

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
MAR - 1 2018
Clerk of the Appellate Courts
Rec'd By _____

LEE HALL, JR.,)
)
 Petitioner,) E1997-00344-SC-DDT-DD
)
 v.)
)
 STATE OF TENNESSEE)
 Respondent.) (CAPITAL CASE)

**LEE HALL'S RESPONSE IN OPPOSITION TO STATE'S MOTION
FOR EXPEDITED EXECUTION DATES
AND
REASONS WHY NO EXECUTION DATE SHOULD BE SET**

This Honorable Court should deny the State's motion to set an expedited execution date pending the outcome of Mr. Hall's timely filed challenge to the newly promulgated execution protocols. The State asks the Court to schedule an execution every eleven days in the upcoming months. This is an extraordinary deviation from the previous precedent of this Court under circumstances that the State could have avoided. Further, Mr. Hall requests that this Court issue a recommendation of commutation, pursuant to Tenn. Code Ann. § 40-27-106, because executing Mr. Hall, a blind man, would constitute cruel and unusual punishment, a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, § 16 of the Tennessee Constitution.

Brief Procedural History

In October and December 2013, the State of Tennessee moved this Court, pursuant to Tennessee Supreme Court Rule 12.4, to set execution dates for eleven death row inmates. Petitioner Lee Hall, who was convicted and sentenced to death for the murder of his former girlfriend, Traci Crozier, was among the eleven inmates. In response to the State's motions, this Court subsequently set the eleven execution dates between January 2014 and March 2016.¹ Mr. Hall's date was the tenth scheduled.

Mr. Hall, along with other death sentenced inmates, subsequently brought a declaratory judgment action seeking to have the State's protocol for lethal injection, which used compounded pentobarbital, declared unconstitutional. *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017). The Court stayed all execution dates pending disposition of the lawsuit. On March 28, 2017, this Court held, inter alia, that the pentobarbital lethal injection protocol did not violate the Eighth Amendment. *Id.* The Supreme Court subsequently denied certiorari on November 27, 2017, and January 8, 2018. See *West v. Parker*, 138 S.Ct. 476 (2017); *Abdur'Rahman v. Parker*, 138 S.Ct. 647 (2018).

¹ See *State v. Billy Ray Irick*, No. M1987-00131-SC-DPE-DD, Order (Tenn. filed Oct. 22, 2013); *State v. Edmund Zagorski*, No. M1996-00110-SC-DPE-DD, Order (Tenn. filed Jan. 31, 2014); *State v. Stephen Michael West*, No. M1987-00130-SC-DPE-DD, Order (Tenn. filed Dec. 17, 2014); *State v. Donnie Edward Johnson*, No. M1987-00072-SC-DPE-DD, Order (Tenn. filed Dec. 17, 2014); *State v. Olen E. Hutchison*, No. M1991-00018-SC-DPE-DD, Order (Tenn. filed Dec. 17, 2014); *Charles Walton Wright v. State*, No. M1985-00008-SC-DDT-DD, Order (Tenn. filed Jan. 31, 2014); *State v. David Earl Miller*, No. E1982-00075-SC-DDT-DD, Order (Tenn. filed Dec. 17, 2013); *Abu-Ali Abdur'Rahman (formerly known as James Lee Jones) v. State*, No. M1988-00026-SC-DPE-PD, Order (Tenn. filed Jan. 31, 2014); *State v. Nicholas Todd Sutton*, No. E2000-00712-SC-DDT-DD, Order (Tenn. filed Dec. 17, 2013); *State v. Lee Hall, a/k/a Leroy Hall, Jr.*, No. E1997-00344-SC-DDT-DD, Order (Tenn. filed Aug. 12, 2014); and *Donald Wayne Strouth v. State*, No. E1997-00348-SC-DDT-DD, Order (Tenn. filed Apr. 08, 2014).

On January 18, 2018, this Court ordered the Warden of the Riverbend Maximum Security Institution to execute Billy Irick's death sentence on August 9, 2018. *Irick*, No. M1987-00131-SC-DPE-DD, Order. On February 15, 2018, the State again moved this Court to set execution dates for eight of the above referenced inmates.² *Hall*, No. E1997-00344-SC-DDT-DD, Motion to Set Execution Dates. Citing "the ongoing difficulty in obtaining the necessary lethal injection chemicals" from an entirely new three drug lethal injection protocol that, at the time, was less than six weeks old, the State moved this Court to schedule eight executions before June 1, 2018. *Id.* at 1-2. On February 16, 2018, this Court issued orders granting each of the eight inmates until March 1, 2018 to respond to the State's motion.

In sum, the State is asking this court to schedule an execution approximately every eleven days between March 1 and May 31, 2018.

The backdrop of this extraordinary action by the State—requesting that this Court unnecessarily and unduly pose great stress and burdens on Correction employees, the parties, and their respective counsel, this Court and its staff, the families of the victims, and the Petitioners' families—is of critical importance.

Synopsis of Relevant Facts Regarding Tennessee Midazolam Option

On September 7, 2017,³ the State's contractor, a for-profit pharmaceutical supplier, told the State that midazolam "does not elicit strong analgesic effects," and that inmates "may be able to feel pain from the administration of the second and third drugs" in a three-drug protocol. *See* Attachment 2. That is, the State is on

² Olen Hutchison and Donald Strouth passed away in October 2014 and May 2015, respectively.

³ *See* Attachment 1, Chronology of Events Relevant to State's Motion to Expedite Execution Dates.

notice that if they use midazolam in place of a true anesthetic in a three-drug protocol, a condemned inmate will suffer severe pain during execution.⁴

Despite this warning, on October 18, 2017, the State began the process of procuring midazolam for use in executions; ultimately purchasing midazolam that expires on June 1, 2018. On October 26, 2017, one of the State's drug suppliers,⁵ emailed the Tennessee Department of Correction, and stated, "I will have my pharmacist write up a protocol." Attachment 3. On November 28, 2017, one of the drug suppliers sent another email that contained, "revisions to the protocol." Attachment 4.

On January 8, 2018, the State promulgated a new lethal injection protocol that retained the one-drug, pentobarbital protocol and added a midazolam-based, three-drug lethal injection protocol: Tennessee's Midazolam Option.⁶ Apparently, this is the protocol drafted for the State of Tennessee by the for-profit supplier of drugs that are to be used in the proposed executions.

On January 11, 2018, the State filed Notices requesting nine executions. Five days later, on January 16, 2018, and only in response to a public records request, the State disclosed their amendment of the 2015 lethal injection protocol and the

⁴ Recently, "botched" executions in Arizona, Oklahoma, and Ohio also put the State on notice that midazolam is not an anesthetic, does not render inmates insensate to pain, and is grossly inappropriate for use in lethal injection executions.

⁵ It is not known whether this is the same supplier who had warned Tennessee that midazolam would not work, or a different drug seller.

⁶ That is, the State bought the midazolam first, and created a mechanism to use it, second. With both actions being preceded by a warning from their supplier that midazolam was not effective.

adoption of the Midazolam Option.⁷ No formal announcement was made alerting the public to the new protocol. However, in the February 15, 2018 Motion to Set Execution Dates, the State, for the first time, announced its intention to execute inmates using the Midazolam Option, and not with the single-drug pentobarbital protocol.

The State purchased midazolam in October of 2017 that would only be effective until June 1, 2018. This purchase was made while executions were on hold awaiting the United States Supreme Court's resolution of *Abdur'Rahman, et al. v. Parker, et al.*, Case No. 17-6068. The State was aware that (1) applications for executive clemency will not be entertained until after execution dates are set, (2) this Court's practice has been to permit at least three months for the Governor to consider such applications, (3) this Court has traditionally scheduled executions many weeks or months apart, and (4) this Court's precedent demands a full and fair constitutional adjudication of substantively new execution protocols. Yet they purposefully kept their plans under wraps.

The State's decision to add the Midazolam Option to its lethal injection protocol (after purchasing it first, and despite being warned of its dangers), and to accept midazolam with a June 1, 2018 expiration date does not create an exigency warranting an unprecedented rush to execution.

⁷ This disclosure came in response to a public records request submitted by counsel for Abdur'Rahman, Johnson, Wright, and Zagorski. This request had been pending since November 6, 2017.

The fact that the protocol that would be used to execute Mr. Hall was written, not by State actors, but by the supplier who profits from the sale of the lethal injection chemicals,⁸ is yet another reason not to set Mr. Hall's execution.

Mr. Hall should be given a full opportunity to litigate the constitutionality of the newly proposed lethal injection protocol without the extraordinary pressure of eight execution dates in a compressed, three-month timeframe. Mr. Hall and all similarly situated inmates, should be given adequate time to present petitions for clemency to the Governor of the State of Tennessee. The State's Motion to Set Execution Dates should be denied.

I. Principles Of Stare Decisis And Established Precedent Require A Full And Fair Adjudication Of The Merits Of The Now-Pending Declaratory Judgment Action That Was Filed Expeditiously (27 business days) After The Tennessee Midazolam Option Was Disclosed.

The State's request for relief is foreclosed by binding Tennessee precedent.

This Court's precedent establishes that:

The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

State v. West, No. M1987-000130-SC-DPE-DD, Order p. 3 (Tenn. Nov. 29, 2010).

This Court has held true to the principles announced in *West*. See, e.g., *State v.*

Strouth, No. E1997-00348-SC-DDT-DD, Order, p. 3 (Tenn. Apr. 8, 2014) ("Mr.

⁸ The State's responses to public records requests have been less than illuminating about the process used to produce the current protocol. However, the emails that were produced are the only documents provided that detail any part of the drafting procedure. Thus, Mr. Hall relies on them as the best evidence of how the Midazolam Option came to be.

Strouth is correct that 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.... Accordingly, the Court will set Mr. Strouth's execution for a future date that will allow plenty of time for resolution of the declaratory judgment action in the state courts.")

The State's motion fails to acknowledge the holding in *West*. Further, the State's motion does not provide a single case to give this Court a reason to depart from the principles of stare decisis. "The power of this Court to overrule former decisions 'is very sparingly exercised and only when the reason is compelling.'" *In re Estate of McFarland*, 167 S.W.3d 299, 306 (Tenn. 2005) (quoting *Edingburgh v. Sears, Roebuck & Co.*, 206 Tenn. 660, 337 S.W.2d 13, 14 (1960)). As this Court has held, "The sound principle of stare decisis requires us to uphold our prior precedents to promote consistency in the law and to promote confidence in this Court's decisions." *Cooper v. Logistics Insight Corp.*, 395 S.W.3d 632, 639 (Tenn. 2013). This Court does not deviate from precedent on the basis of speculative "uncertain[ty]." State's Motion To Set Execution Dates, p. 2.

- II. The State's Professed Urgency To Schedule Executions Prior To June 1, 2018 Is A Manufactured And Avoidable Crisis That Does Not Justify Abridging Mr. Hall's Right To Fully Challenge The Midazolam Option.**
 - A. The State Manufactured A Crisis To Support Its Request For Executions Prior To June 1, 2018 To Prevent The Due Process Hearing Required By Court Precedent From Ever Taking Place.**

Midazolam is the most controversial, dangerous drug ever to be used in a lethal injection protocol in the State of Tennessee. Of the seven states to use midazolam in a lethal injection, three have abandoned its use. The State of Arizona

has agreed to never again use any benzodiazepine, including midazolam, or a paralytic in a lethal injection. *First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14–CV–01447–NVW–JFM, Stipulated Settlement Agreement, Docket Entry No. 152 (D. Ariz. Dec. 19, 2016) (Attachment 5) (midazolam); *First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14–CV–01447–NVW–JFM, Stipulated Settlement Agreement, Docket Entry No. 186 (D. Ariz. June 21, 2017) (Attachment 6) (paralytic).

Midazolam—a sedative with no analgesic properties—is a completely different class of pharmaceutical than the barbiturates sodium thiopental and pentobarbital. Unlike sodium thiopental and pentobarbital, midazolam does not render the inmate unaware or insensate to severe pain. The Supreme Court has held: “It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the pancuronium bromide and pain from the injection of potassium chloride.” *Baze v. Rees*, 553 U.S. 35, 53 (2008). The Davidson County Chancery Court agreed with Chief Justice Roberts’ opinion in *Baze* in the 2010 *West v. Ray* litigation. See *West v. Ray*, Case No. 10-1675-I, Order (Davidson County Chancery Court November 22, 2010). The Chancellor’s opinion in the 2010 *West* litigation remains undisturbed. Similarly undisturbed is the opinion of the Davidson County Chancery Court in the 2005 *Abdur’Rahman v. Bredesen* litigation that pavulon (a paralytic similar to the one used in the new Midazolam Option) serves no purpose in an execution. *Abdur’Rahman v. Bredesen*, 181 S.W. 3d 292,

307 (Tenn. 2005) (noting that “the Chancellor correctly observed that the State failed to show a legitimate reason for the use of Pavulon in the lethal injection protocol”).

When Tennessee last used a three-drug protocol, it was found to be unconstitutional unless the State implemented sufficient checks to ensure that the inmate would be unable to experience suffocation and pain. Those necessary checks are absent from Tennessee’s Midazolam Option.

The State knew, or reasonably should have known, when they chose to change its lethal injection protocol and to add a Midazolam Option that its new protocol would be challenged in court. They also knew that the challenge would have merit because they were warned by their pharmacist that midazolam does not work like sodium thiopental or pentobarbital. In a September 7, 2017 email, the supplier wrote “Here is my concern with midazolam, being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium Chloride especially.” Attachment 2. The State knew that counsel for Abdur’Rahman, *et al.*, submit requests for public records regarding execution drugs (among other information) on a routine basis. *See* Attachment 7, Chronology of Public Records Requests During Past Six Months. Despite producing public records on November 6, 2017, TDOC did not provide any records regarding a change in the lethal injection protocol to include a Midazolam Option or regarding TDOC’s attempts to procure midazolam until January 16, 2018. *See* Attachments 1, 7.

On October 18, 2017, TDOC was told that the midazolam it was purchasing expired on June 1, 2018. Attachment 8, Email. TDOC moved forward with the purchase of midazolam that they knew would expire before any challenge to its use could be litigated. Emails, W-9's, invoices, and photographs of the drugs purchased demonstrate that the State knew well in advance of January 8, 2018, that it intended to use Tennessee's Midazolam Option to execute Mr. Hall. Yet, despite public records requests made throughout that time, the State failed to notify undersigned counsel of any intent to implement a new lethal injection protocol.

The State's decision to withhold this information from defense counsel appears intentional and calculated to gain a litigation advantage. The State seeks to avoid a trial on the merits of any challenge to Tennessee's Midazolam Option. To do so, they seek to cut off Mr. Hall's access to the courts by executing him before he has a chance to present his proof.

On January 18, 2018, just two days after learning of Tennessee's Midazolam Option, Mr. Hall told this Court that he intended to challenge the new protocol but required time to consult with experts; Mr. Hall additionally stated he would file a challenge on or before February 20, 2018—a self-imposed deadline that Mr. Hall met. The State delayed until February 15, 2018, to tell this Court that its midazolam supply expires on June 1, 2018.

Importantly, and fatal to their request for expedited execution dates, the State does not say that they will be unable to obtain the drugs necessary to carry out executions after June 1, 2018. Rather, the State alleges that their ability to do

so is “uncertain.” State’s Motion To Set Execution Dates, p. 2. Such vague and unsupported allegations are not enough to overturn Tennessee precedent, particularly where the State could have informed Mr. Hall months earlier that it intended to adopt a new lethal injection protocol that adds a Midazolam Option. Under the circumstances, Mr. Hall has acted with extreme diligence, expediency and transparency. The same cannot be said for the State. *See Attachment 1.*

B. The State’s Vague And Unsupported Representation To The Court About Its Efforts To Obtain Pentobarbital Is Inconsistent With The Proof In The Record, Their Own Representations To The United States Supreme Court, Their Representations To The Public, And The Fact That Executions Using Pentobarbital Continue To Be Carried Out.⁹

In its motion, the State tells the court in an unverified statement: “The Department’s supply of pentobarbital expired while the *West* proceeding was pending.” State’s Motion to Set Execution Dates, p. 2. This cannot be true. TDOC’s numerous responses to Tennessee Public Records Act requests make clear that TDOC never received any pentobarbital (compounded or otherwise) from its supplier(s) and never had any in its possession—thus there was none to expire.

The reason TDOC never had pentobarbital is because the 2015 lethal injection protocol, current Protocol A, uses compounded pentobarbital. According to the USP,¹⁰ high-risk sterile compounds, such as compounded pentobarbital, have a beyond use date of 24 hours at controlled room temperature or three days

⁹ Although this Court does not resolve factual disputes, and Mr. Hall is not requesting that the Court do so, the following facts are asserted in response to the State’s representation regarding pentobarbital. The truth will ultimately be determined in the pending Chancery Court proceedings.

¹⁰ The United States Pharmacopeia sets the world industry standards to “ensure the quality, safety, and benefit of medicines and foods.” <http://www.usp.org/about> (last accessed March 1, 2018)

refrigerated. See *West, et al. v. Schofield, et al.*, Case No. M2015–01952–COA–R3–CV, Technical Record, Trial Exhibits 5, 6. Testimony from State agents during the previous *West* litigation established that the TDOC had a signed contract with a pharmacist who assured that s/he could obtain the active pharmaceutical ingredient necessary to compound pentobarbital and that the compounder was ready, willing, and able to manufacture and distribute compounded pentobarbital to TDOC upon the setting of an execution date. See, e.g., *West, et al. v. Schofield, et al.*, Case No. M2015–01952–COA–R3–CV, Technical Record, Transcript, Volume III, pp. 823–24; *Id.*, Trial Exhibit 54. On March 2, 2017, Debra Inglis, TDOC legal counsel, told reporters that TDOC was able to obtain the drugs necessary for an execution “as needed.” Boucher, *Lethal injections stalled*, *The Tennessean*, March 3, 2017, p. A3; 2017 WLNR 6714205.

Counsel for Abdur’Rahman, Johnson, Wright and Zagorski have consistently requested public records from TDOC. Attachments 1, 7. TDOC has not produced a document indicating that the compounder has withdrawn from the contract with TDOC. TDOC has not produced a document establishing that they are unable to obtain compounded pentobarbital. On November 13, 2017, the State continued to defend the compounded pentobarbital protocol in the United States Supreme Court. *Abdur’Rahman, et al. v. Parker, et al.*, No. 17-6068, Brief in Opposition. That the State did so indicates that they were confident in their ability to obtain pentobarbital as recently as November 13, 2017.

Public records productions by TDOC, which the State represents are full and accurate as of January 10, 2018, provide no evidence that TDOC is unable to obtain compounded pentobarbital.¹¹ In fact, documents produced on January 16, 2018 contain a contract signed December 4, 2017, with an individual who agreed to compound drugs for lethal injections in Tennessee. Attachment 9, Pharmacy Services Agreement, Article 1, §1.2.

The State's new protocol, which retained pentobarbital and added a Midazolam Option, is dated January 8, 2018. Texas was prepared to carry out an execution using pentobarbital on February 22, 2018, but the defendant in that case was granted executive clemency hours before the execution was carried out. Georgia is set to carry out an execution using pentobarbital on March 15, 2018. Thus, the State's bald assertion that their ability to obtain pentobarbital is uncertain does not justify their request to schedule Mr. Hall's execution prior to June 1, 2018, and to choose the Midazolam Option, without ever giving Mr. Hall an opportunity for the due process hearing this Court's precedent demands.

C. The State's Argument That The Pharmaceutical Companies Are Acting At The Behest Of Death Penalty Opponents Is A Baseless Conspiracy Theory.

Multi-billion dollar pharmaceutical companies do not act at the behest of small, non-profit, death penalty abolitionist groups. These businesses act at the behest of their stockholders and pursuant to their business model. These private businesses do not have a stake or a position on how or whether Mr. Hall lives or

¹¹ Despite requests to the contrary, when TDOC finally answers public records requests they only do so as of the date of the letter requesting the records. A February 2, 2018 public records request remains unanswered.

dies. Mr. Hall has no control over these Fortune 500 companies. Nor does Mr. Hall have control over the actions of small non-profits.

The truth is that the pharmaceutical companies have always objected to their drugs being misused in lethal injections. When states began to use branded drugs in lethal injections, those companies simply enforced their contracts, as any business would.

The fact that the business concerns of multi-billion dollar companies collide with the State's interest in misusing those companies' drugs is not the fault of Mr. Hall. The actions of individuals on either side of the death penalty debate are irrelevant to Mr. Hall's right to due process and the rule of law. Such actions do not provide a reason to cast aside stare decisis and set execution dates before Mr. Hall has an opportunity to fully and fairly litigate his case against the new lethal injection protocol.

III. Tennessee Courts Are Concerned With Due Process And The Rule Of Law.

The February 22, 2018 botched non-execution of Doyle Hamm in Alabama¹² demonstrates why it is essential to fully and fairly litigate challenges to risky protocols such as the Tennessee Midazolam Option in a courtroom environment without the extreme pressure of compressed execution schedules. The constitutionality of the Midazolam Option must be adjudicated in a forum that is free from the immense time pressure the State seeks to impose.

¹² <https://www.reuters.com/article/us-alabama-execution/alabamas-aborted-execution-was-botched-and-bloody-lawyer-idUSKCN1G90Y2> (last accessed March 1, 2018)

The cases cited by the State in their motion arise in a stay-posture where the defendants faced a higher burden than the one governing Mr. Hall's pending lawsuit in Chancery Court. Moreover, the cases cited by the State do not change the fact that this Court has always held that lethal injection challenges must be fairly adjudicated on their own, unique facts in Tennessee.¹³ Fair adjudication means a trial with a full record addressing the merits. "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." *State v. West*, No. M1987-000130-SC-PE-DD, Order p.3 (Tenn. Nov. 29, 2010). The State's motion implicitly admits that there is no time to meet the requirement of a fully developed record if eight executions are to be conducted by June 1, 2018. The State's motion fails on the basis of precedent alone.

Indeed, this Court's precedent establishes that Mr. Hall is entitled to sufficient notice and time to challenge the Tennessee Midazolam Option that this State's courts have never reviewed. This Court previously acknowledged that Mr. Hall has a "legitimate. . . right to and need for notice" regarding significant changes in lethal injection protocols. *West v. Schofield*, 468 S.W.3d 482, 494 (Tenn. 2015)

¹³ Mr. Hall's lawsuit cannot be dismissed by reference to cases decided in other jurisdictions in the context of appeals from the preliminary injunction proceedings respecting protocols which are not identical to the Tennessee Midazolam Option. Tennessee courts decide what is constitutional in Tennessee after a full and fair hearing. Further, the State overstates the Supreme Court's holding in *Glossip v. Gross*, 135 S.Ct. 2726 (2015). *Glossip* did not hold that the any lethal injection protocol using midazolam is constitutional. Rather, in the context of an appeal from the denial of a preliminary injunction in a federal court action, it was found that the lower court did not commit clear error. *Id.*, at 2740-41.

(interlocutory appeal holding challenge to electrocution unripe but guaranteeing sufficient notice and time to challenge any change to the protocol).

IV. Scheduling Execution Dates On An Expedited Basis Unduly Burdens And/Or Denies Mr. Hall Fair Access To Meaningful Clemency Proceedings.

Mr. Hall has a statutory and constitutional right to seek executive clemency:

As the United States Supreme Court has observed

Executive clemency has provided the “fail safe” in our criminal justice system. K. Moore, *Pardons: Justice, Mercy, and the Public Interest* 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. E. Borchard, *Convicting the Innocent* (1932). Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of “actual innocence” have been made. *See* M. Radelet, H. Bedau, & C. Putnam, *In Spite of Innocence* 282-356 (1992).

Herrera v. Collins, 506 U.S. 390, 415 (1993). The Court reaffirmed the importance of clemency in *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (“As this Court has recognized, however, ‘[c]lemency is deeply rooted in our Anglo–American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.’ *Herrera v. Collins*, 506 U.S. 390, 411–412, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (footnote omitted).”)

In the modern era, the State of Tennessee has executed six men.¹⁴ Two men and one woman facing imminent execution have received executive clemency.¹⁵

¹⁴ Robert Coe, Sedley Alley, Philip Workman, Daryl Holton, Stephen Henley, Cecil Johnson.

Thus, in this state, thirty-three percent of defendants who completed the standard three-tier process and who were facing execution were found to be worthy of a life sentence.

A request for executive clemency in a capital case will not be considered by the executive branch until all litigation is exhausted. An effective case for clemency cannot be cobbled together in a matter of days. Moreover, expediting eight executions before June 1, 2018, prevents a careful, thorough and meaningful consideration of Mr. Hall's clemency request. Forcing Mr. Hall to seek clemency while at the same time litigating the Tennessee Midazolam Option under an extremely compressed timeline alongside seven other inmates effectively denies each of the inmates a legitimate opportunity to pursue clemency. Such a compressed timeframe is also extremely disrespectful to Governor Haslam, who would be expected to make eight life or death decisions in mere weeks.¹⁶ This is a separate and untenable injustice that would result if expedited execution dates are set.

V. This Court Should Issue A Certificate Recommending Commutation Of Mr. Hall's Death Sentence.

Lee Hall has always been and continues to be deeply remorseful for killing his ex-girlfriend, Traci Crozier, in 1991. *See Hall*, No. E1997-00344-SC-DDT-DD, Response to Motion to Set Execution Date (filed Jul. 18, 2014) [hereinafter "*Hall Response*"], Ex. 1, *Report of Dr. Tom Pendergrass* at 11 ("When describing the

¹⁵ Michael Boyd, Edward Harbison, Gaile Owens.

¹⁶ Governor Haslam's two predecessors were asked to make only one-more clemency determination (nine), during the sixteen-years they held office.

events that led to Traci's death, Mr. Hall demonstrated remorse and behaviors consistent with guilt, loss and shame. He maintains that his intent was not to hurt her and he becomes tearful and emotionally regressive when describing the situation."). Mr. Hall broke down sobbing uncontrollably during medical testimony about Ms. Crozier's injuries. Trial Tr. at 901–06. The trial court noted that Mr. Hall sobbed "uncontrollably" during the entire opening argument as well. *Id.* at 902. During the medical testimony, when he again broke down, defense counsel stated "I'm not so sure that he is mentally capable of continuing, period." *Id.* at 903. Lee Hall is "not someone who can justify or gets enjoyment from the suffering of others. His lifelong anxious and dependent personality style and problems with control of thinking and behavior (perseveration) [] cause him to fixate on his own behavior rather than doing something that victimizes others or shows malice." *Hall Response, Ex. 2, Report of Dr. Peter Brown* at 3.

Significant new neuropsychological evidence was developed post-trial that was never considered by the courts on the merits. This evidence went to the heart of Mr. Hall's intentions and demonstrated that Mr. Hall's offense, while tragic, was not a premeditated murder. *Hall Response*, pp. 7–14. Although this Court on direct appeal found sufficient evidence of premeditation based on the trial record, despite Mr. Hall's severe intoxication at the time of the offense, questions regarding the amount of deliberation militate in favor of commutation. *See Bass v. State*, 231 S.W.2d 707, 715, 191 Tenn. 259, 278–79 (Tenn. 1950):

[T]he question of whether defendant's mind was sufficiently clear to be capable of that deliberation of thought which is necessary to become a basis of murder in the first degree, naturally intrudes itself.

...

[I]n the opinion of the individuals who compose this court, the question concerning the defendant's deliberation well warrants the indulgence of executive clemency to the extent that the death sentence be commuted to one of life imprisonment. Such a course is recommended. The judgment of the trial court is affirmed.

Indeed, the jurors in Mr. Hall's case were inclined to impose a life sentence if the possibility of life without parole had been an option at the time, as it is now for this Court and this Governor. *Hall* Response, pp. 17–20; Exhibits 7–12. Further circumstances favor commutation since Mr. Hall's 2014 Response.

In February 2010, Lee Hall was transported to the emergency room where he was diagnosed with chronic angle closure glaucoma. An eye doctor noted that the advanced condition of his previously undiagnosed and untreated glaucoma made Mr. Hall a poor surgical candidate at time. Since 2010, Mr. Hall's vision has continued to deteriorate. Over the past eight years, the Tennessee Department of Correction has routinely failed to comply with the directions and recommendations of Mr. Hall's eye doctors. His scheduled follow up visits to the eye clinic have been ignored or delayed. The Department of Correction has repeatedly failed to provide Mr. Hall his prescribed eye medications. Correction officials have denied requests to allow Mr. Hall low vision devices as innocuous as a large-numbered clock that would allow Mr. Hall to timely take the twenty-plus eye drops that prevent total vision loss. Today, Mr. Hall is functionally blind.

A. Executing Lee Hall Would Constitute Cruel and Unusual Punishment

Execution of the blind is a rare occurrence in our country. Counsel is aware of only one blind inmate executed since the reinstatement of the death penalty in 1976—Clarence Ray Allen—who was executed by the State of California in 2006. *See Senior Prisoner on California's Death Row Is Executed at Age 76*, Wash. Post, Jan. 18, 2006, at A02.¹⁷

Indeed, blind individuals are exempted wholly or in part from societal obligations such as labor and military service on the basis of their physical disability. Our society does not expect the significantly visually impaired to meet the same challenges posed to sighted individuals. Indeed, we exempt and protect the physically impaired much as we do the mentally impaired, the elderly, and the young.¹⁸

1. Blind Individuals Experience Physical Pain More Acutely

Scientific studies suggest that blind or visually impaired individuals experience pain more acutely than sighted persons.

¹⁷ Counsel is aware of only two additional current or former death row inmates who are blind like Lee Hall:

- (1) Ernest D. Jamison, a blind inmate on Illinois's former death row, *People v. Jamison*, 756 N.E.2d 788, 798 (Ill. 2001), whose sentence was commuted in January, 2003 by then Governor George Ryan. *Death Row inmates receive life Ryan Issues Blanket Clemency*, Chicago Tribune, January 12, 2003, 2003 WLNR 15365788, and
- (2) Vernon Madison, an Alabama death row inmate whose January 25, 2018 execution was stayed by the United States Supreme half an hour before it was scheduled to commence. David Beasley, *U.S. Supreme Court halts execution of Alabama man for 1985 murder*, January 25, 2018, Reuters (available at: <https://www.reuters.com/article/us-alabama-execution/u-s-supreme-court-halts-execution-of-alabama-man-for-1985-murder-idUSKBN1FE1DP>).

¹⁸ This is true in the capital sentencing structure as well. A victim's particular vulnerability "due to a significant disability, whether mental or physical" is an aggravating circumstance. Tenn. Code Ann. § 39-13-204(i)(14), *id.*(i)(1).

In the 1960s, government funded studies demonstrated increased pain sensitivity in sighted individuals after spending seven days in total darkness to replicate blindness. John Zubek et al., *Cutaneous Sensitivity After Prolonged Visual Deprivation*. 144 *Science* 1591–03 (1964). More recent studies conducted on sighted participants have also showed that the visual context can modulate the perception of acute pain. Mancini et al., *Visual Distortion of Body Size Modulates Pain Perception*. 22 *Psychol. Sci.* 325–30 (2011). Likewise, the degree of an individual's sightedness impacts an individual's perception and sensitivity to chronic pain. See Moseley et al., *Visual distortion of a limb modulates the pain and swelling evoked by movement*. 18 *Curr. Biol.* R1047–08 (2008); see also *Commentary: Focus on pain in the blind*, 154 *PAIN* 1973–78 (2013) (“This study is noteworthy for research on multisensory interactions and plasticity because it shows a strong link between vision and pain.”) (discussing the research published by Slimani et al., *Hypersensitivity to pain in congenital blindness*. 154 *PAIN* 1973–78 (2013)).

In sum, blind individuals such as Mr. Hall are significantly more likely to experience pain associated with Tennessee's lethal injection procedure.

2. Evolving Standards of Decency

Execution of the death sentence upon Lee Hall under these circumstances would violate evolving standards of decency, and risk our society's “own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” See *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

The Eighth Amendment of the U.S. Constitution and Article I, § 16 of the Tennessee Constitution both prohibit the state-sanctioned infliction of “cruel and

unusual punishment.” See, e.g., *Van Tran v. State*, 66 S.W.3d 790, 801 (Tenn. 2001). A sentence that is disproportionate to the crime committed—as measured against objective indicia of national standards and the subjective purposes served by a particular punishment—is “cruel and unusual,” and thus, unconstitutional. *Id.* at 800–01 (construing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). Because the death penalty, which is reserved for a narrow category of crimes, is the most severe punishment, the Eighth Amendment applies to it with “special force.” *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

The Eighth Amendment is not a static concept. *Gregg*, 428 U.S. at 173. Whether the death penalty violates the Eighth Amendment must be judged by the standards that “currently prevail”—not those of the past. *Atkins v. Virginia*, 536 U.S. 304, 311. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). As the court held in *Atkins*, the standards of decency evolve and, practices once permitted, may be held to violate the Eighth Amendment.¹⁹ The Court must “take[] into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the [Eighth] Amendment protects.” *Ford*

¹⁹ The Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989), held that the Eighth Amendment did not prohibit the execution of the mentally retarded; based on standards of decency that evolved thereafter, however, the Court in *Atkins* held that executing mentally retarded defendants indeed violated the Eighth Amendment.

v. Wainwright, 477 U.S. 399, 406 (1986). Accordingly, an assessment of contemporary values regarding the death penalty is relevant to an Eighth Amendment analysis. *Gregg*, 428 U.S. at 173. Indeed, in the post-*Furman* era, the Supreme Court has found that evolving standards of decency have narrowed the range of defendants who qualify for the death penalty, holding that the execution of certain types of persons is unconstitutional under the Eighth Amendment.²⁰

CONCLUSION

Lee Hall is blind and vulnerable. If confined to prison for the remainder of his natural life, Mr. Hall bears no practical risk of harm to anyone. The spectacle of his execution—guiding him to the gurney—would “offend humanity.” In a recent concurring opinion in *Dunn v. Madison*, Justice Breyer concluded:

[W]e may face ever more instances of state efforts to execute prisoners suffering the diseases and infirmities of old age. And we may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty. . . .

138 S.Ct. 9, 12 (2017) (citations omitted).

This Court has inherent, supreme judicial power under Article VI § 1 of the Tennessee Constitution and undisputed “broad conference of full, plenary, and discretionary inherent power” under Tenn. Code Ann. §§ 16–3–503 & 504²¹ to deny

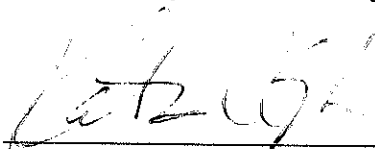
²⁰ See *Coker v. Georgia*, 433 U.S. 584 (1977) (Execution for offenses short of murder is unconstitutional); *Enmund v. Florida*, 458 U.S. 782 (1982) (Executing those who aided a felony but did not kill or intend to kill is unconstitutional); *Ford*, 477 U.S. 399 (Executing the mentally incompetent is unconstitutional); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Executing youths under age 16 at the time of the offense is unconstitutional); *Atkins*, 536 U.S. 304 (Executing the mentally retarded is unconstitutional); *Roper v. Simmons*, 125 S.Ct. 1183 (2005) (Executing juveniles who committed the offense while under 18 is unconstitutional); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Executing those who commit the offense of rape of a child is unconstitutional).

²¹ See *In Re Burson*, 909 S.W.2d 768, 772–73 (Tenn. 1995).

the Attorney General's motion to set an execution date, vacate Mr. Hall's death sentence, and modify it to life. See *Ray v. State*, 67 S.W.553 (1901) (modifying death sentence to life); *Poe v. State*, 78 Tenn. 673 (1882) (modifying death sentence to life). This Court also has the authority to recommend that the Governor commute Mr. Hall's sentence by issuing a certificate of commutation under Tenn. Code Ann. § 40–27–106. See *Bass v. State*, *supra* (recommending commutation); *Green v. State*, 14 S.W. 489 (Tenn. 1889) (recommending commutation). This Court likewise has the authority to order a new sentencing hearing, or recall the post-conviction mandate and grant post-conviction relief.

This Court should grant a certificate recommending that the Governor commute Mr. Hall's death sentence. If the Court elects to decline this request, the Court should deny the State's motion to set an execution date.

Respectfully submitted by,



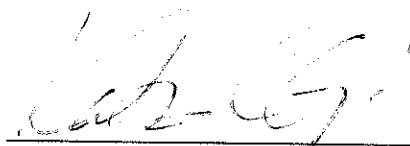
KATHLEEN G. MORRIS (No. 016223)
LAW OFFICE OF KATHLEEN G. MORRIS
42 Rutledge Street
Nashville, TN 37210
Phone: (615) 242-3200
Fax: (615) 777-3206

Counsel for Lee Hall

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent to the following via email and first-class mail on this the 13th day of March, 2018, to:

Jennifer L. Smith
Deputy Attorney General
500 Charlotte Avenue
Nashville, TN 37243-1401



Kathleen G. Morris

Attachment 1

**CHRONOLOGY OF EVENTS RELEVANT TO
STATE'S MOTION TO EXPEDITE EXECUTION DATES**

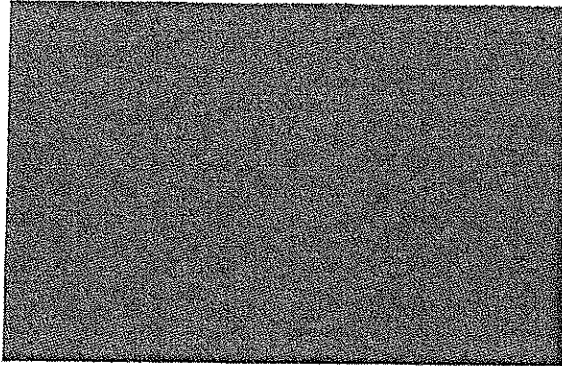
Date	Event
9/7/2017	Drug Supplier Emails TDOC stating “Here is my concern with midazolam, being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium Chloride especially.”
9/12/2017	TPRA Request sent to TDOC by counsel for <i>Abdur'Rahman, et al.</i>
10/18/2017	Drug Supplier emails TDOC a list of drugs that they have provided, indicating a June 1, 2018 expiration date, and inquiring about TDOC DEA license.
10/26/2017	Drug Supplier emails first invoice for midazolam.
10/26/2017	Drug Supplier emails TDOC “I will have my pharmacist write up a protocol.”
11/1/2017	Drug Supplier emails second invoice for midazolam and signed W-9
11/06/2017	Response to 9/12/2017 TPRA request received. Despite request that response be current as of date of response, TDOC produces documents only up to September 7, 2017. “As has become your practice, you ask for records as of the date of your request, as well as the date of my response. In responding to your request I must request records from multiple sources, and necessarily must include a cut-off date in such requests. Accordingly, I will respond as of the date of your request only. As you are aware, the TPRA does not require that I do more.”
11/06/2017	TPRA Request sent to TDOC by counsel for <i>Abdur'Rahman, et al.</i>
11/07/2017	TDOC sends email to drug supplier which asks “Any more product come in?”
11/08/2017	TDOC sends copy of Deberry Special Needs DEA license to Drug Supplier.
11/04/2017	Drug Supplier sends photos of the drugs to TDOC.
11/27/2017	Drug Supplier emails third invoice for midazolam.
11/28/2017	Drug Supplier sends email with attachments “Edited Protocol.pdf” and “TN Agreement –Executed.pdf.”
12/4/2017	Pharmacy service agreement signed by Tony Parker; date agreement signed by Drug Supplier is unknown because of redaction.
12/5/2017	TPRA Request sent to TDOC by counsel for <i>Abdur'Rahman, et al.</i>
12/14/2017	Drug Supplier emails fourth invoice for midazolam.
12/21/2017	TDOC legal counsel sends letter to counsel for <i>Abdur'Rahman, et al.</i> stating that TDOC will respond to TPRA requests from 11/6/2017 and 12/5/2017 by 01/15/2018.
12/28/2017	Drug Supplier emails fifth invoice for midazolam.
01/08/2018	Petition for Writ of Certiorari in <i>Abdur'Rahman v. Parker</i> , No. 17-6068 is denied.

**CHRONOLOGY OF EVENTS RELEVANT TO
STATE'S MOTION TO EXPEDITE EXECUTION DATES**

Date	Event
01/08/2018	TDOC adopts new lethal injection protocol adding the Midazolam Option
1/10/2018	TPRA Request sent to TDOC by counsel for <i>Abdur'Rahman, et al.</i>
1/11/2018	State Attorney General files Notice with the Tennessee Supreme Court regarding the denial of certiorari in <i>Abdur'Rahman</i> . No mention of problems with drug supply; no mention of new protocol. Service is by mail. The motions were filed late in the day Thursday. The following Friday state offices and many businesses in Nashville are closed due to inclement weather. The next business day is Tuesday, January 16, 2018 due to Martin Luther King Day.
1/16/2018	Response to 11/06/2017 and 12/05/2017 TPRA requests is received. Despite request that response be current as of date of response, TDOC produces documents only up to December 4, 2017, plus the new protocol containing the Midazolam Option. This is the first notice to any person working on behalf of Tennessee Death Row Inmates that TN had adopted a new lethal injection protocol.
01/18/2018	Abdur'Rahman, Johnson, Hall, Irick, Miller, Sutton, Wright, West, and Zagorski each file notice with the Tennessee Supreme Court of their intent to challenge the new Midazolam Option in Chancery Court and state that such Complaint will be filed in thirty days.
01/18/2018	Tennessee Supreme Court sets August 9, 2018 execution date for Billy Ray Irick.
02/02/2018	Response to 01/10/2018 TPRA request is received. Despite request that response be current as of date of response, TDOC produces documents only up to January 3, 2018. This heavily redacted response did not provide any additional relevant information.
02/02/2018	TPRA Request sent to TDOC by counsel for <i>Abdur'Rahman, et al.</i>
02/15/2018	State Attorney General files Motion asking Tennessee Supreme Court to set expedited execution dates for Abdur'Rahman, Johnson, Hall, Miller, Sutton, Wright, West, and Zagorski. Motion indicates that the State intends to use the Midazolam Option to execute the named inmates.
02/15/2018	Counsel for Abdur'Rahman, Johnson, Hall, Miller, Sutton, Wright, West, and Zagorski file notice with Tennessee Supreme Court that they intend to respond to State's motion for expedited execution dates within 14 days and that they will file Complaint in Chancery Court on February 20, 2018.
02/20/2018	Abdur'Rahman, Johnson, Hall, Irick, Miller, Sutton, Wright, West, and Zagorski and others file 16 count, 92 page complaint in Davidson County Chancery Court challenging the Midazolam Option.

Attachment 2

The places that it is readily available from do they have disclaimer requirements like what [REDACTED] hit us with on the Pento?



CONFIDENTIALITY: The information contained in this e-mail message, including any attachments, is intended only for the personal, confidential and privileged (either legally or otherwise) use of the individual to which it is addressed. The email message and attachments may contain confidential information that is protected by Attorney/Client privilege and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are notified that any review, use, disclosure, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please contact the sender by reply e-mail immediately and destroy all copies of the original message.

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

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

Hello [REDACTED]

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

Regards,

<image004.jpg>

This document may contain information covered under the Privacy Act, 5 USC 552(a), and/or Health Insurance Portability and Accountability Act (PL104-191) and its various implementing regulations and must be protected in accordance with those provisions. Healthcare information is personal and sensitive and must be treated accordingly. If this correspondence contains healthcare information it is being provided to you after appropriate authorization from the patient or under circumstances that do not require patient authorization. You, the recipient, are obligated to maintain it in a safe, secure, and confidential manner. Redisclosure without additional patient consent or as permitted by law is prohibited. Unauthorized redisclosure or failure to maintain confidentiality subjects you to appropriate sanction. If you have received this correspondence in error, please notify the sender at once and destroy any copies you have made.

Attachment 3

[REDACTED]

From: [REDACTED]
Sent: Thursday, October 26, 2017 4:16 PM
To: [REDACTED]
Subject: Re: Additional Info

Can you shoot me a W9 so I can get that to fiscal?

Sent from my iPhone

On Oct 26, 2017, at 3:30 PM, [REDACTED] wrote:

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

[REDACTED]

I will have my pharmacist write up a protocol. All drugs are required to be stored in a secured location at room temperature (between 15 and 30 degrees celcius).

Attached is the current invoice along with our Pharmacy Services Agreement. Please review the agreement and let me know if you have any concerns or questions. We will also need the address along with a copy of the current DEA and pharmacy/state license for the facility where we will be shipping the medication to.

There is another shipment arriving tomorrow with 8 Midazolam and 4 Vecuronium sets on board. I will get you the particulars when it arrives. Thanks Kelly. Let me know if I can be of further assistance.

Regards,

[REDACTED]

This document may contain information covered under the Privacy Act, 5 USC 552(a), and/or Health Insurance Portability and Accountability Act (PL104-191) and its various implementing regulations and must be protected in accordance with those provisions. Healthcare information is personal and sensitive and must be treated accordingly. If this correspondence contains healthcare information it is being provided to you after appropriate authorization from the patient or under circumstances that do not require patient authorization. You, the recipient, are obligated to maintain it in a safe, secure, and confidential manner. Redisclosure without additional patient consent or as permitted by law is prohibited. Unauthorized redisclosure or failure to maintain confidentiality subjects you to appropriate sanction. If you have received this correspondence in error, please notify the sender at once and destroy any copies you have made.

From: [REDACTED]
Sent: Thursday, October 26, 2017 1:43 PM

Attachment 4

[Redacted]

From: [Redacted]
Sent: Tuesday, November 28, 2017 12:48 PM
To: [Redacted]
Subject: [Redacted]
Attachments: Edited Protocol.pdf; TN Agreement - Executed.pdf

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

[Redacted]

[Redacted]

Attached is the executed agreement and revisions to the protocol. Only one change was noted. Where the potassium chloride is concerned, in order to reach the required dose you need 120ml. Using 50cc syringes would only allow for 100ml necessitating the need for a third syringe with 20ml. You can eliminate the third syringe by using two 60cc syringes in place of the 50cc. One thing to note is that each 10mg Vecuronium vial will need to be reconstituted with 10ml of bacteriostatic water before use, which we will provide. Did you all want us to provide you with the syringes and needles?

[Large Redacted Area]

Regards,

Attachment 5

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16 Counsel for Defendants
[additional counsel listed on signature page]

17 **UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF ARIZONA**

19 First Amendment Coalition of Arizona, Inc.;
Charles Michael Hedlund; Graham S.
20 Henry; David Gulbrandson; Robert Poyson;
Todd Smith; Eldon Schurz; and Roger
21 Scott,

22 Plaintiffs,

23 v.

24 Charles L. Ryan, Director of ADC; James
25 O'Neil, Warden, ASPC-Eyman; Greg Fizer,
Warden, ASPC-Florence; and Does 1-10,
26 Unknown ADC Personnel, in their official
capacities as Agents of ADC,

27 Defendants.
28

Case No. 2:14-cv-01447-NVW-JFM

**STIPULATED SETTLEMENT
AGREEMENT AND [PROPOSED]
ORDER FOR DISMISSAL OF CLAIM
ONE**

1 Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson,
2 Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, “Plaintiffs,”),
3 and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections
4 (“ADC”); James O’Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–
5 Florence (collectively, “Defendants”), hereby stipulate and agree as follows:

6 **WHEREAS**, Claim One of Plaintiffs’ Second Amendment Complaint (“Claim
7 One”) challenges ADC’s intended use of lethal injection drug Protocol C that consists of
8 midazolam, which belongs to a class of drugs called benzodiazepines, followed by a
9 paralytic (vecuronium bromide, rocuronium bromide, or pancuronium bromide), and
10 potassium chloride under the Eighth Amendment;

11 **WHEREAS**, Defendants contend that ADC’s previous supplier of midazolam no
12 longer provides the drug for use in lethal injection executions and that ADC’s supply of
13 midazolam expired on May 31, 2016;

14 **WHEREAS**, ADC has removed Protocol C, the three-drug combination
15 beginning with midazolam that Plaintiffs’ challenge in Claim One, from Department
16 Order 710;

17 **WHEREAS**, Defendants hereby represent, covenant, and agree, and Plaintiffs
18 and Defendants (collectively, the “parties”) intend, that ADC will never again use
19 midazolam, or any other benzodiazepine, as part of a drug protocol in a lethal injection
20 execution;

21 **WHEREAS**, Plaintiffs contend that they have incurred in excess of \$2,080,000 in
22 attorneys’ fees and costs in litigating this action;

23 **WHEREAS**, the parties agree that, because of the above-described
24 circumstances, resolution of Claim One—without further litigation, without any
25 admission of liability, and without any final adjudication of any issue of fact or law—is
26 appropriate and will avoid prolonged and complicated litigation between the parties;

1 **WHEREAS**, the parties intend this stipulated settlement agreement to be
2 enforceable by, and for the benefit of, not only the Plaintiffs but also all current and
3 future prisoners sentenced to death in the State of Arizona (“Condemned Prisoner
4 Beneficiaries”), who are express and intended third-party beneficiaries of this stipulated
5 settlement agreement and who are entitled to all rights and benefits provided to Plaintiffs
6 herein, and who, upon any showing that ADC intends to use midazolam, or any other
7 benzodiazepine, in an execution or in an execution protocol, may continue this action as
8 substituted plaintiffs pursuant to Rule 25(c) of the Federal Rules of Civil Procedure;

9 **WHEREAS**, the parties intend this stipulated settlement agreement to bind
10 Defendants, ADC, and any of Defendants’ successors in their official capacities as
11 representatives of ADC, who, in the event that any Plaintiff or Condemned Prisoner
12 Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of
13 Civil Procedure, will be deemed to have been automatically substituted as defendants in
14 this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure;

15 **WHEREAS**, the parties intend and agree that, upon any breach of this stipulated
16 settlement agreement, (a) any Plaintiff or Condemned Prisoner Beneficiary has standing
17 and the right to move to reopen this proceeding under Rule 60(b)(6) of the Federal Rules
18 of Civil Procedure, and (b) an order shall issue permanently enjoining ADC from using
19 midazolam, or any other benzodiazepine, in an execution or in an execution protocol;

20 **WHEREAS**, in the event that any Plaintiff or Condemned Prisoner Beneficiary
21 moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil
22 Procedure, the parties agree that Defendants, ADC, and/or any of Defendants’
23 successors in their official capacities as representatives of ADC waive all objections to
24 this Court’s reopening of this proceeding, including on the basis of timing, ripeness,
25 mootness, or the standing of the moving parties;

26 **WHEREAS**, in the event that this stipulated settlement agreement is breached
27 through ADC’s use or intent to use a benzodiazepine in an execution or in an execution
28

1 protocol, and any Plaintiff's or Condemned Prisoner Beneficiary's motion to reopen this
2 proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure is not granted
3 for reasons related to the moving parties' standing or the Court's jurisdiction,
4 Defendants consent to the entry of an order in a separate action by a Plaintiff or a
5 Condemned Prisoner Beneficiary for breach of this agreement that permanently enjoins
6 ADC from using midazolam, or any other benzodiazepine, in an execution or in an
7 execution protocol.

8 **IT IS THEREFORE STIPULATED AND AGREED** that:

9 (1) Claim One of Plaintiffs' Second Amended Complaint is dismissed,
10 without prejudice.

11 (2) Upon any showing by any Plaintiff or Condemned Prisoner Beneficiary
12 that ADC intends to use midazolam, or any other benzodiazepine, in an execution or in
13 an execution protocol, Claim One shall be reinstated and reopened pursuant to Rule
14 60(b)(6) of the Federal Rules of Civil Procedure, and, based on the agreement and
15 consent of the parties granted herein, an injunction shall issue in this action or in a
16 separate action for breach of the parties' stipulated settlement agreement permanently
17 enjoining ADC from using midazolam, or any other benzodiazepine, in an execution or
18 in an execution protocol.

19 (3) Plaintiffs agree not to seek their attorneys' fees and costs incurred in
20 litigating Claim One unless Defendants or ADC breach this stipulated settlement
21 agreement, in which case Plaintiffs shall be entitled to seek an award of their reasonable
22 attorneys' fees and costs incurred in litigating Claim One, in an amount to be determined
23 by the Court, either in this action or in a separate action for breach of the parties'
24 stipulated settlement agreement. In that circumstance, Plaintiffs shall also be entitled to
25 seek to collect their reasonable attorneys' fees and costs incurred in moving to enforce
26 this stipulated settlement agreement.

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Dated: December 19, 2016

Sidley Austin LLP

s/ Mark E. Haddad

Mark E. Haddad

Attorneys for Plaintiffs Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz; and Roger Scott

Dated: December 19, 2016

Office of the Arizona Attorney General

s/ Jeffrey L. Sparks

Jeffrey L. Sparks

David Weinzweig

Lacey Stover Gard

John Pressley Todd

Attorneys for Defendants

I, Mark Haddad, hereby attest that counsel for Defendants, Jeffrey L. Sparks, authorized the use of his signature on, and concurred in the filing of, this document, on December 19, 2016.

s/ Mark E. Haddad

Mark E. Haddad

* * *

ORDER

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IT IS SO ORDERED.

DATED this ____ day of _____, 2016.

Neil V. Wake
United States District Judge

Attachment 6

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16 Counsel for Defendants
[additional counsel listed on signature page]

17 **UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF ARIZONA**

19 First Amendment Coalition of Arizona, Inc.;
Charles Michael Hedlund; Graham S.
20 Henry; David Gulbrandson; Robert Poyson;
Todd Smith; Eldon Schurz; and Roger
21 Scott,

22 Plaintiffs,

23 v.

24 Charles L. Ryan, Director of ADC; James
25 O'Neil, Warden, ASPC-Eyman; Greg Fizer,
Warden, ASPC-Florence; and Does 1-10,
26 Unknown ADC Personnel, in their official
capacities as Agents of ADC,

27 Defendants.
28

Case No. 2:14-cv-01447-NVW-JFM

**STIPULATED SETTLEMENT
AGREEMENT AND [PROPOSED]
ORDER FOR DISMISSAL OF
CLAIMS SIX AND SEVEN**

1 Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert
2 Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, “Plaintiffs”), and
3 Defendants Charles L. Ryan, Director of the Arizona Department of Corrections (“ADC”);
4 James O’Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–Florence
5 (collectively, “Defendants”), hereby stipulate and agree as follows:

6 **WHEREAS**, on December 22, 2016, this Court entered an Order for Dismissal of
7 Claim One (ECF No. 155) based on the December 19, 2016 Stipulated Settlement
8 Agreement (ECF No. 152) between Plaintiffs and Defendants (collectively, the “parties”);

9 **WHEREAS**, Claim Six and Claim Seven of Plaintiffs’ Second Amended
10 Complaint (“SAC”) (ECF No. 94) and Plaintiffs’ Supplemental Complaint (ECF No. 163)
11 challenge the ADC’s reservations of excessive discretion in its execution procedures, and
12 Defendants’ past and proposed future exercises of that discretion, including through “last-
13 minute deviations from critical aspects of its announced execution process,” May 18,
14 2016, Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss SAC at
15 13 (ECF No. 117), as violative of the Eighth and Fourteenth Amendments;

16 **WHEREAS**, Defendants intend to resolve the deficiencies Plaintiffs allege
17 through their permanent repudiation of certain provisions contained in past versions of the
18 ADC’s execution procedures, as set forth herein, and through the adoption of a new set of
19 execution procedures reflecting those changes;

20 **WHEREAS**, Defendants’ execution procedures have, in the past, stated that “[t]his
21 Department Order outlines internal procedures and does not create any legally enforceable
22 rights or obligations,” *e.g.*, Ariz. Dep’t of Corr., Dep’t Order 710, at p.1 (Jan. 11, 2017);

23 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties
24 intend, that Defendants and the ADC will remove from the ADC’s current execution
25 procedures the sentence—“[t]his Department Order outlines internal procedures and does
26 not create any legally enforceable rights or obligations”—and that Defendants and the
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1 ADC will never again include such language or substantially similar language in any
2 future version of the ADC's execution procedures (together, "Covenant No. 1");

3 **WHEREAS**, Defendants' execution procedures have, in the past, granted the
4 Director of the ADC (the "ADC Director") the discretion to change any of the timeframes
5 set forth in the execution procedures based on the ADC Director's determination that there
6 has been an "unexpected or otherwise unforeseen contingency," *e.g.* Ariz. Dep't of Corr.,
7 Dep't Order 710 ¶ 1.1.2.3 (Jan. 11, 2017);

8 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties
9 intend, that the ADC Director shall henceforth have the authority to change timeframes
10 relating to the execution process only when those timeframes correspond to minor or
11 routine contingencies not central to the execution process; that timeframes that *are* central
12 to the execution process include, but are not limited to, those relating to execution
13 chemicals and dosages, consciousness checks, and access of the press and counsel to the
14 execution itself; and that Defendants and the ADC will never again include provisions in
15 any version of the ADC's execution procedures that purport to expand the ADC Director's
16 discretion to deviate from timeframes set forth in the execution procedures beyond those
17 relating to minor or routine contingencies not central to the execution process (together,
18 "Covenant No. 2");

19 **WHEREAS**, Defendants' execution procedures have, in the past, granted the ADC
20 Director the discretion to change the quantities or types of chemicals to be used in an
21 execution at any time that he determines such a change to be necessary, even after a
22 warrant of execution has been sought, *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D
23 ¶ C.6 (Jan. 11, 2017);

24 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties
25 intend, that the ADC Director shall henceforth have the authority to change the quantities
26 or types of chemicals to be used in an execution after a warrant of execution has been
27 sought only if the Director, the ADC, Defendants, and/or their counsel, (1) notify the
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1 condemned prisoner and his/her counsel of the intended change, (2) withdraw the existing
2 warrant of execution, and (3) apply for a new warrant of execution; and that Defendants
3 and the ADC will never again include provisions in any version of the ADC's execution
4 procedures that permit the ADC Director or the ADC to change the quantities or types of
5 chemicals to be used in an execution after a warrant of execution has been sought without
6 also withdrawing and applying through counsel for a new warrant of execution (together,
7 "Covenant No. 3");

8 **WHEREAS**, Defendants' execution procedures, in the past, have not expressly
9 limited the ADC Director's discretion regarding the use of quantities and types of
10 chemicals to only those quantities and types of chemicals set forth in the ADC's execution
11 procedures;

12 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties
13 intend, that the ADC Director's discretion to choose the quantities and types of chemicals
14 for an execution shall be limited to the quantities and types of chemicals set forth expressly
15 in the then-current execution procedures; that the quantities or types of chemicals that may
16 be used in an execution may be modified only through the formal publication of an
17 amended set of execution procedures; and that any future version of execution procedures
18 will expressly reflect this limitation of discretion (together, "Covenant No. 4");

19 **WHEREAS**, Defendants' execution procedures, in the past, have required that, if
20 any compounded chemical is to be used in an execution, the ADC shall obtain it from only
21 a "certified or licensed" compounding pharmacist or compounding pharmacy, but the
22 ADC's most recent version of its execution procedures has removed that limitation in lieu
23 of a requirement that the ADC provide a "qualitative analysis of any compounded or non-
24 compounded chemical to be used in the execution . . . within ten calendar days after the
25 state seeks a Warrant of Execution," *compare* Ariz. Dep't of Corr., Dep't Order 710, Att.
26 D ¶ C.2 (Oct. 23, 2015), *with* Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 (Jan. 11,
27 2017);

1 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties
2 intend, that the ADC shall provide, upon request and within ten (10) calendar days after
3 the State of Arizona seeks a warrant of execution, a quantitative analysis of any
4 compounded or non-compounded chemical to be used in an execution that reveals, at a
5 minimum, the identity and concentration of the compounded or non-compounded
6 chemical; that ADC will only use chemicals in an execution that have an expiration or
7 beyond-use date that is after the date that an execution is to be carried out; that, if the
8 chemical's expiration or beyond-use date states only a month and year (*e.g.*, "May 2017"),
9 ADC will not use that chemical after the last day of the month specified; and that all future
10 versions of the ADC's execution procedures shall include these requirements (together,
11 "Covenant No. 5");

12 **WHEREAS**, Defendants' execution procedures have, in the past, permitted the use
13 of a three-drug lethal-injection protocol using: (1) a barbiturate or a benzodiazepine as the
14 first drug, (2) a paralytic such as vecuronium bromide, pancuronium bromide, or
15 rocuronium bromide (collectively, "Paralytic") as the second drug, and (3) potassium
16 chloride as the third drug; *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 at Chart
17 C (Jan. 11, 2017);

18 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties
19 intend, that Defendants and the ADC will never again use a Paralytic in an execution; and
20 that Defendants and the ADC consequently will remove their current three-drug lethal-
21 injection protocol from the current and any future version of the ADC's execution
22 procedures (together, "Covenant No. 6");

23 **WHEREAS**, Defendants' execution procedures have, in the past, provided for
24 prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own
25 execution, *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.1 (Jan. 11, 2017);

26 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties
27 intend, that Defendants and the ADC shall remove from the ADC's execution procedures
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1 any provision that purports to permit prisoners or their agents to purchase and/or supply
2 chemicals for use in the prisoner's own execution, and that Defendants and the ADC will
3 never again include any such provision or any substantially similar provision in any future
4 version of the ADC's execution procedures (together, "Covenant No. 7");

5 **WHEREAS**, the parties agree that the version of Department Order 710 published
6 on June 13, 2017 fully satisfies Covenant Nos. 1 through 7;

7 **WHEREAS**, Plaintiffs contend that they have incurred in excess of \$2,350,000 in
8 attorneys' fees and costs in litigating this action since its inception, and have incurred in
9 excess of \$280,000 in attorneys' fees and costs in litigating this action since this Court's
10 December 22, 2016, Order dismissing Claim One without prejudice (ECF No. 155);

11 **WHEREAS**, the parties agree that, because of the above-described circumstances,
12 resolution of Claim Six and Claim Seven—without further litigation, without any
13 admission of liability, and without any final adjudication of any issue of fact or law—is
14 appropriate and will avoid prolonged and complicated litigation between the parties;

15 **WHEREAS**, the parties intend this Stipulated Settlement Agreement to be
16 enforceable by, and for the benefit of, not only the Plaintiffs but also all current and future
17 prisoners sentenced to death in the State of Arizona ("Condemned Prisoner
18 Beneficiaries"), who are express and intended third-party beneficiaries of this Stipulated
19 Settlement Agreement and who are entitled to all rights and benefits provided to Plaintiffs
20 herein, and who, upon any showing that any of the Defendants, any of the Defendants'
21 successors in their official capacities as representatives of the ADC ("Defendants'
22 Successors"), or the ADC has violated or intends to violate any of Covenant Nos. 1
23 through 7 may continue this action as substituted plaintiffs pursuant to Rule 25(c) of the
24 Federal Rules of Civil Procedure;

25 **WHEREAS**, the parties intend this Stipulated Settlement Agreement to bind
26 Defendants, the ADC, and Defendants' Successors, who, in the event that any Plaintiff or
27 Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of
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1 the Federal Rules of Civil Procedure, will be deemed to have been automatically
2 substituted as defendants in this action pursuant to Rule 25(d) of the Federal Rules of Civil
3 Procedure;

4 **WHEREAS**, the parties intend and agree that, upon any breach of this Stipulated
5 Settlement Agreement, (a) any Plaintiff or Condemned Prisoner Beneficiary has standing
6 and the right to move to reopen this proceeding under Rule 60(b)(6) of the Federal Rules
7 of Civil Procedure, and (b) an order shall immediately issue permanently enjoining the
8 ADC from violating Covenant Nos. 1-7;

9 **WHEREAS**, in the event that any Plaintiff or Condemned Prisoner Beneficiary
10 moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil
11 Procedure, the parties agree that the Defendants, the ADC, and Defendants' Successors
12 waive all objections to this Court's reopening of this proceeding, including on the basis of
13 timing, ripeness, mootness, or the standing of the moving parties;

14 **WHEREAS**, in the event that this Stipulated Settlement Agreement is breached
15 through an actual or intended violation of any of Covenant Nos. 1 through 7 by
16 Defendants, Defendants' Successors, or the ADC, and any Plaintiff's or Condemned
17 Prisoner Beneficiary's motion to reopen this proceeding under Rule 60(b)(6) of the
18 Federal Rules of Civil Procedure is not granted for reasons related to the moving parties'
19 standing or the Court's jurisdiction, Defendants, Defendants' Successors, and the ADC
20 consent to the entry of an order in a separate action by a Plaintiff or a Condemned Prisoner
21 Beneficiary for breach of this agreement that permanently enjoins Defendants,
22 Defendants' Successors, and the ADC from engaging in any conduct that violates any of
23 Covenant Nos. 1 through 7.

24 **IT IS THEREFORE STIPULATED AND AGREED** that:

25 (1) Claims Six and Seven of Plaintiffs' Second Amended Complaint and
26 Supplemental Complaint are dismissed, without prejudice.

27 (2) The parties do not hereby intend to settle, and Plaintiffs instead expressly
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1 reserve their right to appeal, other claims that were dismissed by the Court's May 18,
2 2016, Order, including Claims 3, 4, and 5, which challenge various aspects of the ADC's
3 execution procedures on First Amendment grounds.

4 (3) Upon any showing by any Plaintiff or Condemned Prisoner Beneficiary that
5 any of the Defendants, any of the Defendants' Successors, or the ADC intend to engage
6 in or have actually engaged in any of the following conduct (together, the "Prohibited
7 Conduct"):

8 (a) adopt language in any future version of the ADC's execution
9 procedures that purports to disclaim the creation of rights or obligations;

10 (b) grant the ADC and/or the ADC Director the discretion to deviate
11 from timeframes set forth in the ADC's execution procedures regarding issues that
12 are central to the execution process, which include but are not limited to those
13 relating to execution chemicals and dosages, consciousness checks, and access of
14 the press and counsel to the execution itself;

15 (c) change the quantities or types of chemicals to be used in an execution
16 after a warrant of execution has been sought without first notifying the condemned
17 prisoner and his/her counsel of the intended change, withdrawing the existing
18 warrant of execution, and applying for a new warrant of execution;

19 (d) select for use in an execution any quantity or type of chemical that is
20 not expressly permitted by the then-current, published execution procedures;

21 (e) fail to provide upon request, within ten (10) calendar days after the
22 State of Arizona seeks a warrant of execution, a quantitative analysis of any
23 compounded or non-compounded chemical to be used in an execution that reveals,
24 at a minimum, the identity and concentration of the compounded or non-
25 compounded chemicals;

26 (f) use or select for use in an execution any chemicals that have an
27 expiration or beyond-use date that is before the date that an execution is to be
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1 carried out; or use or select for use in an execution any chemicals that have an
2 expiration or beyond-use date listed only as a month and year that is before the
3 month in which the execution is to be carried out;

4 (g) adopt or use any lethal-injection protocol that uses a paralytic
5 (including but not limited to vecuronium bromide, pancuronium bromide, and
6 rocuronium bromide); or

7 (h) adopt any provision in any future version of the ADC's execution
8 procedures that purports to permit prisoners or their agents to purchase and/or
9 supply chemicals for use in the prisoner's own execution; then

10 Claims Six and Seven shall be reinstated and reopened pursuant to Rule 60(b)(6) of the
11 Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties
12 granted herein, an injunction shall immediately issue in this action or in a separate action
13 for breach of this Stipulated Settlement Agreement permanently enjoining Defendants,
14 Defendants' Successors, and the ADC from engaging in any of the Prohibited Conduct.

15 (4) Plaintiffs agree not to seek their attorneys' fees and costs incurred in
16 litigating Claims Six and Seven unless Defendants, Defendants' Successors, or the ADC
17 breach this Stipulated Settlement Agreement, in which case Plaintiffs shall be entitled to
18 an award, either in this action or in a separate action for breach of this Stipulated
19 Settlement Agreement, of their reasonable attorneys' fees and costs incurred in litigating
20 this action from its inception through the effective date of this Stipulated Settlement
21 Agreement, as determined by the Court after briefing by the parties. In that circumstance,

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Plaintiffs shall also be entitled to seek to collect their reasonable attorneys' fees and costs incurred in moving to enforce this Stipulated Settlement Agreement.

IT IS SO STIPULATED.

Dated: June 21, 2017

Sidley Austin LLP

s/ Mark E. Haddad

Mark E. Haddad

Attorneys for Plaintiffs

Dated: June 21, 2017

Office of the Arizona Attorney General

s/ Jeffrey L. Sparks

Jeffrey L. Sparks

Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2017, I electronically filed the foregoing **Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claims Six and Seven** by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Barbara Cunningham
Barbara Cunningham
Legal Secretary

Attachment 7

Chronology of Public Records Requests

Request Date	Response Date	Timeframe of Documents Actually Produced
September 12, 2017	November 6, 2017	February 15, 2017- September 7, 2017
November 6, 2017 & December 5, 2017	January 16, 2018	October 17, 2017- December 4, 2018
January 10, 2018	February 2, 2018	October 26, 2017 - January 3, 2018
February 2, 2018	No Response Received	

Attachment 8

[REDACTED]

From: [REDACTED]
Sent: Wednesday, October 18, 2017 11:01 AM
To: [REDACTED]
Subject: Re: Question

I believe we do I will double check on it.

Sent from my iPhone

On Oct 18, 2017, at 10:47 AM, [REDACTED] wrote:

Good morning [REDACTED]

Below is a list of what has been received from our suppliers

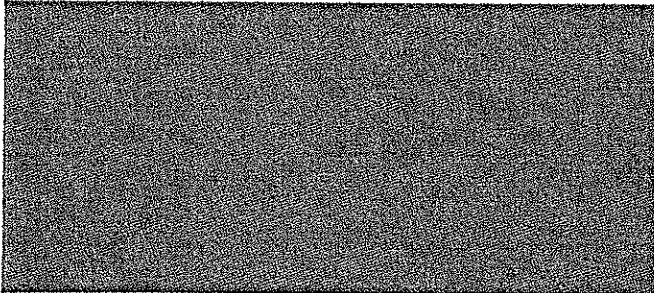
Midazolam – 1000mg, Lot: [REDACTED] EXP: 1June2018

Vecuronium – 200mg, Lot: [REDACTED] EXP: 12/18

Potassium Chloride – 2000mEq, Lot: [REDACTED] EXP: 1May2018

I'm working on revising the BAA and agreement. I should have it to you by the end of the day. Do you all have a DEA license?

Regards,



This document may contain information covered under the Privacy Act, 5 USC 552(a), and/or Health Insurance Portability and Accountability Act (PL104-191) and its various implementing regulations and must be protected in accordance with those provisions. Healthcare information is personal and sensitive and must be treated accordingly. If this correspondence contains healthcare information it is being provided to you after appropriate authorization from the patient or under circumstances that do not require patient authorization. You, the recipient, are obligated to maintain it in a safe, secure, and confidential manner. Redisclosure without additional patient consent or as permitted by law is prohibited. Unauthorized redisclosure or failure to maintain confidentiality subjects you to appropriate sanction. If you have received this correspondence in error, please notify the sender at once and destroy any copies you have made.

From: [REDACTED]
Sent: Wednesday, October 18, 2017 8:33 AM
To: [REDACTED]
Subject: RE: Question

I got some info re: the test Let me know if there is a good time to call and fill you in. thx

Attachment 9

PHARMACY SERVICES AGREEMENT

This PHARMACY SERVICES AGREEMENT ("Agreement") is being made and entered into by and between [REDACTED] ("Pharmacy") and [REDACTED] ("Department") on this 21 day November, 2017, and is being made for the purposes and the consideration herein expressed.

WITNESSETH:

WHEREAS, Pharmacy is [REDACTED] that provides controlled substance and compounded preparations to practitioners for office use; and

WHEREAS, Department is a State of Tennessee governmental agency that is responsible for carrying out sentences of death by means of lethal injection; and

WHEREAS, Department desires to engage Pharmacy to provide Department with certain controlled substances and/or compounded preparations for lethal injection administration by the Department to those individuals sentenced to death; and

WHEREAS, Pharmacy and Department have agreed to enter into this Agreement setting forth the terms under which Pharmacy will provide certain controlled substances and/or compounded preparations to Department for use in lethal injection.

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein, Pharmacy and Department hereby agree as follows:

Article I
SERVICES

1.1 **Controlled substance.** Upon a written request, which may be sent electronically via facsimile or electronic mail, by Department, Pharmacy shall provide Department with the requested controlled substance. Quantities of the controlled substance shall be limited to an amount that does not exceed the amount the Department anticipates may be used in the Department's office or facility before the expiration date of the controlled substance and is reasonable considering the intended use of the controlled substance and the nature of the services offered by the Department. For controlled substance, Pharmacy shall dispense all drugs in accordance with applicable licensing regulations adopted by the [REDACTED] and the United States Food and Drug Administration that pertain to pharmacies dispensing controlled substance.

1.2 **Compounding Preparations.** Upon a written request, which may be sent electronically via facsimile or electronic mail, by Department, Pharmacy shall provide Department with the requested compounded preparation. Quantities of the compounded preparation shall be limited to an amount that does not exceed the amount the Department anticipates may be used in the Department's office or facility before the expiration date of the compounded preparation and is reasonable considering the intended use of the compounded preparation and the nature of the services offered by the Department. For compounded preparations, Pharmacy shall compound all drugs in a clean sterile environment in compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments. In addition, Pharmacy shall compound all drugs in accordance with applicable licensing regulations adopted

by the [REDACTED] that pertain to pharmacies compounding sterile preparations.

1.3 Limitation on Services. Pharmacy shall only provide controlled substance and compounding preparations that it can prepare to ensure compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments. In the event Department requests a controlled substance or compounded preparation which Pharmacy is not able to fill, Pharmacy shall notify Department.

1.4 Recalls. In the event that Pharmacy determines that a recall for any controlled substance or compounded preparation provided hereunder is warranted Pharmacy shall immediately notify Department of the medication and/or preparations subject to the recall. Pharmacy shall instruct Department as how to dispose of the medication or preparation, or may elect to retrieve the medication or preparation from Department. Pharmacy shall further instruct Department of any measures that need to be taken with respect to the recalled medication or preparation.

Article 2 **OBLIGATIONS OF DEPARTMENT**

2.1 Written Requests. All requests for controlled substances and compounded preparations must be in writing and sent to Pharmacy via electronic mail or facsimile. The following shall appear on all requests:

- A. Date of request;
- B. FOR COMPOUNDED PREPARATIONS ONLY: Name, address, and phone number of the practitioner requesting the preparation;
- C. Name, strength, and quantity of the medication or preparation ordered; and
- D. Whether the request needs to be filled on a STAT basis.

2.2 Use of Controlled Substance and Compounded Preparations. Department agrees and acknowledges that all controlled substance and compounded preparations provided by Pharmacy may only be used by Department in carrying out a sentence of death by lethal injection and may not be dispensed or sold to any other person or entity. Department assumes full responsibility for administering any controlled substance or compounded preparations.

2.3 Recordkeeping. Department agrees to maintain records of the lot number and beyond-use date of a controlled substance or compounded preparation to be administered or administered by Department that was prepared by Pharmacy. Department agrees to maintain inventory control and other recordkeeping as may be required by applicable federal and state laws and regulations.

Article 3 **TERM AND TERMINATION**

3.1 Term. The Effective Date of this Agreement shall be the date first specified above. The term of this Agreement shall be for a period of one (1) year unless sooner terminated by either party pursuant to the terms and provisions hereof. If this Agreement is not terminated by either party prior to the anniversary date of this Agreement or any renewal term, this Agreement shall automatically renew for an additional one (1) year term.

3.2 Termination.

- A. Either party to this Agreement may terminate this Agreement, with or without cause, by providing the other party sixty (60) days prior written notice of said termination.
- B. Pharmacy may immediately terminate this Agreement in the event of any of the following:
 - 1. Department ceases to provide professional services for any reason.
 - 2. Department's professional license is revoked, terminated, or suspended.
 - 3. Department declares bankruptcy.
 - 4. Department fails to comply the terms of this Agreement and fails to cure such breach within 5 business days of receiving notice of the breach.
- C. Department may immediately terminate this Agreement in the event of any of the following:
 - 1. Pharmacy's professional license is revoked, terminated, or suspended.
 - 2. Pharmacy is excluded or debarred from participation in the Medicare and/or Medicaid programs for any reason.
 - 3. Pharmacy declares bankruptcy.
 - 4. Pharmacy fails to comply the terms of this Agreement and fails to cure such breach within 5 business days of receiving notice of the breach.

Article 4

REPRESENTATION

4.1 Representation by TN Attorney General. The Tennessee Attorney General's Office will represent or provide representation to Pharmacy in any civil lawsuit filed against Pharmacy for its acts or omissions arising out of and within the scope and course of this agreement except for willful, malicious or criminal acts or omissions or for acts or omissions done for personal gain. Any civil judgment leveled against Pharmacy arising out of its acts or omissions pursuant to this agreement will be reimbursed by the State in accordance with the terms of T.C.A. § 9-8-112. The Attorney General's Office will advocate before the Board of Claims for full payment of any judgment against Pharmacy arising out of a civil lawsuit in which the Attorney General's Office represents or provides representation to Pharmacy.

Article 5

Miscellaneous

5.1 Amendment. This Agreement may be amended only by mutual agreement and reduced to writing and signed by both parties hereto.

5.2 Payment. Pharmacy agrees to submit invoices within thirty (30) days after rendering services and/or providing controlled substances or compounded preparations to: TDOC Fiscal Director, Rachel Jackson Building, 6th Floor, 320 6th Avenue North, Nashville, Tennessee, 37243. Department agrees to pay an annual fee to Pharmacy in the amount of \$5,000.00 (five thousand dollars).

5.3 Captions. Any caption or heading contained in this Agreement is for convenience only and shall not be construed as either broadening or limiting the content of this Agreement.

5.4 Sole Agreement. This Agreement constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter herein.

5.5 Controlling Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee. The parties hereto expressly agree that this Agreement is executed and shall be performed in Davidson County, Tennessee, and venue of all disputes, claims and lawsuits arising hereunder shall lie in Davidson County, Tennessee.

5.6 Severability. The sections, paragraphs and individual provisions contained in this Agreement shall be considered severable from the remainder of this Agreement and in the event that any section, paragraph or other provision should be determined to be unenforceable as written for any reason, such determination shall not adversely affect the remainder of the sections, paragraphs or other provisions of this Agreement. It is agreed further, that in the event any section, paragraph or other provision is determined to be unenforceable, the parties shall use their best efforts to reach agreement on an amendment to the Agreement to supersede such severed section, paragraph or provision.

5.7 Notice. Any notices under this Agreement shall be hand-delivered or mailed by certified mail, return receipt requested to the parties at the addresses set forth on the signature page of this Agreement, or such other addresses as the parties may designate to the other in writing from time to time.

5.8 Agreement Subject to State and Federal Law. The parties recognize that this Agreement, at all times, is subject to applicable state, local and federal laws including, but not limited to, the Social Security Act and the rules, regulations and policies adopted thereunder and adopted by the [REDACTED] as well as the public health and safety provisions of state laws and regulations. The parties further recognize that this Agreement shall be subject to amendments of such laws and regulations, and to new legislation. Any such provisions of law that invalidate, or otherwise are inconsistent with the terms of this Agreement, or that would cause one or both of the parties to be in violation of the laws, shall be deemed to have superseded the terms of this Agreement; provided, however, that the parties shall exercise their best efforts to accommodate the terms and intent of this Agreement to the greatest extent possible consistent with the requirements of applicable laws and regulations.

5.9 Compliance With All Applicable Laws. The parties hereto hereby acknowledge and agree that each party shall comply with all applicable rules regulations, laws and statutes including, but not limited to, any rules and regulations adopted in accordance with and the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The parties hereby specifically agree to comply with all privacy and security rules, regulations and provisions of HIPAA and to execute any required agreements required by all HIPAA Security Regulations and HIPAA Privacy Regulations whether presently in existence or adopted in the future, and which are mutually agreed upon by the parties. In addition, in the event the legal counsel of either party, in its reasonable opinion, determines that this Agreement or any material provision of this Agreement violates any federal or state law, rule or regulation, the parties shall negotiate in good faith to amend this Agreement or the relevant provision thereof to remedy such violation in a manner that will not be inconsistent with the intent of the parties or such provision. If the parties cannot reach an agreement on such amendment, however, then either party may terminate this Agreement immediately. This section shall survive the termination of this Agreement.

5.10 Referral Policy. Nothing contained in this Agreement shall require, directly or indirectly, explicitly or implicitly, either party to refer or direct any patients to the other party.

5.11 Assignment. This Agreement is not assignable without the other party's prior written consent.

5.12 Independent Contractor Status. In performing their responsibilities pursuant to this Agreement, it is understood and agreed that Pharmacy and its pharmacists and other professionals are at all times acting as independent contractors and that the parties to this Agreement are not partners, joint-venturers, or employees of one another.

5.13 Non-Waiver. No waiver by one of the parties hereto of any failure by the other party to keep or perform any provision, covenant or condition of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same, or any other provision, covenant or condition.

5.14 Counterparts/Execution. This document may be executed in multiple counterparts, each of which when taken together shall constitute but one and the same instrument. In addition, this Agreement may be executed by facsimile or electronic signature, which shall constitute an original signature.

5.15 No Third-Party Beneficiaries. No provision of this Agreement is intended to benefit any third party, nor shall any person or entity not a party to this Agreement have any right to seek to enforce or recover any right or remedy with respect hereto.

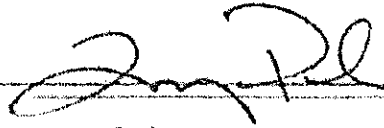
5.16 Confidentiality. Both parties agree to keep this Agreement and its contents confidential and not disclose this Agreement or its contents to any third party, other than its attorneys, accountants, or other engaged third parties, unless required by law, without the written consent of the other party.

IN WITNESS WHEREOF, the parties have hereunto caused their authorized representatives to execute this Agreement as of the date first set forth above.

[Redacted]

By: [Redacted]
Name: [Redacted]
Title: [Redacted]
Date: [Redacted]

Address: [Redacted]

By: 
Name: Tony Parker
Title: TDOC Commissioner
Date: 12/4/17

Address: 320 6th Ave. North, 6th Floor
Nashville, TN 37243