess. The Lethal Injection Protocol does not require that the EMTs be qualified in any particular way, other than "certification." *See* Plaintiffs' Exhibit A p.32. The Lethal Injection Protocol does not require the EMTs to be trained, and/or skilled, and/or experienced in IV access procedures (Plaintiffs' Exhibit A p.32).

254. Under the Lethal Injection Protocol, the EMTs have duties that are critical to preventing the infliction of unnecessary pain and suffering during Plaintiffs' execution.

255. Failure in the EMTs' performance of their duties will result in a substantial risk of unnecessary pain.

256. There is a risk that a person inserting an IV might get "false positives" showing that an IV was inserted properly when, in fact, it was not.

257. Under the Lethal Injection Protocol swelling might not occur in surrounding tissue, and other signs of "infiltration" might not be present, thus, making detection of the improper insertion of the IV line unlikely.

258. Under the Lethal Injection Protocol, such errors could not be detected by remote visual observation of the injection site, especially at the antecubital fossa.

259. In past practice, the IV Team members (including the EMTs) and the Executioners were "largely ignorant" about reliable ways to detect infiltration.

260. If infiltration occurs, Plaintiffs will not receive a full dose of pentobarbital.

261. If Plaintiffs do not receive a full dose of pentobarbital, there is a substantial risk that they will suffer damage to the brain and/or organs, and will not die.

262. The infliction of permanent damage to the brain and/or organs of the Plaintiffs constitutes cruel and unusual punishment.

263. Death slowly caused by a prolonged period of brain and/or organ damage constitutes cruel and unusual punishment.

264. Because undetected infiltration increases the substantial risk that the Plaintiffs will not receive an adequate dose of pentobarbital, Defendants' adherence to the Lethal Injection Protocol that fails to provide for adequate qualifications and training of the EMTs to minimize the known risks involved in execution by lethal injection violates the Eighth and Fourteenth Amendment and Tennessee Constitution Article 1, § 16.

265. The Lethal Injection Protocol fails to indicate what instruction the Executioner receives, by whom that instruction is given, and what qualifications, education, training, licensing and screening that individual has to provide any such instruction. The Lethal Injection Protocol only says that "[t]he Executioner receives initial and periodic instruction from a qualified medical professional" (Plaintiffs' Exhibit A p.33).

266. The Lethal Injection Protocol fails to indicate what training is required for members of the Execution Team. *See* Plaintiffs' Exhibit A p.33. The Lethal Injection Protocol only indicates that Execution Team members are required to read the manual and that "[t]he

Warden or his designee holds a class during which the manual is reviewed and clearly understood by all participants" (Plaintiffs' Exhibit A p.33).

267. The Lethal Injection Protocol does not explain how the Warden ensures that the manual is clearly understood by all participants nor does it explain who teaches the science and medical techniques to be utilized in the manual (Plaintiffs' Exhibit A p.33).

268. The Lethal Injection Protocol fails to provide training and instructions for using the shortest amount of tubing, extensions and junctions for the IV set-up which will reduce problems associated with blockages, kinks, *etc.*, in the lines.

269. The Lethal Injection Protocol fails to indicate what kind of junctures are used in the tubing, what kind of stopcock is used, or the size of the IV catheter.

270. The Lethal Injection Protocol fails to provide training and specific instructions regarding the effects of pentobarbital and its known risks.

271. Under the Lethal Injection Protocol, Executioners who feel "resistance to the pressure being applied to the plunger" are required to check to determine whether the IV catheter has remained in the vein throughout the execution process (Plaintiffs' Exhibit A, pp.43-44).

272. The "check" described in the previous paragraph provides the only method of determining whether the IV catheter has remained in the vein throughout the execution process.

273. Under the Lethal Injection Protocol, training is conducted with saline and not pentobarbital (Plaintiffs' Exhibit A p.33).

274. Pentobarbital and saline are of different viscosity.

275. Because the Executioners have not trained using pentobarbital and/or a liquid of similar viscosity, they are unaware of what resistance is normal.

276. Because the executioners do not know what resistance is normal during an IV push of pentobarbital, a "check" dependent upon resistance is ineffective to determine whether the IV catheter has not remained in the vein.

277. There is a substantial risk that an initially properly inserted catheter will slip from the vein during the pentobarbital injections.

278. There is a risk that a person inserting an IV might get "false positives" showing that an IV was inserted properly when, in fact, it was not.

279. Expert testimony in *Harbison v. Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007), *vacated and remanded*, *Harbison v. Little*, 571 F.3d 531 (6th Cir. 2009), showed that IV catheters do move "with a fairly high frequency," from veins into outer tissue even in a clinical setting. *Id.* at 889.

280. Dr. Dershwitz, an expert witness for the State of Tennessee in *Harbison*, stated that "'[s]ometimes intravenous catheters fail' and that if the only individuals who are trained in monitoring IV lines leave the room following insertion of the catheters--which is what the new protocol dictates--he 'think[s] it is logical to assume that there's an increased risk.'" *Id.* at 888.

281. IV disruption is much more likely to occur under Tennessee's protocol where the untrained Executioners administer large amounts of bolus injections, from far away, through long IV lines, "'without direct visual contact and without tactile contact,' all of which [are] 'set-ups for failure and mistakes.'" *Id.* at 889.

282. Under the Lethal Injection Protocol, the Executioners are responsible for the preparation and administration of pentobarbital (Plaintiffs' Exhibit A pp.38-39, 43-44).

283. The Lethal Injection Protocol requires that Plaintiffs are to be injected with 5 grams of pentobarbital (Plaintiffs' Exhibit A p.35).

284. The Lethal Injection Protocol provides instructions for the set-up and administration of 100 ml of pentobarbital solution (Plaintiffs' Exhibit A pp.38, 43-44).

285. The Lethal Injection Protocol allows "the chemical manufacturer [to] change the concentration of the chemical solution without notification" (Plaintiffs' Exhibit A p.36).

286. If the "chemical manufacturer" changes the concentration of the pentobarbital solution, 100 ml of pentobarbital solution will not contain 5 grams of pentobarbital.

287. The Lethal Injection Protocol provides no instructions regarding the set-up, or administration of either more, or less, than 100 ml of pentobarbital solution.

288. If the "chemical manufacturer" changes the concentration of the pentobarbital solution, the Lethal Injection Protocol provides no instructions regarding adjustments necessary to administer 5 grams of pentobarbital.

289. If the "chemical manufacturer" changes the concentration of the pentobarbital solution, the Executioners lack the skill, training, and expertise to adjustment as necessary to administer 5 grams of pentobarbital.

290. Because undetected infiltration will decrease the amount of pentobarbital effectively administered to Plaintiffs, it increases the substantial risk that Plaintiffs will not receive an adequate dose of pentobarbital.

291. Because of the Executioners' lack of skill, training, expertise, as well as the lack of instructions in the Lethal Injection Protocol, the likely event that the "chemical manufacturer" provides compounded pentobarbital in other than a 50 mg/ml solution, will increase the already

substantial risk that Plaintiffs will not receive an adequate and properly administered dose of pentobarbital.

292. Defendant Schofield (and/or one or more other Defendants) knew or should have known each fact alleged in this Count and they have acted and/or continue to act, with deliberate indifference to the same.

293. The Lethal Injection Protocol therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

294. By adhering to the Lethal Injection Protocol, Defendants will violate the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16 and 42 U.S.C. § 1983.

LETHAL INJECTION COUNT IV

VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TENNESSEE CONSTITUTION ARTICLE 1, § 16 THROUGH ADHERENCE TO THE LETHAL INJECTION PROTOCOL WHICH FAILS TO REQUIRE AND INCLUDE, AND FAILS TO COMPORT WITH, THOSE ACCEPTED MEDICAL PRACTICES NECESSARY TO MINIMIZE THE KNOWN RISKS INVOLVED IN EXECUTION BY LETHAL INJECTION

295. Plaintiffs incorporate the preceding paragraphs in their entirety.

296. The method of finding a suitable blood vessel and maintaining a flow through that blood vessel are considered to be medical matters. Standard medical methods and procedures have been developed that are required to minimize known risks inherent in those procedures.

297. The known risks inherent in the execution process including the IV set-up, location of veins, access to veins, insertion of catheters, monitoring and introduction of the pentobarbital are therefore minimized by adherence to such standard medical methods and procedures.

298. The Lethal Injection Protocol fails to minimize such risks because it does not adhere to such medical methods and procedures.

299. There is a substantial risk that persons performing the medical procedures incorporated into the Lethal Injection Protocol will be impaired during Plaintiffs' executions.

300. Persons with known alcohol and/or drug addictions have been allowed to participate in past Tennessee lethal injections.

301. The Lethal Injection Protocol fails to require drug and alcohol testing for participants in the execution, thus acting with deliberate indifference to a known risk that one or more such participants may be impaired while performing assigned duties.

302. Upon information and belief, the use of more than a single IV line at a time poses a substantial risk of error in the administration of intravenous drugs.

303. Should there be an error in the administration of pentobarbital during Plaintiffs' executions resulting in the administration of an inadequate amount of pentobarbital during Plaintiffs' executions, there is a substantial risk that Plaintiffs will suffer unnecessary and serious pain.

304. If venous access is inaccessible, whether from Plaintiffs' previous intravenous drug use or other reasons, the Lethal Injection Protocol utilizes a cut-down procedure.

305. A cut-down is an outdated, dangerous surgical procedure. *See Nelson v. Campbell*, 541 U.S. 637 642 (2004).

306. Engaging in a cut-down without first trying the less painful and less invasive method of percutaneous access represents a profound departure from standard medical methods and the standard of care used in executions in other states.

a. The Lethal Injection Protocol indicates that a cut-down may be used but does not indicate at what point in the procedure the IV Team would resort to this option or who would make the determination that a cut-down is necessary.

b. The Lethal Injection Protocol is silent as to the Physician's qualifications to perform a cut-down.

c. Only 15% of physicians in the United States are qualified to perform a cut-down.

d. Any cut-down procedure is a dangerous and antiquated medical procedure that is rarely performed in the practice of medicine.

e. A cut-down procedure involves making a series of sharp incisions through the skin and through several layers of connective tissue, fat, and muscle - all with only local anesthetic – to expose a suitable vein for IV catheterization.

f. The Lethal Injection Protocol fails to provide for the acquisition, storage and placement of any local anesthetic in the execution chamber.

g. A cut-down is a complicated medical procedure requiring equipment and skill that has a high probability of not proceeding properly in the absence of adequately trained and experienced personnel, and without the necessary equipment.

h. The Lethal Injection Protocol fails to provide for persons possessing training and skill required for successful cut-down and for the necessary equipment.

i. If done improperly, the cut-down process can result in very serious complications including severe hemorrhage (bleeding), pneumothorax (collapse of a lung which may cause suffocation), and improper seating of the catheter resulting in infiltration of the pentobarbital to surrounding tissue.

j. Cut-downs are outdated and are only used in clinical situations that are not pertinent to executions by lethal injection, including emergency scenarios where there has been extensive blood loss, and in situations involving very small pediatric patients and premature infants.

k. Cut-downs have been replaced by the percutaneous technique which is less invasive, less painful, less mutilating, faster, safer, and less expensive than the cut-down technique.

l. The use of a cut-down as a back-up before trying to find percutaneous access is a profound departure from standard medical methods and from the standard of care used in executions in other jurisdictions.

m. To use a cut-down as the backup method of achieving IV access defies contemporary medical standards and would be a violation of any modern standard of decency.

n. The Lethal Injection Protocol is silent on the procedures that will be followed by the Physician should a cut-down become necessary (Plaintiffs' Exhibit A p.67).

o. The Lethal Injection Protocol gives the Physician complete discretion to "choose a different method to find an IV site" (Plaintiffs' Exhibit A p.67).

p. The Lethal Injection Protocol is completely silent on permissible options for finding an IV site and obtaining venous access and whether they are medically sound, constitutional and minimize unnecessary pain.

q. The Protocol is silent as to the Physician's qualifications and training to perform "a different method" of inserting the primary IV line.

307. There is a substantial risk that a leak in the tubing, junctions, or valves can result in the failure to properly administer a full dosage of pentobarbital to Plaintiffs.

308. The failure to administer a full dose of pentobarbital to Plaintiffs increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

309. Problems with IV lines detaching and spilling chemicals is a known risk which has occurred in the State of Texas.

310. The Lethal Injection Protocol fails to indicate whose responsibility it is, if any, to watch the IV lines for leaks in the tubing, junctions, and valves during the administration of the pentobarbital and what member(s) of the Execution Team should do when a leak is found. *See* Plaintiffs' Exhibit A p.43.

311. The failure to designate a person to be responsible for examining and monitoring IV lines for leaks in the tubing, junctions, and valves during the administration of the pentobarbital and assure that such person has the skill and training to correct any such leaks creates a substantial risk of error in the administration of intravenous drugs and is contrary to standard medical practices and procedures necessary to minimize this risk.

312. An error in the administration of pentobarbital during Plaintiffs' executions resulting in the administration of an inadequate amount of pentobarbital during Plaintiffs' executions increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

313. There is a substantial risk that the catheters used in the Lethal injection Protocol will become dislodged during the injection of pentobarbital.

314. The only monitoring of the catheters prescribed by the Lethal Injection Protocol during the administration of the Lethal Injection Chemicals is "by watching the monitor in his room which displays the exact location of the catheter(s) by means of a pan-tilt zoom camera" (Plaintiffs' Exhibit A p.43).

315. The person responsible for such monitoring is also responsible for recording time data on the Chemical Administration Record. *See* Plaintiffs' Exhibit A p.43.

316. The monitoring of an IV site from a remote camera creates a substantial risk of error in the administration of intravenous drugs and is contrary to standard medical practices and procedures necessary to minimize this risk.

317. An error in the administration of pentobarbital during Plaintiffs' executions resulting in the administration of an inadequate amount of pentobarbital during Plaintiffs' executions increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

318. In order to ensure that an IV does not migrate, infiltrate, move, and is working properly, the IV site must be monitored from the bedside.

319. The Lethal Injection Protocol does not provide for anyone to monitor the IV site from the bedside, nor is there any qualified medical personnel in the room to do any personal, medical monitoring of the process. *See* Plaintiffs' Exhibit A p.43.

320. The failure to provide for anyone to monitor the IV site from the bedside, or for any qualified medical personnel in the room to do any personal, medical monitoring of the process creates a substantial risk of error in the administration of pentobarbital.

321. An error in the administration of pentobarbital during Plaintiffs' executions resulting in the administration of an inadequate amount of pentobarbital during Plaintiffs' executions increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

322. The Lethal Injection Protocol fails to include safeguards that would protect the prisoner in the event a stay of execution is entered after the lethal injection process has begun.

a. The Lethal Injection Protocol does not indicate what training, education, or licensing the IV Team, the Execution Team and the medical doctor has, if any, in reviving Plaintiffs in the event a stay is issued after the execution begins.

b. The Lethal Injection Protocol does not provide for emergency life saving equipment in the execution chamber.

c. The Lethal Injection Protocol fails to provide any protections to prevent Plaintiffs from being wrongly executed should a reprieve be granted after the process has begun but before death has occurred. *See Baze*, 553 U.S. at 46.

d. Any resuscitation would require the close proximity of the necessary equipment, medication, and properly trained personnel.

e. The omission of such personnel and equipment under the Lethal Injection Protocol constitutes/increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

323. The failure of the Lethal Injection Protocol to provide for procedures, personnel, and training for the revival of Plaintiffs in the event it becomes necessary creates a substantial

risk that Plaintiffs will not be revived, will be revived only after suffering unnecessary and serious pain, or will be revived only after suffering unnecessary, painful, and permanent bodily injury and is contrary to standard medical practices and procedures necessary to minimize this risk.

324. The Lethal Injection Protocol fails to require and include, and fails to comport with, accepted medical practices necessary to minimize the known risks involved in execution by lethal injection. The Lethal Injection Protocol increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol.

325. Defendant Schofield (and/or one or more other Defendants) knew or should have known each fact alleged in this Count and they have acted and/or continue to act, with deliberate indifference to the same.

326. The Lethal Injection Protocol therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Tennessee Constitution Article 1, § 16.

327. By adhering to the Lethal Injection Protocol, Defendants will violate the Eighth and Fourteenth Amendments to the United States Constitution, Tennessee Constitution Article 1, § 16 and 42 U.S.C. § 1983.

LETHAL INJECTION COUNT V

THE LETHAL INJECTION PROTOCOL VIOLATES FEDERAL AND STATE DRUG LAWS AND THE UNITED STATES AND TENNESSEE CONSTITUTIONS

328. Plaintiffs incorporate the preceding paragraphs in their entirety.

329. Under Tennessee's Lethal Injection Protocol, Defendants intend to procure, possess, dispense, and/or administer pentobarbital and/or compounded pentobarbital to Plaintiffs in order to kill the Plaintiffs.

330. Under Tennessee's Lethal Injection Protocol, Defendant Carpenter shall contact Defendant Physician(s) to secure a prescription for pentobarbital and/or compounded pentobarbital which Defendants intend to administer to Plaintiffs to kill Plaintiffs.

331. Defendant Pharmacist(s) will fill that prescription and deliver pentobarbital and/or compounded pentobarbital to Defendants which Defendants will then dispense and/or administer to Plaintiffs to kill Plaintiffs.

332. Under federal and Tennessee drug laws, pentobarbital is a Schedule II controlled substance.

333. Under federal and Tennessee drug laws, any compound, mixture, preparation, etc., that contains pentobarbital is a Schedule III controlled substance.

334. 21 U.S.C. §§ 822(a)(1) & (2) requires registration of every person who manufactures or distributes any controlled substance, or who proposes to engage in the manufacture or distribution of any controlled substance, and every person who dispenses, or who proposes to dispense, any controlled substance.

335. 21 C.F.R. § 1301.11(a) requires every person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any controlled substance shall obtain a registration.

336. Tenn. Code Ann. § 53-11-302(a) provides that every person who manufactures, distributes, or dispenses any controlled substance within this state must obtain annually a registration.

337. Tenn. Code Ann. § 53-11-302(b) provides that persons registered to manufacture, distribute or dispense controlled substances may do so only to the extent authorized by their registration.

338. It is unknown whether Defendants possess the registration and licenses required to manufacture, distribute, dispense and administer pentobarbital and/or compounded pentobarbital.

339. 21 U.S.C. § 353(b)(1)(A) provides that:

> A drug intended for use by man which because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug[,] shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist. . . .

340. 21 U.S.C. § 802(10) provides that before a controlled substance can be dispensed, there must be a lawful order, such as a prescription, from a practitioner.

341. 21 U.S.C. § 829(a) provides that unless a practitioner directly dispenses a Schedule II controlled substance, such as pentobarbital, to an ultimate user, no Schedule II controlled substance may be dispensed without a written prescription from a practitioner.

342. Tenn. Code Ann. § 53-11-303(c) provides that if practitioners are authorized to dispense under state law, they must be registered to dispense Schedule II and Schedule III controlled substances.

343. Tenn. Code Ann. § 53-11-308 provides that no Schedule II controlled substance, such as pentobarbital, may be dispensed without the written prescription of a practitioner.

344. 21 U.S.C. § 829(b) provides that unless a practitioner directly dispenses a Schedule III controlled substance, such as a substance containing pentobarbital, to an ultimate user, no Schedule III controlled substance may be dispensed without a written or oral prescription from a practitioner.

345. 21 C.F.R. § 1306.04(a) establishes that a prescription for a controlled substance is legal only when a practitioner, acting in the usual course of his or her professional practice, issues it for a legitimate medical purpose.

346. Tenn. Code Ann. § 53-11-401(a)(1) makes it unlawful for any person to distribute or dispense a controlled substance for any purposes other than those authorized by and consistent with the person's professional or occupational licensure or registration law, or to distribute or dispense any controlled substance in a manner prohibited by the person's professional or occupational licensure or registration law.

347. 21 C.F.R. § 1306.06 provides that a prescription for a controlled substance may only be filled by a pharmacist or practitioner acting in the usual course of his or her professional practice.

348. Under 21 U.S.C. § 844, it is unlawful for any person to knowingly and intentionally possess a controlled substance unless pursuant to a valid prescription or order from a practitioner acting in the course of his or her professional practice.

349. Tenn. Code Ann. §53-401(a)(2) makes it unlawful for any person who is a registrant to manufacture a controlled substance not authorized by the registrant's registration, or

to distribute or dispense a controlled substance not authorized by the registrant's registration to another registrant or other authorized person.

350. Tenn. Code Ann. § 53-11-402(a)(1) makes it unlawful for any person to knowingly or intentionally distribute as a registrant a Schedule II controlled substance, such as pentobarbital, except to another registrant pursuant to an order form.

351. Tenn. Code Ann. § 53-11-402(a)(3) makes it unlawful for any person to knowingly or intentionally acquire or obtain, or attempt to acquire or attempt to obtain, possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge.

352. Plaintiffs have no physician-patient or pharmacy-patient relationship with any of the Defendants, including Defendant Physician(s) and Defendant Pharmacist(s), and renounce any such relationship which any Defendants in any way would intend to establish without Plaintiffs' consent.

353. Plaintiffs do not consent and do not give informed consent to any Defendants to seek, write, issue and/or fill any prescription or order for pentobarbital and/or compounded pentobarbital which Defendants would use or administer to Plaintiffs.

354. Plaintiffs do not consent to and do not give informed consent to any Defendants to administer pentobarbital and/or compounded pentobarbital to them at any time, and they do not consent or provide informed consent to any Defendants to kill him using pentobarbital and/or compounded pentobarbital.

355. Killing a human being is not a legitimate medical purpose.

356. Killing Plaintiffs who have no legitimate physician-patient relationship with Defendants also fails to establish a legitimate medical purpose for a prescription.

357. Defendant Physician(s) who issues an order or prescription that pentobarbital and/or any compound, mixture, preparation, etc., containing pentobarbital be dispensed for use in carrying out Plaintiffs' executions does not act in the usual course of the practitioner's professional practice and does not act lawfully.

358. Defendant Pharmacist(s) who fills a prescription for pentobarbital and/or any compound, mixture, preparation, etc. containing pentobarbital to be dispensed for use in Plaintiffs' executions does not act in the usual course of the practitioner's professional practice and does not act lawfully.

359. Defendant Physician(s) and Defendant Pharmacist(s) distribution or dispensation of pentobarbital and/or compounded pentobarbital for use in Plaintiffs' executions is not authorized by and consistent with the Defendants' professional or occupational licensure or registration law.

360. Defendant Physician(s) and Defendant Pharmacist(s) distribution or dispensation of pentobarbital and/or compounded pentobarbital for use in Plaintiffs' executions is prohibited by Defendants' professional or occupational licensure or registration law.

361. Defendant Physician(s) and Defendant Pharmacist(s) who either issues and orders a prescription or fills a prescription for pentobarbital and/or compounded pentobarbital for administration to Plaintiffs to kill Plaintiffs acts in violation of Tennessee law, ethics governing Tennessee physicians and pharmacists and/or their professional oaths, including, if applicable, the Hippocratic Oath.

362. Defendant Physician(s) and Defendant Pharmacist(s) who, under the Lethal Injection Protocol, train execution personnel and/or any physician or emergency medical technician involved in any part of the execution process to be used upon Plaintiffs also act in violation of Tennessee law, ethics governing Tennessee physicians and pharmacists and/or their professional oaths, including, if applicable, the Hippocratic Oath.

363. A prescription or order for pentobarbital and/or compounded pentobarbital for use in Plaintiffs' execution is not issued by Defendant Physician(s) acting in the course of his or her professional practice.

364. A prescription or order for pentobarbital and/or compounded pentobarbital for use in Plaintiffs' execution is not a valid prescription issued by Defendant Physician(s) acting in the course of his or her professional practice.

365. Under 21 U.S.C. § 841(a), unless authorized by the federal Controlled Substance Act, it is unlawful for any person to knowingly or intentionally manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance.

366. Under 21 U.S.C. § 802(15), "manufacturing" includes the production, preparation, propagation, compounding or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or re-labeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his

administration or dispensing of such drug or substance in the course of his professional practice. *See also* Tenn. Code Ann. §§ 39-17-402(15), 63-10-204(21).

367. Under 21 U.S.C. § 802(11), "distribute" means to deliver, other than by administering or dispensing, a controlled substance or listed chemical. *See also* Tenn. Code Ann. §§ 39-17-402(9), 63-10-204(13).

368. Under 21 U.S.C. § 802(10), "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of a practitioner including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for delivery. *See also* Tenn. Code Ann. §§ 39-17-402(7); 63-10-204(12).

369. Under 21 U.S.C. § 802(2), "administer" refers to the direct application of a controlled substance to the body of a patient or research subject by a practitioner (or, in his presence, by his authorized agent), or the patient or research subject at the direction and in the presence of the practitioner, whether such application be by injection, inhalation, ingestion, or any other means. *See also* Tenn. Code Ann. §§ 39-17-402(1); 63-10-204(1).

370. Under 21 U.S.C. § 802(8), "deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship. *See also* Tenn. Code Ann. §§ 39-17-402(6), 63-10-204(8).

371. Under 21 U.S.C. § 842, it is unlawful to distribute or dispense a controlled substance in violation of 21 U.S.C. § 829.

372. Under 21 U.S.C. § 846, it is also unlawful for any person to attempt or conspire to commit any offense contained in the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

373. Defendant(s)' manufacturing, possession, delivery, distribution, dispensation, and administration of pentobarbital and/or compounded pentobarbital for Plaintiffs' executions violates federal and state laws.

374. Under 21 U.S.C. § 321(p), a new drug includes any drug whose composition is not generally recognized among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof.

375. As to new drugs, 21 U.S.C. § 355 mandates a new drug application approved by the Secretary of Health and Human Services.

376. The pentobarbital and/or compounded pentobarbital which Defendants intend to prescribe, to manufacture, to fill a prescription of, and/or administer to Plaintiffs are new drugs for which there has been no new drug application made or approved by the Secretary of Health and Human Services.

377. The pentobarbital and/or compounded pentobarbital that Defendants intend to prescribe, to manufacture, to fill a prescription of, and/or administer to Plaintiffs are misbranded under 21 U.S.C. §§ 331 and 352.

378. Defendants' actions under the Lethal Injection Protocol, with respect to obtaining and using pentobarbital and/or compounded pentobarbital for Plaintiffs' executions, violate federal and state laws.

A. In violation of the Supremacy Clause of the United States Constitution (Article VI, § 2), Defendants' Lethal Injection Protocol providing for the procurement and use of pentobarbital and/or compounded pentobarbital is facially void and unlawful.

379. Plaintiffs incorporate the preceding paragraphs in their entirety.

380. The Constitution of the United States and all federal statutes and treaties comprise the Supreme Law of the Land (U.S. Const. Art. VI, § 2) and all state law or policy that conflicts with or violates the United States Constitution or federal law cannot stand.

381. Under Tennessee's Lethal Injection Protocol, it is impossible for the Defendants and the Tennessee Department of Correction to prescribe, issue a valid prescription for, procure, receive, manufacture, deliver, distribute, fill a valid prescription for, possess, dispense, and/or administer pentobarbital or any compounded pentobarbital, compound, mixture, preparation, or other substance containing pentobarbital to Plaintiffs without violating, attempting to violate, or conspiring to violate all of the federal statutes and regulations cited herein, including but not limited to 21 U.S.C. §§ 321, 331, 352, 353, 355, 802(10), 802(11), 802(15), 822, 829, 841, 844, 846, and 21 C.F.R. §§ 1301.11, 1306.04, 1306.06.

382. The Lethal Injection Protocol is therefore facially void under the Supremacy Clause of the United States Constitution, Article VI, § 2.

B. Defendants' Lethal Injection Protocol and use and attempted use upon Plaintiffs of pentobarbital and/or compounded pentobarbital is unlawful and illegal and violates the Eighth and Fourteenth Amendments to the United States Constitution.

383. Plaintiffs incorporate the preceding paragraphs in their entirety.

384. The Eighth and Fourteenth Amendments to the United States Constitution prohibit the carrying out of an execution by a lethal injection of drugs that are unlawfully

obtained or otherwise secured or possessed, used or administered in violation of the United States Constitution or the laws of the United States.

385. For all the reasons stated in this Count, Defendants do, have, will, are attempting to, have attempted to, are conspiring to, and/or have conspired to: violate federal law; unlawfully prescribe, fill a prescription for, manufacture, procure and/or receive pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital; knowingly and/or intentionally manufacture and/or distribute and/or dispense pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital; knowingly and intentionally possess with intent to manufacture, deliver, distribute or dispense pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital, all in violation of federal law, including but not limited to 21 U.S.C. §§ 321, 331, 352, 353, 355, 802(10), 802(11), 802(15), 822, 829, 841, 844, 846, and 21 C.F.R. §§ 1301.11, 1306.04, 1306.06.

386. The pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital that Defendants have or will procure, prescribe, fill a prescription for, deliver, possess, possess with intent to distribute or dispense, and/or administer or use upon Plaintiffs, is or will be unlawfully obtained, and secured and possessed in violation of federal law and the Supreme Law of the Land, and therefore, the use or administration of such pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital upon Plaintiffs violates the Eighth and Fourteenth Amendments to the United States Constitution.

C. As applied to Plaintiffs, Defendants' Lethal Injection Protocol and use and attempted use upon Plaintiffs of pentobarbital and/or compounded pentobarbital is unlawful and illegal and violates the Supremacy Clause of the United States Constitution (Article VI, § 2).

387. Plaintiffs incorporate the preceding paragraphs in their entirety.

388. The Constitution of the United States and all federal statutes and treaties comprise the Supreme Law of the Land (U.S. Const. Art. VI, § 2) and all state law or policy that conflicts with or violates the United States Constitution or federal law cannot stand.

389. For all the reasons stated in this Count, Defendants do, have, will, are attempting to, have attempted to, are conspiring to, and/or have conspired to: violate federal law; unlawfully prescribe, fill a prescription for, manufacture, deliver, procure and/or receive pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital; knowingly and/or intentionally manufacture and/or distribute and/or dispense pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital; knowingly and intentionally possess with intent to manufacture, deliver, distribute or dispense pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital, all in violation of federal law, including but not limited to 21 U.S.C. §§ 321, 331, 352, 353, 355, 802(10), 802(11), 802(15), 822, 829, 841, 844, and/or 846, and 21 C.F.R. §§ 1301.11, 1306.04 and/or 1306.06.

390. The pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital that Defendants have or will procure, prescribe, manufacture, deliver, fill a prescription for, possess, possess with intent to distribute or dispense, and/or administer to or use upon Plaintiffs, is unlawfully obtained, and secured and

possessed in violation of federal law and the Supreme Law of the Land, and therefore, the use or administration of such pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital upon Plaintiffs violates the Supremacy Clause of the United States Constitution, Article VI § 2.

D. Facially and as applied to Plaintiffs, Defendants' Lethal Injection Protocol and its use and attempted use upon Plaintiffs is void and unlawful and violates Article I, § 8 of the Tennessee Constitution.

391. Plaintiffs incorporate the preceding paragraphs in their entirety.

392. Article I, Section 8, of the Tennessee Constitution limits the authority of the state, state actors, and their employees, associates and/or contractors to deprive Plaintiffs of their lives. They can only do so through a process that comports with "the law of the land."

393. Federal law is "the law of the land."

394. State law is the "law of the land."

395. For the reasons set out in this Count, Defendants do, have, will, are attempting to, have attempted to, are conspiring to, and/or have conspired to: violate federal and state law; unlawfully prescribe and/or fill a prescription for, procure, receive, deliver, distribute and/or manufacture pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital; knowingly and/or intentionally manufacture and/or distribute and/or deliver and/or dispense pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital; knowingly and intentionally possess with intent to manufacture, distribute, deliver, or dispense pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital, all in violation of federal law, including but not limited to 21 U.S.C. §§

321, 331, 352, 353, 355, 802(10), 802(11), 802(15), 822, 829, 841, 844, 846, and 21 C.F.R. §§ 1301.11, 1306.04, 1306.06, and state law, including but not limited to Tenn. Code Ann. §§ 39-17-402, 403, 408, 410; §§ 53-11-301, 302, 303, 307, 308, 401, 402; §§ 63-10-204; and Tenn. Comp. R. & Regs. 1140-01-.01 through 1140-13-.08.

396. The Lethal Injection Protocol on its face and as applied to Plaintiffs, and the actions of the Defendants and the Tennessee Department of Correction in using their Lethal Injection Protocol to secure and use pentobarbital and to thereby kill Plaintiffs thus violates Article I, § 8 of the Tennessee Constitution.

E. Facially and as applied to Plaintiffs, Defendants' Lethal Injection Protocol and its use and attempted use upon Plaintiffs violates state law and Article I, §§ 8 and 16 of the Tennessee Constitution.

397. Plaintiffs incorporate the preceding paragraphs in their entirety.

398. To the extent Tennessee's drug laws incorporate and/or rely upon federal drug laws, the actions of Defendants under the Tennessee Lethal Injection Protocol, as set forth within this Count, violate state law.

399. Defendants' manufacture, distribution, delivery, possession, dispensation and/or administration of pentobarbital and/or compounded pentobarbital to be used in Plaintiffs' executions, without the required registration and licenses and without a valid prescription written for a valid purpose, violates Tennessee's drug control laws, as well as Tennessee's pharmacy laws and regulations, including but not limited to Tennessee Code Annotated §§ 39-17-402, 403, 408, 410; §§ 53-11-301, 302, 303, 307, 308, 401, 402; §§ 63-10-204; and Tenn. Comp. R. & Regs. 1140-01-.01 through 1140-13-.08.

400. The Lethal Injection Protocol on its face and as applied to Plaintiffs, and the actions of the Defendants under the Lethal Injection Protocol to secure and use pentobarbital and/or compounded pentobarbital Plaintiffs' executions thus violates state law and Article I, §§ 8 and 16 of the Tennessee Constitution.

F. Facially and as applied to Plaintiffs, Defendants' Lethal Injection Protocol and its use and attempted use upon Plaintiffs is void for public policy.

401. Plaintiffs incorporate the preceding paragraphs in their entirety.

402. Any statute, rule, regulation, or policy that requires any person or entity to violate federal or state law is void for public policy.

403. For all the reasons stated in preceding paragraphs in this Count, in order to execute Plaintiffs, Defendants do, have, will, are attempting to, have attempted to, are conspiring to, and/or have conspired to: violate federal and state law; unlawfully prescribe, procure, fill a prescription for pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital; knowingly and/or intentionally manufacture and/or distribute and/or dispense and/or administer pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital; knowingly and intentionally possess with intent to manufacture, distribute, dispense or administer pentobarbital, compounded pentobarbital, or any compound, mixture, preparation, or other substance containing pentobarbital, all in violation of federal and state law, including but not limited to 21 U.S.C. §§ 321, 331, 352, 353, 355, 802(10), 802(11), 802(15), 822 829, 841, 844, 846, and 21 C.F.R. §§ 1301.11, 1306.04, 1306.06; Tenn. Code Ann. §§ 39-

17-402, 403, 408, 410; §§ 53-11-301, 302, 303, 307, 308, 401, 402; §§ 63-10-204; and Tenn. Comp. R. & Regs. 1140-01-.01 through 1140-13-.08.

404. The Lethal Injection Protocol on its face and as applied to Plaintiffs, and the actions of the Defendants in using their Lethal Injection Protocol to secure and use pentobarbital for Plaintiffs' executions is thus void for public policy.

G. Defendants are illegally and unlawfully engaged in a civil conspiracy to unlawfully harm and to execute Plaintiffs.

405. Plaintiffs incorporate the preceding paragraphs in their entirety.

406. A civil conspiracy involves an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way. It is an agreement between two or more persons to engage in concerted action for an unlawful purpose or for some lawful purpose by unlawful means, a tortious or wrongful act by one or more of the conspirators and injury or damage to a person.

407. Through the use, application and following of Tennessee's Lethal Injection Protocol, the Defendants are, and/or have, engaged in a civil conspiracy. Given the actions of Defendants outlined in this Count and the violations of federal law resulting from those actions, Defendants are following and have an agreement to do unlawful acts or lawful acts in unlawful ways and are engaged in concerted action for an unlawful purpose and/or are acting using unlawful means. They have agreed to do and pursue a course of any number of unlawful acts or lawful acts in pursuit of an unlawful end, and have individually or collectively taken steps and actions in furtherance of, and pursuant to their agreement, all as outlined in this Count and/or set

forth in the Lethal Injection Protocol, as well as actions presently unknown but ascertainable after reasonable discovery.

408. Given all such acts of Defendants outlined in this complaint, whether planned, attempted, conspired, or actually committed, Defendants are acting and have acted for an unlawful purpose or using unlawful means to pursue their purposes. Defendants are, and/or have, engaged in wrongful acts resulting, or intending to result in injury to Plaintiffs, including executing Plaintiffs' by cruel and unusual means. *Stanfill v. Hardney*, No. M2004-02768-COA-R3-CV, 2007 WL 2827498 (Tenn. Ct. App. Sept. 27, 2007).

LETHAL INJECTION COUNT VI

TENNESSEE'S SECRECY STATUTE, TENNESSEE CODE ANNOTATED § 10-7-504(h)(1), VIOLATES PLAINTIFFS' FEDERAL AND STATE CONSTITUTIONAL RIGHTS AND 42 U.S.C. § 1983

409. Plaintiffs incorporate the preceding paragraphs in their entirety.

410. As of April 29, 2013, Tennessee's Public Records laws effectively shielded from disclosure the identity of persons or entities "who or that has been or may in the future be directly involved in the process of executing a sentence of death[.]" Tenn. Code Ann. § 10-7-504(h)(1).

411. On April 29, 2013, Tennessee Code Annotated § 10-7-504(h)(1) was amended to provide that:

> "person or entity" includes, but is not limited to, an employee of the state who has training related to direct involvement in the process of executing a sentence of death, a contractor or employee of a contractor, a volunteer who has direct involvement in the process of executing a sentence of death, or 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.

412. Records made confidential by § 10-7-504(h)(1) include, but are not limited to, records related to remuneration to a person or entity in connection with such person's or entity's

participation in, or preparation for, the execution of a sentence of death. Such payments shall be made in accordance with a memorandum of understanding between the commissioner of correction and the commissioner of finance and administration in a manner that will protect the public identity of the recipients; provided, that, if a contractor is employed to participate in or prepare for the execution of a sentence of death, the amount of the special payment made to such contractor pursuant to the contract shall be reported by the commissioner of correction to the comptroller of the treasury and such amount shall be a public record.

413. On September 27, 2013, Defendants instituted the new Lethal Injection Protocol. The Lethal Injection Protocol calls for two bolus injections of 2.5 grams of the barbiturate pentobarbital.

414. Plaintiff Irick is confronted with an execution date of October 7, 2014.

415. Plaintiff West is confronted with an execution date of February 10, 2015.

416. Plaintiff Sutton is confronted with an execution date of November 17, 2015.

417. Plaintiff Miller is confronted with an execution date of August 18, 2015.

418. Plaintiff Hutchison is confronted with an execution date of May 12, 2015.

419. Defendants, the Tennessee Department of Corrections ("TDOC"), its agents, and employees, have relied upon Tennessee Code Annotated § 10-7-504(h)(1) to withhold information about how it intends to carry out Plaintiffs' executions.

420. Defendants have withheld from Plaintiffs the identities of persons or entities involved in the procurement or provision of any lethal injection chemicals (pentobarbital) for use in carrying out Plaintiffs' executions.

421. Defendants have indicated that they do not have written prescriptions and/or physician orders for any lethal injection chemicals (pentobarbital) to be used during an execution, but, in any event, such documents would not be disclosed to Plaintiffs.

422. Defendants have withheld from Plaintiffs the source of the pentobarbital intended to be used for Plaintiffs' executions.

423. Defendants have withheld from Plaintiffs the identity of the chemical manufacturer of the pentobarbital intended to be used for Plaintiffs' executions.

424. Defendants have withheld from Plaintiffs the name of the pharmacy where the prescription for pentobarbital will be filled for use in Plaintiffs' executions.

425. Defendants have withheld from Plaintiffs the source of the Active Pharmaceutical Ingredient ("API") from which the injectable form of pentobarbital (intended to be used for Plaintiffs' executions) will be made.

426. Defendants have withheld from Plaintiffs the identity of the person(s) or entity/entities who will compound the injectable form of pentobarbital intended to be used for Plaintiffs' executions.

427. Defendants have withheld from Plaintiffs the location(s) where the injectable form of pentobarbital will be compounded.

A. Tennessee Code Annotated § 10-7-504(h)(1) denies Plaintiffs access to the courts.

428. Plaintiffs incorporate the preceding paragraphs in their entirety.

429. Plaintiffs have a fundamental right of access to the courts for a redress of grievances under the First and Fourteenth Amendments and Tennessee Constitution Article I, §

17. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Barnes v. Kyle*, 306 S.W.2d 1, 4 (Tenn. 1957).

430. The right of access to the courts includes a meaningful and effective opportunity to petition the court for redress of grievances. *Bounds v. Smith*, 430 U.S. at 828.

431. A meaningful and effective opportunity to petition the court includes a right to discover facts and evidence relevant to the petition's allegations. It is "relatively immutable in our jurisprudence . . . that when governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

432. The Eighth Amendment of the United States Constitution and Article I, § 16 of the Tennessee Constitution protect Plaintiffs from cruel and unusual punishment. Plaintiffs' lawsuit is based on this fundamental right.

433. A condemned inmate may file suit to challenge the method of his execution. *Baze v. Rees*, 553 U.S. 35 (2008); *Hill v. McDonough*, 547 U.S. 573 (2006); *West v. Schofield*, 380 S.W.3d 105 (Tenn. App. 2012); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (2005). Plaintiffs' lawsuit challenges Tennessee's Lethal Injection Protocol which will be used for their executions.

434. Because there is a substantial risk that the use of pentobarbital or compounded pentobarbital, as directed by the Lethal Injection Protocol, will increases the substantial risk of pain and suffering, lingering death, and degradation to Plaintiffs inherent in Tennessee's Lethal Injection Protocol, Plaintiffs require the information that Defendants have withheld by invoking confidentiality under Tennessee Code Annotated § 10-7-504(h)(1).

435. For example, Defendants' withholding of information has denied Plaintiffs the means to assess: (a) the quality and potency of the pentobarbital that will be used for Plaintiffs' executions; (b) the qualifications of the compounding pharmacy or its agents ("the compounder") to make the pentobarbital for Plaintiffs' executions; (c) the adequacy of the compounder's quality assurances, if any; (d) whether the compounder's facilities are equipped to make sterile products; (e) whether the compounder's facilities are indeed sterile; (f) whether the compounder's facilities are equipped to test the identity and purity of the APIs used for compounding the pentobarbital for use in Plaintiffs' exeuctions; (g) whether the compounder will comply with federal and state laws when producing the pentobarbital for Plaintiffs' executions; and, (h) whether Defendants are able to comply with federal and state laws regarding controlled substances.

436. Further, because Defendants have withheld information, Plaintiffs have no means to determine: (a) whether the lethal injection drug that is manufactured for his execution will or will not actually consist of pentobarbital; if so, (b) whether it will contain a dose sufficient to kill him, rather than severely injure him, (c) whether it will have the proper pH so it does not burn or decimate the veins at the injection site, and (d) whether it will not be filled with particulate or biological matter that may lead to a painful allergic reaction or reduce its effectiveness and cause permanent brain and/or other organ damage, but not death.

437. By withholding information relevant to Plaintiffs' lawsuit the Defendants have impeded Plaintiffs' ability to prosecute this lawsuit.

438. By withholding information relevant to Plaintiffs' lawsuit the Defendants have impeded Plaintiffs' ability to prosecute this lawsuit in violation of Plaintiffs' rights and 42 U.S.C. § 1983.

B. Tennessee Code Annotated § 10-7-504(h)(1) denies Plaintiffs due process.

439. Plaintiffs incorporate the preceding paragraphs in their entirety.

440. Article I, § 8, of the Tennessee Constitution, Tennessee's law of the land provision, is generally recognized as synonymous with the due process clause of the Fourteenth Amendment to the United States Constitution. *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994).

441. "The fundamental requisite of due process of law is the opportunity to be heard" when one's rights are to be affected. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1949)); *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006).

442. The opportunity to be heard is worthless unless Plaintiffs are given meaningful notice of the means and manner by which Defendants intend to execute them so that objections may be presented to this Court. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *LaChance v. Erickson*, 522 U.S. 262, 266 (1988).

443. Defendants' and/or TDOC's failure to disclose relevant information about the manner and means they intend to execute Plaintiffs constitutes a denial of notice and information necessary to plead and prove the instant lawsuit, so they may fairly be heard.

444. Defendants' use of Tennessee Code Annotated § 10-7-504(h)(1) denies Plaintiffs their rights to due process of law and violates 42 U.S.C. § 1983.

C. Tennessee Code Annotated § 10-7-504(h)(1) violates the Supremacy Clause.

445. Plaintiffs incorporate the preceding paragraphs in their entirety.

446. Article VI of the United States Constitution establishes that the Constitution is the "supreme Law of the Land." "[C]onstitutional right[s] . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted ingeniously or ingenuously." *Smith v. Texas*, 311 U.S. 128, 132 (1940).

447. The Fourteenth Amendment directs that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."

448. The Supremacy Clause will not tolerate any legislative act, including Tenn. Code Ann. § 10-7-504(h)(1), that infringes upon the protections provided by constitutional rights.

> A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protections of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State. . . . This must be so, or the constitutional prohibition has no meaning. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, or whatever the guise in which it is taken.

Cooper v. Aaron, 358 U.S. 1, 16-17 (1958).

449. Defendants' use of Tennessee Code Annotated § 10-7-504(h)(1) to withhold information about the means and manner in which they intend to execute Plaintiffs has the effect of preventing Plaintiffs from determining whether their executions will comport with the Eighth Amendment's prohibition against cruel and unusual punishment.

450. The statute, § 10-7-504(h)(1), and Defendants' reliance upon it, have abridged Plaintiffs' constitutional rights pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, in violation of the Supremacy Clause of the United States Constitution and 42 U.S.C. § 1983.

D. Tennessee Code Annotated § 10-7-504(h)(1) violates separation of powers as set forth in Article II, § 2 of the Tennessee Constitution.

451. Plaintiffs incorporate the preceding paragraphs in their entirety.

452. Article II, § 2 of the Tennessee Constitution recognizes the separation of powers between the executive, legislative and judicial branches of the State government.

453. The power of the Tennessee's General Assembly to legislate is "not unlimited, and any exercise of that power by the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts." *State v. Mallard*, 40 S.W.3d 473, 480-81 (Tenn. 2001).

454. The courts have "affirmative obligations to assert and fully exercise their powers, to operate efficiently by modern standards, to protect their independent status, and to fend off legislative or executive attempts to encroach upon judicial [prerogatives]." *Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit*, 579 S.W.2d 875, 878 (Tenn. App. 1978).

455. By preventing disclosure of information relevant to the method and manner by which the state seeks to execute Plaintiffs, Tennessee Code Annotated § 10-7-504(h)(1) prevents Plaintiffs from fully pleading or proving their case.

456. By preventing Plaintiffs from fully pleading and proving their case, Tennessee Code Annotated § 10-7-504(h)(1) prevents judicial review of the constitutionality of Tennessee's Lethal Injection Protocol.

457. By preventing judicial review of Tennessee's Lethal Injection Protocol, § 10-7-504(h)(1) violates Tennessee's separation of powers doctrine.

PRAYER FOR RELIEF (LETHAL INJECTION)

Wherefore, this Court should:

1. Declare Tennessee's Lethal Injection Protocol to be unconstitutional under Tennessee Constitution Article 1, § 16 and the Eighth and Fourteenth Amendments to the United States Constitution.

2. Declare that any attempt by Defendants to carry out Plaintiffs' executions, and/or the carrying out of such executions, using the Lethal Injection Protocol will violate 42 U.S.C. § 1983.

3. Declare that the Lethal Injection Protocol, on its face and as applied to Plaintiffs null and void and/or unconstitutional under United States Constitution Article VI, § 2, the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Tennessee Constitution.

4. Declare that the Lethal Injection Protocol causes, requires or constitutes violations of state and federal laws, including 21 U.S.C. §§ 321, 331, 352, 353, 355, 802(10), 802(11), 802(15), 822, 829, 841, 844, 846, and 21 C.F.R. §§ 1311, 1306.04, 1306.06; state laws including but not limited to, Tenn. Code Ann. §§ 39-17-402, 403, 408, 410; §§ 53-11-301, 302, 303, 307, 308, 401, 402; §§ 63-10-204; and Tenn. Comp. R. & Regs. 1140-01-.01 through 1140-13-.08.

5. Declare that the Lethal Injection Protocol is void as contrary to public policy.

6. Declare that the Lethal Injection Protocol is void as constituting an unlawful civil conspiracy.

7. Declare that Tennessee Code Annotated § 10-7-504(h)(1) violates:

(a) the First Amendment to the Constitution of the United States and/or Article I, § 17 of the Tennessee Constitution;

(b) the Fourteenth Amendment to the Constitution of the United States and/or Article I, § 8 of the Tennessee Constitution;

(c) the Supremacy Clause in Article VI of the United States Constitution; and/or,

(d) Article II, § 2 of the Tennessee Constitution.

8. Grant any other relief as is just and appropriate under the circumstances.

ELECTROCUTION CAUSES OF ACTION

TENNESSEE'S NEWLY ENACTED ELECTROCUTION STATUTE

458. On July 1, 2014, Tennessee's Capital Punishment Enforcement Act took effect. The Act provides that "the method of carrying out the sentence shall be by electrocution" if:

> (1) Lethal injection is held to be unconstitutional by a court of competent jurisdiction . . . ; or
> (2) The commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.

2014 Tennessee Laws Pub. Ch. 1014 (S.B. 2580); Tenn. Code Ann. § 40-23-114(e) (2014).

459. The Act provides that it "shall take effect July 1, 2014" and does not contain a provision providing for its retrospective application.

460. The Act does not: (a) contain any standard or guideline for Defendant Schofield to consider when determining whether an essential lethal injection ingredient is unavailable; (b) define "essential ingredient" or "unavailable"; (c) provide any time frame for the "unavailable" decision; or, (d) specify whether the Defendant Schofield must consider substituting ingredients for the "unavailable ingredient" before making an "unavailable" certification.

461. Plaintiffs have invoked the Tennessee Department of Corrections Inmate Grievance Procedures to assert that any attempt to electrocute them would violate their rights under, among other constitutional provisions: (a) Article I, §§ 8, 16, 20, and 32; and Article II, §§ 1 and 2, of the Tennessee Constitution; and, (b) the Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

462. The grievance process was concluded when the Tennessee Department of Corrections Deputy Commissioner of Operations denied Plaintiffs relief.

A. Definitions

463. Electricity is the flow of electrons from one atom to another.

464. A circuit is the path electrons follow from the point where they leave an electrical generating unit until they return to it.

465. Voltage is the electrical pressure that forces electrons through a circuit. Voltage is measured in volts.

466. Current is the flow of electrons traveling through a circuit. Current is measured in amperes or amps.

467. Direct current is current that flows steadily through a circuit in one direction.

468. Alternating current is current that flows through a circuit in one direction for half a cycle, then reverses direction and flows in the opposite direction for the remaining half of the cycle. Hertz, or HZ, is the term for cycles per second that occur in an alternating electrical current.

469. Resistance is the opposition an object presents to the passage of an electrical current through it. Resistance is measured in ohms.

470. Ohm's Law provides that resistance = voltage/current, measured as ohms = volts/amps.

B. Tennessee's Electric Chair and Chamber

471. Fred A. Leuchter designed and manufactured the equipment Tennessee uses to execute prisoners by means of electrocution.

472. On or around November 29, 1989, Leuchter installed in the Riverbend Maximum Security Institution, Nashville, Tennessee (RMSI) the electrocution equipment he created.

473. Leuchter does not have, and never had, an electrical engineering license from any State.

474. Leuchter claimed expertise in scientific matters has been previously rejected out of hand by trained scientists in the fields in which he claims expertise, *e.g.*, the scientific community's wholesale rejection of his claim that the absence of trace elements of lethal gas on bricks Leuchter had stolen from the WWII Auschwitz concentration camp constituted evidence that the Holocaust did not occur.

475. On or around April 16, 1994, Michael S. Morse tested the electrocution equipment Leuchter created. Morse opined that the Leuchter's equipment did not deliver an adequate current to carry out an execution and did not have the capacity to do so. Morse made fourteen specific recommendations for modifications to Leuchter's electrocution equipment.

476. On or around April 25, 1994, Jay Weichert tested the electrocution equipment Leuchter created. Weichert opined that Leuchter's equipment did not function properly. Weichert made seven specific recommendations for modifications to Leuchter's electrocution equipment.

477. State employees made some, but not all, of the modifications Morse and Weichert suggested.[2]

[2]After Morse and Weichert suggested modifications to Leuchter's electrocution equipment, they examined Florida's electric chair. Weichert concluded that Florida's electrocution equipment "looks excellent." In a subsequent Florida electrocution, however, the condemned prisoner survived after the executioner shut off the chair's power, taking ten deep breaths before dying. Before a medical doctor declared the prisoner dead blood poured out from under the sheath covering the prisoner's face and blood on the prisoner's chest spread to the size of a dinner plate, oozing through the buckle holes on the chest straps that harnessed him to the electric chair.

478. Defendants maintain the electrocution equipment in an Execution Chamber and Executioner's Room located within the RMSI.

479. The Execution Chamber contains the Electric Chair.

480. The component parts of the Electric Chair include: (a) a head piece (a leather cranial cap lined with copper mesh inside - hereafter sometimes referred to as the head electrode); (b) two leg electrodes; (c) a junction box located behind a back leg of the Electric Chair; (d) a cable that runs from the junction box to the head electrode; (e) two cables that run from the junction box to the leg electrodes; and, (f) a removable drip pan underneath a perforated seat.

481. The Executioner's Room adjoins the Execution Chamber.

482. The Executioner's Room contains: (a) an electrical console (the unit the executioner manipulates to carry out an electrocution); (b) a transformer (the device that transfers electricity to and from the Electric Chair); (c) an amp meter (a device that measures the number of amps in an electrical current); and, (d) a switch for activating an exhaust fan above the Electric Chair.

483. In preparing to activate the Electric Chair, Defendants connect a low voltage cable from the electrical console to the transformer and a high voltage cable from the transformer to the Electric Chair's junction box.

484. When activated, the transformer and the Electric Chair create an open alternating current electrical circuit. Any object that creates a connection between the head electrode and the leg electrodes closes, and becomes part of, the electrical circuit. That current traveling that circuit will alternate, or reverse direction, sixty times per second (60 HZ).

C. Defendants' Inadequate Testing Procedures for Tennessee's Electric Chair

485. The Tennessee Protocol for Execution Procedures For Electrocution provides that Defendants' electrocution equipment is designed to deliver to a prisoner for twenty seconds an alternating current of 1,750 volts at 7 amps, followed by a pause of fifteen seconds, followed by a fifteen second alternating current of 1,750 volts at 7 amps.

486. Defendants use a Test Load Box when they test the electrocution equipment.

487. The purpose of the Test Load Box is to simulate a prisoner's body.

488. Defendants place the Test Load Box in the Electric Chair's perforated seat and connect it to the power cable for the head electrode and the leg electrodes.

489. After connecting the Test Load Box to the power cable for the head electrode and the leg electrodes, Defendants activate the Electric Chair and check to see if the transformer meter reads 1,750 volts and the amperage meter reads 7 amps.

490. Ohm's Law establishes that for the electrocution equipment to maintain a circuit that delivers a current of 1,750 volts at 7 amps, the circuit must provide 250 ohms of resistance. (1,750 (volts)/7 (amps) = 250 (ohms)).

491. Defendants' testing procedure establishes only that when the Test Load Box is used to complete the circuit containing the Electric Chair, the Test Load Box provides resistance that creates a total circuit resistance of 250 ohms.

492. Defendants' testing procedure fails to establish that the electrocution equipment will maintain during the electrocution of a prisoner a circuit that delivers a current of 1,750 volts at 7 amps to the prisoner because:

a. For testing purposes, Defendants attach a tester lead from the Test Load Box directly to the power cable for the head electrode. During an execution, however, Defendants: (a) attach the power cable for the head electrode to the head piece; (b) put a sponge saturated with salt water on the prisoner's head; and, (c) attach the head piece to the prisoner's sponge-covered head. The interface between the head electrode/sponge and scalp of the prisoner's head presents a region of high electrical resistance unaccounted for in Defendants' testing procedure.

b. While the Test Load Box contains constant material and thereby reliably provides a constant resistance that creates a total circuit resistance of 250 ohms, the electrical resistance of human bodies varies widely. Factors affecting an individual's resistance to an electrical current include, but are not limited to: (a) the presence or absence of fatty tissue beneath his skin; (b) the distribution and activity of sweat glands; (c) the amount of oil in and on his skin; (d) the thickness of his skin; (e) the amount of hair on his body; (f) the thickness of his skull; (g) the location and size of any cranial skull fissures; and, (h) regional blood flow at the time of electrocution.

c. As a consequence of these factors, a prisoner's body may create a circuit resistance significantly higher or lower than the 250 ohm circuit resistance the Test Load Box creates and thereby significantly alter the voltage and/or current that Defendants apply to him.

d. Defendants make no effort to investigate the resistance individual prisoners present to electrical current.

e. While conditions remain constant within the Test Load Box throughout the testing procedure, during an electrocution execution the resistance of the prisoner's body changes dramatically as his skin heats, perforates, vaporizes, burns, and chars and the saline solution in the sponges between the prisoner's body and the electrodes heats and vaporizes.

493. Defendants' testing procedure fails to ensure that the electrocution equipment will minimize the pain it inflicts on a prisoner because:

a. Individual prisoners have different thresholds for the sensation of electrical current.

b. Individual prisoners have different thresholds for the perception of pain.

c. Individual prisoners experience different physiological effects to electrical current.

d. Individual prisoners will experience significant differences in the amount of electrical current required, and the amount of time for application of that current, to cause unconsciousness.

D. Pre-execution Protocol

494. Three days prior to a scheduled electrocution, Defendants require the prisoner to pack up his belongings. After the prisoner does so, Defendants shackle and handcuff him and transport him and his belongings to Building 8, the Capital Punishment Building.

495. Upon arriving at the Capital Punishment Building, a guard thoroughly strip searches the prisoner, issues him a new prison uniform, and locks him in a solitary cell adjacent to the Execution Chamber (Death Watch). A guard inventories the prisoner's belongings and packs them away.

496. From his Death Watch cell, the prisoner is aware of the electrocution preparations that prison employees perform in the Execution Chamber during the days leading up to the prisoner's electrocution, including tests activating the exhaust fan over the Electric Chair and the Electric Chair itself.

497. A guard is posted outside the prisoner's Death Watch cell twenty-four hours a day. Guards constantly monitor and record the prisoner's behavior, actions, movements, and communications.

498. All communication with other inmates, even through notes, is terminated.

499. All recreation opportunities are terminated.

500. All contact visits with the prisoner's family and friends are terminated.

501. A guard performs a "very thorough strip search" of the prisoner any time the prisoner leaves or enters his Death Watch cell. After strip searching the prisoner, the guard issues him a new prison uniform and handcuffs him.

502. A prisoner lives under Death Watch conditions for two to three days prior to his electrocution.

503. Prior to taking the prisoner to the Electric Chair, Defendants shave the prisoner's head and legs.

504. Guards chosen to take the prisoner from his Death Watch cell to the Electric Chair (Extraction Team) approach the prisoner's cell and ask the prisoner to come to the cell door so they can handcuff him. After being handcuffed Extraction Team members require the prisoner to kneel on his bunk with his head facing the wall.

505. Extraction Team members escort the prisoner to the adjoining Execution Chamber.

506. Extraction Team members require the prisoner to sit on the Electric Chair's perforated seat.

507. Extraction Team members remove the handcuffs, body belt, and leg irons they attached to the prisoner when he was in his Death Watch cell.

508. Extraction Team members tightly strap the prisoner's arms onto the arms of the Electric Chair.

509. Extraction Team members tightly harness the prisoner into the Electric Chair with belts that cross the prisoner's chest.

510. Extraction Team members place two sponges saturated with salt water on each of the prisoner's ankles and secure the prisoner's ankles to the Electric Chair's leg electrodes.

511. It takes Extraction Team members approximately ten minutes to secure the prisoner into the Electric Chair.

512. Prison guards often bind a prisoner into the Electric Chair so tightly that the belts and straps inhibit the prisoner's breathing, cut off blood flow to the prisoner's arms and legs, and pinch the prisoner's nipples.

513. The blinds to the Witness Room are opened.

514. The Warden asks the prisoner to speak his last words.

515. Extraction Team members place a sponge saturated with salt water on top of the prisoner's head.

516. Extraction Team members put the head piece on the prisoner's head and tightly secure its two side straps and chin strap. Salt water from the sponge on top of the prisoner's head runs down the prisoner's face.

517. Extraction Team members snap a shroud onto the head piece.

518. Extraction Team members use water bottles to add salt water to the ankle sponges.

519. Extraction Team members leave the Execution Chamber.

520. The prisoner sits in silence and darkness, tightly bound to the Electric Chair, with water from the sponges running down his head and ankles.

521. The prisoner hears the exhaust fan go on.

E. Execution Through the Use of the Electric Chair

522. When the Electric Chair is activated, the transformer sends electrical current through the head electrode/sponge and onto the prisoner's head. The current exits the prisoner's body at the leg electrodes and travels back to the transformer, completing a circuit. The current alternates between traveling this direction and the opposite direction sixty times per second.

Prisoner Remains Alive For A Period Of Time

523. There is no scientific evidence suggesting that applying high voltage electrical current to a prisoner during an electrocution execution causes the prisoner's instantaneous death.

524. Historical events establish that individuals have remained alive: (a) when they contacted high voltage electrical currents; (b) during the time they remained in contact with those currents; and, (c) after the currents stopped contacting their bodies.

525. Judicial electrocutions establish that prisoners have remained alive during and after the electrocution process.

526. A prisoner's heart will not necessarily stop instantaneously when the high voltage electrical current contacts the prisoner's body. The heart can remain active for a period of time after introduction of the electrical current because:

a. While skeletal muscles involuntarily contract when high voltage electrical current contacts a body and will remain contracted for the duration of the contact (known as muscle tetany), cardiac muscle does not tetanize with application of the strong, rapid stimuli associated with 60 HZ alternating current.

b. The electrical resistance of the lungs and the great vessels in the mediastinum shunt the electrical current away from the heart.

527. Even when contact with high voltage electrical current causes a prisoner's heart to stop beating, when the current ceases there is a high probability that the prisoner's heart will resume beating.

528. While there is a possibility that a prisoner's heart will enter a mode of excitation known as fibrillation during an electrocution execution, when the current ceases the prisoner's heart can resume a normal beating pattern.

529. Even when a prisoner's heart fibrillates for an extended period of time during an electrocution execution, death does not occur instantaneously. Rather, death results over a period of time as the fibrillation of the prisoner's heart reduces cardiac output to the point that it is insufficient to maintain life.

530. When high voltage electrical current contacts a prisoner, the skeletal muscles he requires for breathing tetanize. These muscles include the intercostal muscles between the ribs, the muscles of the diaphragm, and the muscles of the abdomen.

531. Tetanized muscle rapidly burns large quantities of metabolic energy. As a result, during an electrocution execution the prisoner experiences a rapid increase in demand for oxygenated blood and a corresponding rapid increase in the need to eliminate carbon dioxide.

532. Because the skeletal muscles the prisoner requires for breathing tetanize during an electrocution, the prisoner cannot breathe to supply the needed oxygen and eliminate the carbon dioxide.

533. As a result, when Defendants electrocute a prisoner, the prisoner dies from asphyxiation and/or organ damage due to thermal heating, *i.e.*, cooking. These processes require a period of time to produce death.

The Prisoner Remains Conscious And Sensate

534. There is no scientific evidence suggesting that applying high voltage electrical current to a prisoner during an electrocution execution induces instantaneous unconsciousness or analgesia.

535. Historical events establish that individuals have remained conscious and sensate: (a) when they contacted high voltage electrical currents; (b) during the time that they remained in contact with those currents; and, (c) after the currents stopped contacting their bodies.

536. A prisoner will lose consciousness during an electrocution through loss of brain function. Loss of brain function occurs through a direct assault on the brain, or insufficient blood circulation to the brain due to cardiac fibrillation or asphyxia.

537. There is no scientific evidence that applying high voltage electrical current to a prisoner during an electrocution execution provides a sufficient direct assault on the prisoner's brain to cause invariably an instantaneous loss of brain function.

a. Upon contacting the prisoner's body at the top of his head, the electrical current follows to the leg electrodes on the paths of least resistance. The prisoner's skull presents the current a resistance significantly greater than the resistance the prisoner's skin presents. As a result, the vast majority of the electrical current travels around the perimeter of the prisoner's head and down the prisoner's torso and legs until it leaves his body through the leg electrodes. As the current alternates, it follows like paths of least resistance in the opposite direction.

b. Because the skull effectively insulates the brain from the electrical current flowing from and to the head electrode/sponge, the electrical current does not immediately incapacitate the prisoner's brain. Rather, the ability of the prisoner's brain to function becomes compromised over time by: (a) the reduced portion of the current that reaches the prisoner's brain; (b) indirect thermal transfer through the skull; (c) indirect thermal transport through the blood vessels of the prisoner's neck; and, (d) loss of oxygen.

c. While the reduced portion of electrical current that reaches the prisoner's brain may, on occasion, depolarize a prisoner's brain, there is no scientific evidence that the prisoner's depolarized brain neurons will thereafter be incapable of repolarizing during the alternating current stimulation.

d. Should depolarization occur, the Electric Chair's 60 HZ alternating current provides for repolarization of the prisoner's brain.

538. There is no scientific evidence that applying high voltage electrical current to a prisoner during an electrocution execution invariably causes fibrillation of the prisoner's heart.

a. Even when the prisoner's heart fibrillates during an electrocution execution, when the current ceases, the prisoner's heart can resume a normal beating pattern.

b. Even when the prisoner's heart fibrillates for an extended period of time during an electrocution execution, the prisoner will not lose consciousness for eleven to twenty seconds.

539. There is no scientific evidence that asphyxiation causes an instantaneous loss of consciousness. Rather, scientific evidence and historical events establish that loss of consciousness by asphyxiation requires one to three minutes.

540. There is no scientific evidence that applying high voltage electrical current to a prisoner during an electrocution execution invariably causes an instantaneous inability in the prisoner's brain to receive and process brain signals. Rather, scientific evidence and historical events establish that an individual who contacts a high voltage electrical current can experience excruciating pain. Thus, for some period of time during an electrocution execution, the prisoner's brain can remain capable of processing pain sensations arising from peripheral nerves, direct stimulation of the brain, or both.

The Prisoner Will Experience Unnecessary And Wanton Pain

541. A prisoner that remains alive, conscious, and sensate for some period of time during an electrocution execution will experience excruciating pain and suffering from the phenomena that occurs when a high voltage electrical current contacts a person.

542. When high voltage electrical current contacts the prisoner and travels through his body it will burn him, causing extreme pain.

543. When high voltage electrical current contacts the prisoner and travels through his body it will thermally heat, *i.e.*, cook, his body and internal organs, causing extreme pain.

544. When high voltage electrical current contacts the prisoner and travels through his body it will directly excite all sensory, motor, secretory, and autonomic nerves along the paths the current follows, causing extreme pain.

545. When high voltage electrical current contacts the prisoner and travels through his body it will excite brain neurons, causing extreme pain as well as sensations of sound, light, dread, and fear.

546. When high voltage electrical current contacts the prisoner and travels through his body, his skeletal flexor and extensor muscles will simultaneously tetanize, causing extreme pain and possibly breaking bones in the prisoner's body. The muscles will remain tetanized until the current ceases.

547. When high voltage electrical current contacts the prisoner and travels through his body, the skeletal muscles he requires for breathing tetanize, and the prisoner can neither inhale nor exhale. As a result, the prisoner experiences the sensation of suffocating. The intense metabolic demands of muscle tetany aggravate the prisoner's sense that he is suffocating.

548. The initial twenty-second application of electrical current will not provide a time long enough for a prisoner to die from asphyxiation because electrical current applied during an electrocution execution will not necessarily stop the prisoner's heart and the skeletal muscles the prisoner requires for respiration will relax when the current stops and air will flow into the prisoner's lungs.

549. During the fifteen-second interval that follows, a prisoner's heart can circulate the newly oxygenated blood to the brain and the rest of the prisoner's body, keeping him alive, conscious, and sensate for the second application of electrical current.

550. Because Tennessee uses an alternating electrical current for electrocution executions, the prisoner's extreme pain and suffering will repeat sixty times per second as the current alternates the direction it follows.

551. The prisoner's perception of time during the electrocution process can become distorted so that he may perceive each of the sixty per second alternating cycles of electrical current and electrical trauma lasting dramatically longer than it would appear to a bystander.

552. Because contact with high voltage electrical current causes muscle tetany, and because a prisoner is harnessed tightly into the Electric Chair, during an electrocution execution a prisoner is unable to signal that he is experiencing pain and suffering.

553. Because of the unpredictability and variability of each prisoner's electrical resistance during an electrocution execution, the current delivered to each prisoner will vary significantly from the currents delivered to other prisoners and the current the Electric Chair delivers when Defendants test it using the Test Load Box. As a result, the time a prisoner will remain alive, conscious, and sensate is unknown and will vary substantially from prisoner to prisoner.

554. Because prisoners can remain alive at the conclusion of an electrocution execution, the Defendants' protocol provides that a medical doctor wait five minutes after the executioner shuts off power to the Electric Chair before the doctor examines a prisoner's body

for signs of life. During this five minute period, prisoners who survive the electrocution process die from thermal heating, *i.e.*, cooking, of their vital organs, and asphyxiation.

Witness Accounts

555. Witnesses to electrocution executions report that when the executioner activated the Electric Chair, the bodies of prisoners violently lunged forward, arched up, and/or slammed back into the chair. Their hands clenched into fists, sometimes leaving behind a grotesquely distended finger. Their chests heaved and their legs jerked. Defendants' electrocution protocol recognizes the possibility of such occurrences by instructing Extraction Team members to secure tightly the straps and harness that bind the prisoner to the Electric Chair.

556. Witnesses to electrocution executions report hearing a prisoner briefly scream when the executioner first activated the Electric Chair.

557. Witnesses to electrocution executions report: (a) seeing the prisoner's skin burning and/or split open at the site of a leg electrode; (b) seeing steam, smoke, sparks, electrical arcs, and/or flames coming out from under the hood covering the prisoner's face; (c) seeing steam, smoke, sparks, electrical arches, and/or flames surrounding the prisoner's head; (d) seeing steam, smoke, sparks, electrical arches, and/or flames emanating from the site of a leg electrode; (e) hearing a sizzling sound; and, (f) smelling burning flesh.[3]

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[3]Defendants' electrocution protocol recognizes the possibility of such occurrences by posting a fire extinguisher near the Electric Chair during an electrocution execution and instructing the executioner that before he activates the electric chair, he activate and leave on an exhaust fan located above the Electric Chair.

558. Witnesses to electrocutions report that visible portions of the prisoner's body changed colors during the electrocution. Witnesses report seeing visible portions of a prisoner's body become white, yellow, green, pink, red, scarlet, blue, purple, gray, and/or black.

559. Witnesses to electrocutions report seeing: (a) blood, saliva, sweat, and other fluids come out from under the hood covering the prisoner's face; and, (b) blood come out of other parts of the prisoner's body.

560. At the conclusion of an electrocution protocol, witnesses report: (a) seeing the prisoner breathing, gasping for air, nodding his head, shuddering and/or otherwise moving; (b) hearing the prisoner gasp, moan, and/or groan; (c) seeing medical doctors ascertain that the prisoner remained alive; and, (d) seeing the prisoner subjected to the electrocution protocol a second and third time before a doctor declared the prisoner dead.[4]

Results of Post-Mortem Examinations

561. Post-mortem examinations of electrocuted prisoners report severe burns to the prisoners' scalps. These burns form "hatband" rings on the prisoners' scalps and can be so severe that the skin at the burn cite sloughs off a prisoner's head.

562. Post-mortem examinations of electrocuted prisoners report burns to the sides of the prisoners' heads, as well as to their faces, necks, torsos, backs, knees, groins, inner thighs, and scrotums.

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[4] Defendants' electrocution protocol recognizes the possibility that a prisoner will survive their electrocution process by providing that "if the inmate is not deceased after the initial electrical cycle ... the Warden gives the command to repeat the electrocution procedure."

563. Post-mortem examinations of electrocuted prisoners report minimal abnormalities of their brains, consisting mostly of discoloration of the dura underneath the site of electrical burns to the prisoners' scalps.

564. Post-mortem examinations of electrocuted prisoners report severe burns to the prisoners' legs that were attached to the leg electrodes. These burns can be so severe that the skin at the burn site sloughs off a prisoner's leg.

565. The above post-mortem findings establish that when the electrical currents contacted the prisoners' heads, the currents followed paths of least resistance to the leg electrodes. The vast majority of the current moved tangentially along the prisoner's scalps, away from the head electrodes, went around the prisoners' heads, and ran down their necks, torsos, backs, and legs.

566. Post-mortem examinations of electrocuted prisoners report burst blood vessels in, among other areas of the prisoners' bodies, the prisoners' eyes, ears, nose, and anus, as well as blood and/or bloody froth in the prisoners' lungs.

567. Post-mortem examinations of electrocuted prisoners report feces and urine in the underclothing taken off the prisoners.

568. Defendants' Electric Chair recognizes the possibly that during an electrocution a prisoner will lose control of his bodily functions by providing a drip pan underneath a perforated seat.

569. A post-mortem examination of an electrocuted prisoner reports the prisoner's rectum burst and his bowels came out.

570. Post-mortem examinations of electrocuted prisoners report bruises to those areas of the prisoners' bodies where the straps and harnesses to the electric chairs secured the prisoners to those chairs.

571. Post-mortem examinations of prisoners report a blue or purple coloration of the prisoners' skins known as cyanosis. Cyanosis occurs when a person dies from asphyxia and respiratory arrest.

The Daryl Holton Electrocution

572. On September 12, 2007, Tennessee electrocuted Daryl Holton in its Electric Chair.

573. Witnesses to the Holton electrocution report:

a. Prior to electrocuting Holton, Defendants housed him in a solitary Death Watch cell where they monitored and recorded Holton's behavior, actions, movements, and communications.

b. At the time of his execution, Holton's head had been shaved clean.

c. Eight physically imposing guards comprised the Extraction Team.

d. Extraction Team members went into Holton's cell and required him to kneel on his bunk with his head facing the wall. Extraction Team members fastened handcuffs, a body belt, and leg irons onto him.

e. Extraction team members escorted Holton as he shuffled to the execution chamber.

f. When Holton arrived at the Electric Chair, Extraction Team members took off the handcuffs, body belt, and leg irons, made Holton sit on the Electric Chair's

perforated seat, tightly strapped Holton's arms to the arms of the Electric Chair, and tightly harnessed Holton to the Electric Chair with belts across his chest. Extraction Team members placed large wet sponges on Holton's ankles and strapped his ankles to the Electric Chair's leg electrodes.

g. It took approximately ten minutes for Extraction Team members to secure Holton to the Electric Chair.

h. Holton's breathing became labored and he started to hyperventilate.

i. The Warden walked to Holton and asked if he had any final words. Holton said, "I do." Because Holton was hyperventilating, those present had trouble understanding his slurred words.

j. Extraction Team members placed a sponge saturated with salt water on Holton's head, and then tightly strapped onto Holton's head the head piece. Salt water ran down Holton's cheeks.

k. An Extraction Team member attached a power cable to the head piece.

l. An Extraction Team member attached a black shroud to the head piece.

m. The Extraction Team left the Execution Chamber.

n. The exhaust fan over the Electric Chair went on.

o. A loud bang sounded, and Holton's body jerked violently upward and remained there. The black shroud fluttered and witnesses may have heard Holton sigh. Holton's hands gripped the Electric Chair's arms tightly and turned red. After approximately twenty seconds Holton's body slumped over.

p. Approximately fifteen second later a loud bang sounded, and Holton's body jerked higher than it jerked the first time. Holton's hands continued to grip the Electric Chair, and they turned bright red. After approximately fifteen seconds, Holton's body slumped.

q. After five minutes, a doctor checked Holton for signs of life and declared him dead.

574. Consistent with post-mortem examinations of other electrocuted prisoners, a post-mortem examination of Holton reports:

a. Thermal "hatband" burns to the head causing extensive areas of blanching, sloughing, and missing skin. These burns were located above and behind the left ear, above the right ear, and at the right side of the forehead.

b. Thermal burns to the body. These burns were located at the front and back of the neck, at the right lower portion of the back, on both hands, at the back of the right thigh, behind the left knee, and the front and back of both calves.

c. Alveolar hemorrhage in the lungs.

d. Minimal to no damage to the brain.

e. Minimal to no damage to the heart.

575. Consistent with post-mortem examinations of other prisoners who have been electrocuted, photographs of Holton's corpse depict cyanosis.

576. The Holton post-mortem examination and corpse photographs establish that:

a. When the electrical current contacted Holton's head, it followed paths of least resistance to the leg electrodes. The vast majority of the current moved tangentially along Holton's scalp away from the head electrode, went around Holton's head, and ran down his neck, torso, back, and legs.

b. Holton died as a result of asphyxiation and respiratory arrest.

The Rejection of Electrocution as Humane Method of Execution

577. Every State that has ever mandated electrocution as a method of carrying out judicial executions which can be conducted without the express consent of the condemned inmate have withdrawn that mandate.

578. No state, other than Tennessee, has ever renewed that mandate.

a. In 1974 electrocution was the sole method of execution in Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Nebraska, New Jersey, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and Virginia.

b. In 1977 Texas abandoned electrocution. Tex. Crim. Proc. Code Ann. § 43.14.

c. In 1982 New Jersey abandoned electrocution. N.J. Stat. Ann. § 2C:49-2.

d. In 1983 Illinois abandoned electrocution. 725 Ill. Comp. Stat. 5/115-5.

e. In 1983 Arkansas abandoned electrocution as an imposed method of execution. Arkansas gave prisoners sentenced to death before July 4, 1983, the ability to avoid electrocution by choosing instead lethal injection or lethal gas. Arkansas

abandoned electrocution as an execution method for prisoners sentenced to death after that date. Ark. Code Ann. § 5-4-617.

f. In 1984 South Dakota abandoned electrocution. S.D. Codified Laws § 23-A-27A-32.

g. In 1990 Louisiana abandoned electrocution. La. Rev. State. Ann. § 15:569.

h. In 1993 Ohio abandoned electrocution as an imposed method of execution. Ohio gave prisoners the ability to avoid electrocution by choosing instead lethal injection. Ohio Rev. Code Ann. § 2949.22.

i. In 1994 New York abandoned electrocution. N.Y. Correct. Law § 658.

j. In 1994 Connecticut abandoned electrocution. Conn. Gen. Stat.§ 54-100.

k. In 1994 Virginia abandoned electrocution as an imposed method of execution. Virginia gave prisoners the ability to avoid electrocution by choosing instead lethal injection. Va. Code Ann. §§ 53.1-233, 53.1-234.[5]

l. In 1995 Indiana abandoned electrocution. Ind. Code Ann. § 35-38-6-1.

m. In 1995 South Carolina abandoned electrocution as an imposed method of execution. South Carolina gave prisoners the ability to avoid electrocution by choosing instead lethal injection. S.C. Code Ann. § 24-3-530.[6]

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[5]"Electrocution is a violent, torturous and dehumanizing act. Carrying out executions should not require the state to stoop to the same level as the criminal. The objective is death, not violent torture." (Statement of Senator Edgar Robb). "(Electrocution is) a violent, torturous and, yes, dehumanizing way of carrying out the mandate of the people." (Statement of Delegate Phillip Hamilton).

[6] "The technology that was available for us at the turn of the century in South Carolina was electricity. . . . It's kind of cruel and inhumane." (Statement of Representative Harry Hallman).

n. In 1998 Kentucky abandoned electrocution as an imposed method of execution. Kentucky gave prisoners sentenced to death on or before March 31, 1998, the ability to avoid electrocution by choosing instead lethal injection. Kentucky abandoned electrocution as an execution method for prisoners sentenced to death after that date. Ky. Rev. Stat. Ann. § 431.220.

o. In 1998 Pennsylvania abandoned electrocution. Pa. Stat. Ann. Tit. 61, § 3004.

p. In 1998 Tennessee abandoned electrocution as an imposed method of execution. Tennessee gave prisoners sentenced to death before January 1, 1999, the ability to avoid electrocution by choosing instead lethal injection, with the default execution method being electrocution if the prisoner refused to select an execution method. Tennessee abandoned electrocution as an execution method for prisoners sentenced to death after that date. In 2000, Tennessee abandoned electrocution as the default execution method for prisoner sentenced to death before January 1, 1999. Tenn. Code Ann. § 40-23-114(a).[7]

q. In 2000 Florida abandoned electrocution as an imposed method of execution. Florida gave prisoners the ability to avoid electrocution by choosing instead lethal injection. Fla. Stat. Ann. §§ 922.10 and 922.105.

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[7]"We have reason to be very suspect of the technology of our Electric Chair, the maintenance of our Electric Chair, modifications that have been performed to the Electric Chair, as to whether or not this is actually gonna result in a death that would be quite heinous and cruel. . . ." (Statement of Representative Frank Buck).

r. In 2000 Georgia abandoned electrocution as a method for executing future death sentences, but left electrocution in place as the method for prisoners sentenced to death before the new legislation took effect. Ga. Code Ann. § 17-10-38.

s. In 2001, the Georgia Supreme Court declared electrocution a cruel and unusual punishment. It concluded that:

> death by electrocution involves more than the "mere extinguishment of life," and inflicts purposeless physical violence and needless mutilation that makes no measurable contribution to accepted goals of punishment. Accordingly, we hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment.

Dawson v. State, 554 S.E.2d 137, 143-44 (Ga. 2001) (citations omitted).

t. In 2001 Ohio abandoned electrocution.[8]

u. In 2002 Alabama abandoned electrocution as an imposed method of execution. Alabama gave prisoners the ability to avoid electrocution by choosing instead lethal injection. Ala. Code § 15-18-82.[9]

v. In 2008 the Nebraska Supreme Court declared electrocution a cruel and unusual punishment. It concluded that:

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

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[8] "Electrocution is no longer a humane way of putting condemned prisoners to death. . . ." (Representative Jim Trakas).

[9] "[Electrocution is a] horrible way for us to put a person to death." (Statement of Representative Thomas Jackson).

> 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 of the laboratory of Baron Frankenstein that the death chamber" of state prisons.

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

579. No state that adopted the death penalty after 1974 authorized electrocution as a method of execution. Arizona, Az. Const. Art. 22 § 22; California, Cal. Penal § 3604; Colorado, Colo. Rev. Stat. § 18-1.3-1202; Delaware, Del. Code Ann. Tit. 11 § 4209; Idaho, Idaho Code § 19-2716; Kansas, Kan. Stat. Ann. § 22-4001; Maryland, Md. Code Ann. § 3-905; Mississippi, Miss. Code Ann. Correctional Services § 99-19-51; Missouri, Mo. Ann. Stat. § 546.720; Montana, Mont. Code Ann. § 46-19-103; Nevada, Nev. Rev. Stat. 176.355; New Hampshire, N.H. Stat. Ann. § 630:5; New Mexico, N.M. Stat. Ann. § 31-14-11; North Carolina, N.C. Gen. Stat. § 15-188; Oklahoma, Okla. St. Tit. 22 § 1014; Oregon, Or. Rev. Stat. § 137.473; Utah, Utah Code Ann. § 77-18-5.5; Washington, Wash. Rev. Code Ann. § 10.95.180; Wyoming, Wyo. Stat. Ann. § 7-13-904 .

580. The federal government does not authorize electrocution as a method for carrying out a federal death sentence.

581. No government in the world imposes electrocution as a method for executing a death sentence.

ELECTROCUTION COUNT I

EXECUTION BY ELECTROCUTION CREATES A SUBSTANTIAL RISK OF UNNECESSARY PAIN IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND TENNESSEE CONSTITUTION ARTICLE 1, § 16.

582. Plaintiffs incorporate the preceding paragraphs.

583. Plaintiffs respectfully request that this Court:

a. Enter judgment on the following declaration: "Electrocution by means of Defendants' electrocution equipment: (a) involves a substantial risk that a prisoner will suffer unnecessary and wanton pain; (b) involves more than the mere extinguishment of life; and, (c) therefore violates Article I, §§ 8, 16 and 32 of the Tennessee Constitution;"

b. Enter judgment on the following declaration: "Electrocution by means of Defendants' electrocution equipment: (a) involves a substantial risk that a prisoner will suffer unnecessary and wanton pain; (b) involves more than the mere extinguishment of life; and, (c) therefore violates the Eighth and Fourteenth Amendments to the United States;" and

c. Order such other relief as this Court deems just.

ELECTROCUTION COUNT II

EXECUTION BY ELECTROCUTION BURNS, MUTILATES, DISTORTS, AND OTHERWISE DISFIGURES A PRISONER'S BODY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND TENNESSEE CONSTITUTION ARTICLE 1, § 16.

584. Plaintiffs incorporate the preceding paragraphs.

585. Plaintiffs respectfully request that this Court:

a. Enter judgment on the following declaration: "Electrocution by means of Defendants' electrocution equipment: (a) burns, mutilates, distorts, and otherwise disfigures a prisoner's body; and, (b) therefore violates Article I, §§ 8, 16, and 32 of the Tennessee Constitution;"

b. Enter judgment on the following declaration: "Electrocution by means of Defendants' electrocution equipment: (a) burns, mutilates, distorts, and otherwise disfigures a prisoner's body; and, (b) therefore violates the Eighth and Fourteenth Amendments to the United States Constitution;" and

c. Order such other relief as this Court deems just.

ELECTROCUTION COUNT III

EXECUTION BY ELECTROCUTION VIOLATES EVOLVING STANDARDS OF DECENCY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND TENNESSEE CONSTITUTION ARTICLE 1, § 16.

586. Plaintiffs incorporate the preceding paragraphs.

587. Plaintiffs respectfully request that this Court:

a. Enter judgment on the following declaration: "Every State that once imposed electrocution as a method for executing a prisoner has abandoned it, and no government in the world imposes electrocution as a method for executing a human being. As a result electrocution by means of Defendants' electrocution equipment violates evolving standards of decency under Article I, §§ 8, 16, and 32 of the Tennessee Constitution;"

b. Enter judgment on the following declaration: "Every State that once imposed electrocution as a method for executing a prisoner has abandoned it, and no government in the world imposes electrocution as a method for executing a human being. As a result electrocution by means of Defendants' electrocution equipment violates evolving standards of decency under the Eighth and Fourteenth Amendments to the United States Constitution;" and

c. Order such other relief as this Court deems just.

ELECTROCUTION COUNT IV

EXECUTION BY ELECTROCUTION VIOLATES THE DIGNITY OF MAN IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND TENNESSEE CONSTITUTION ARTICLE 1, § 16.

588. Plaintiffs incorporate the preceding paragraphs.

589. Plaintiffs respectfully request that this Court:

a. Enter judgment on the following declaration: "Defendants' electrocution execution protocol violates the dignity of man and, as a result, violates Article I, §§ 8, 16, and 32 of the Tennessee Constitution;

b. Enter judgment on the following declaration: "Defendants' electrocution execution protocol violates the dignity of man and, as a result, violates the Eighth and Fourteenth Amendments to the United States Constitution;" and

c. Order such other relief as this Court deems just.

ELECTROCUTION COUNT V

RETROSPECTIVE APPLICATION OF THE CAPITAL PUNISHMENT ENFORCEMENT ACT VIOLATES TENNESSEE CONSTITUTION ARTICLE 1, § 20.

590. Plaintiffs incorporate the preceding paragraphs.

591. Plaintiffs respectfully request that this Court:

a. Enter judgment on the following declaration: "The Capital Punishment Enforcement Act does not apply retrospectively, but only to death sentences imposed on or after July 1, 2014;"

b. Enter judgment on the following declaration: "Retrospective application of the Capital Punishment Enforcement Act would violate Article I, § 20 of the Tennessee Constitution;" and

c. Order such other relief as this Court deems just.

ELECTROCUTION COUNT VI

THE CAPITAL PUNISHMENT ENFORCEMENT ACT DOES NOT CONTAIN SUFFICIENT STANDARDS OR GUIDELINES FOR THE COMMISSIONER OF CORRECTION TO APPLY WHEN DETERMINING WHETHER A LETHAL INJECTION INGREDIENT IS UNAVAILABLE IN VIOLATION TENNESSEE CONSTITUTION ARTICLE II, §§ 1 & 2.

592. Plaintiffs incorporate the preceding paragraphs.

593. Plaintiffs respectfully request that this Court:

a. Enter judgment on the following declaration: "Because the Capital Punishment Enforcement Act does not contain sufficient standards or guidelines for the commissioner of correction to apply when determining whether a lethal injection ingredient is unavailable, it violates Article II, §§ 1 and 2 of the Tennessee Constitution;" and

b. Order such other relief as this Court deems just.

ELECTROCUTION COUNT VII

THE CAPITAL PUNISHMENT ENFORCEMENT ACT IS VOID FOR VAGUENESS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, § 8 OF THE TENNESSEE CONSTITUTION.

594. Plaintiffs incorporate the preceding paragraphs.

595. Plaintiffs respectfully request that this Court enter judgment on the following declaration: The Capital Punishment Enforcement Act is void for vagueness under Article I, § 8

of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution because it does not: (a) define "essential ingredients" or "unavailable"; (b) provide any time frame for the "unavailable" decision; and, (c) specify whether the commissioner must consider substituting ingredients for the "unavailable" ingredient before making an "unavailable" certification; and

596. Order such other relief as this Court deems just.

PRAYER FOR RELIEF (ELECTROCUTION)

Wherefore this Court should grant such relief as is requested in Electrocution Count I through Electrocution Count VII and grant any other relief as is just and appropriate under the circumstances.

Respectfully Submitted,

FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC.

BY: _____

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CERTIFICATE OF SERVICE

I, Stephen M. Kissinger, hereby certify that a true and correct copy of the foregoing document was sent via Fed-Ex, for overnight delivery to:

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this the 21st day of August, 2014.

Stephen M. Kissinger
Asst. Federal Community Defender