

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

ABU-ALI ABDUR'RAHMAN, et al.,)	
)	No. 18-183-III
Plaintiffs,)	
)	Death Penalty Case
V.)	
)	
TONY PARKER, et al.,)	
)	
Defendants.)	

**EMERGENCY MOTION TO SECURE, RETAIN AND PRESERVE
PHYSICAL EVIDENCE**

Plaintiffs Abu-Ali Abdur'Rahman, John Michael Bane, Byron Black, Andre Bland, Kevin Burns, Tony Carruthers, Tyrone Chalmers, James Dellinger, David Duncan, Lee Hall, Kennath Henderson, Anthony Darrell Hines, Henry Hodges, Stephen Hugueley, Akil Jahi, David Ivy, Donnie Johnson, David Jordan, David Keen, Donnie Middlebrooks, Farris Morris, Pervis Payne, Gerald Lee Powers, William Glenn Rogers, Michael Sample, Oscar Smith, Charles Wright, and Edmund Zagorski hereby move this Court to enter an order requiring all the Defendants, and including all persons or entities acting in concert with them (including, but not limited to, the Office of the State Medical Examiner), **to retain and preserve any and all physical, audio, and video evidence relating to any lethal injection execution of Billy Ray Irick on August 9, 2018, and for the Office of the State Medical Examiner to secure and preserve appropriate blood and tissue samples should an**

autopsy be performed.

All such evidence must be, and is, properly preserved because it provides actual and empirical proof of the actual effect of Tennessee's lethal injection protocol upon a human being, and will confirm and prove Plaintiffs' assertions that Tennessee's lethal injection protocol utilizing compounded midazolam, vecuronium bromide, and potassium chloride constitutes cruel and unusual punishment. All such information is relevant and probative of the issues presented in the Plaintiffs' case before this Court (and any claim that might be raised by Mr. Irick's representatives in the future). *See Lockett v. Fallin*, W.D.Okla. No. CIV-14-1119-HE (civil suit challenging torture of inmate through midazolam execution in Oklahoma).

In support of this motion, Plaintiffs state:

1. This Court has ruled on Plaintiffs' complaint and denied relief on Plaintiffs' facial challenge to Tennessee's lethal injection protocol, which involves the use of midazolam, vecuronium bromide, and potassium chloride.

2. Because Tennessee's protocol is new, there has never been an execution using this particular protocol in Tennessee, and Plaintiffs were thus required to present evidence from executions in other states, wherein witnesses to executions described the circumstances of the inmates' deaths and the inmates' physical reactions to midazolam whereby the inmates were moving, gasping, talking, and conscious even after the administration of midazolam.

3. Inmates administered midazolam were not insensate or unconscious, but writhed and struggled, choked, produced tears, raised their arms, clenched their fists, tried to speak, strained against straps on the gurney. *See generally* Transcript of the Proceedings, *Abdur'Rahman v. Parker*, Chancery Ct. No. 18-183-III, July 11, 2018, pp. 656-870.

4. The best empirical proof of the constitutional infirmities with Tennessee's lethal injection protocol using midazolam, vecuronium bromide, and potassium chloride would be (and is) evidence from any actual execution using Tennessee's midazolam protocol.

5. Such evidence would include video, photographic, and audio evidence showing the preparation and use of drugs, showing an inmate and demonstrating the inmate's actions and physical reactions to the drugs used in the protocol, and any and all physical evidence involved in any execution, including (but not limited to) the drug packaging and labels and instructions, drug containers, materials and objects used to prepare any drugs, plungers and tubing used in an execution, needles, and even the clothing of inmate and the gurney, which contain or would establish evidence showing the state and/or reactions of the body.

6. In fact, in the recent aborted/botched Alabama execution of Doyle Hamm by lethal injection, the physical evidence and Hamm's clothing became critical evidence for analysis and review in ongoing litigation after he survived the execution attempt.

7. Thus, Hamm requested -- and the United States District Court ordered the preservation of -- physical evidence and clothing for purposes of further litigation. *See Hamm v. Dunn*, N.D.Ala. No. 2: 17-cv-2083-KOB, R. 76 (motion for hearing, including request for preservation of evidence)(Exhibit 1); *Id.*, R. 78 (order granting hearing and requiring preservation of evidence)(Exhibit 2).

8. Where the State Medical Examiner is employed under Tennessee's lethal injection protocol to receive an inmate's body and is working in concert with the Defendants in this matter, and where a doctor from that office testified for the Defendants in this matter, the State Medical Examiner may be properly ordered to take and preserve such particular blood samples should an autopsy be performed. *See e.g., McGehee v. Hutchinson*, E.D.Ark. No. 4:17-CV-179, R. 78 (motion requiring blood samples be taken from executed inmate)(Exhibit 3); *Id.*, R. 83 (order granting such request)(Exhibit 4).

9. Because all the physical evidence is relevant and highly probative of Plaintiffs' constitutional claims in this Court (especially after proper analysis), such evidence is properly and justly obtained and preserved so that Plaintiffs can evaluate and assess all such evidence and thereby move this Court for relief under Tenn.R.Civ.P. 52, or via a motion to alter or amend judgment under Tenn.R.Civ.P. 59.04, and/or a new trial under Rule 59.05, or even a motion for relief under Tenn.R.Civ.P. 60.02.

10. As noted earlier, where any and all physical evidence from any execution of Mr. Irick would provide the best evidence of the unconstitutionality of

Tennessee's new lethal injection protocol, it is not simply within this Court's discretion to require the preservation of all such evidence, it is imperative that this Court do so, so that Plaintiffs may fully present their case to this Court with the most complete record possible – a record which (until now) could not possibly include evidence from the events that would take place today.

11. In fact, where this Court entered its judgment on July 26, 2018, the Plaintiffs still have until August 25, 2018 to file any appropriate motions under Tenn.R.Civ.P. 52 or 59.

12. The fact that Plaintiffs have filed a notice of appeal is of no moment and does not interfere with their right to obtain and test the requested evidence, for the Plaintiffs still have the right to file timely motions for relief under Rules 52 and 59, and this Court must address any such motions on the merits – when based upon analysis of the evidence which Plaintiffs ask this Court to order preserved.

13. Indeed, Tenn.R.App.P. 4(b)(2) tolls the time for filing a notice of appeal when a timely Rule 52.02 motion is filed, and Rule 4(b)(4) tolls the time when a motion to alter or amend the judgment is filed under Rule 59.04: “In a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; (4) under Rule 59.04 to alter or amend

the judgment; the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.”

14. Moreover, Tenn.R.App.P. 4(e) makes clear that even though the Plaintiffs have filed an initial notice of appeal, they still have the right to seek relief under Tenn.R.Civ.P. 52.02 and Rule 59 by August 25, 2018 (within 30 days of this Court’s order denying relief), and Plaintiffs can do so based upon presentation of evidence relating to any execution of Mr. Irick.

15. Tenn.R.App.P. 4(e) provides in no uncertain terms that: "The trial court retains jurisdiction over the case pending the court's ruling on any timely filed motion specified in subdivision (b) or (c) of this rule. **If a motion specified in either subdivision (b) or (c) is filed within the time permitted by the applicable rule referred to in that subdivision, the filing of a notice of appeal prior to the filing of the motion, or the filing of a notice of appeal prior to the trial court's ruling on an earlier filed motion, does not deprive the trial court of jurisdiction to rule upon the motion.**" *Id.* (emphasis supplied).

16. Thus, where time is of the essence, and where any and all evidence from any midazolam/vecuronium/potassium chloride execution will provide the best evidence of the unconstitutionality of Tennessee’s lethal injection protocol, this Court should enter an emergency order ordering the Defendants and any and all persons or entities working in concert with any or all of them, including the Office the State Medical Examiner (who may be ordered to do so by this Court or via a Tenn.R.Civ.P. 45 subpoena which this Court may authorize now for this purpose):

a. To retain and preserve any and all physical evidence involved in any execution of Mr. Irick, including, but not limited to, the drug packaging and labels and instructions, drug containers, materials and objects used to prepare any drugs, plungers and tubing used in an execution, needles, the clothing of inmate, the gurney, and any other physical evidence;

b. For the Office of State Medical Examiner to promptly secure and preserve blood from the left and right femoral veins, left and right subclavian veins, left and right ventricles should an autopsy be performed; and

c. For the Office of the State Medical Examiner to secure and maintain tissue samples from the brain (including the hippocampal area), lung, liver, and muscle not near any IV site should an autopsy be performed.

17. As noted *supra*, the order requested by the Plaintiffs is precisely the type of order entered by the United States District Court for the Eastern District of Arkansas in *McGehee v. Hutchinson*, E.D.Ark. No. 4:17-CV-179, R. 83 (Exhibit 4), and the United States District Court for the Northern District of Alabama in *Hamm v. Dunn*, N.D.Ala. No. 2: 17-cv-2083-KOB, R. 78 (Exhibit 2).

18. Exactly as in *McGehee* and *Hamm*, this Court should enter an order requiring the preservation of all the physical evidence and the taking of blood and tissue samples necessary for Plaintiffs to prove, empirically, the validity of their constitutional claims – which they still may do under Rules 52 and 59, or even Rule 60.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was electronically filed and sent to the following via email on this the 9th day of August, 2018, to:

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