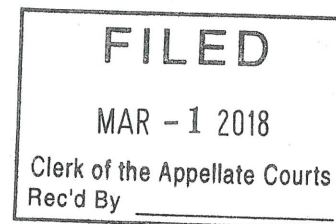


IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE



STATE OF TENNESSEE )  
 )  
v. ) No. E1982-00075-SC-DDT-DD  
 ) Knox County Criminal Court No.12080  
DAVID EARL MILLER )

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**DAVID MILLER’S RESPONSE IN OPPOSITION TO STATE’S MOTION FOR  
EXPEDITED EXECUTION DATES  
AND REASONS WHY NO EXECUTION DATE SHOULD BE SET**

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On September 7, 2017,<sup>1</sup> the State’s contractor, a for-profit pharmaceutical supplier, told the State of Tennessee 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 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.<sup>2</sup>

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,<sup>3</sup> emailed the Tennessee Department of Correction, and stated, “I will have my

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<sup>1</sup> *See*, Attachment 1, Chronology of Events Relevant to State’s Motion to Expedite Execution Dates.

<sup>2</sup> Recently, “botched” executions in Arizona, Oklahoma, and Ohio also put the State of Tennessee 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.

<sup>3</sup> It is not known whether this is the same supplier who had warned Tennessee that midazolam would not work, or a different drug seller.

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.<sup>4</sup> 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 moved this Honorable Court to resume executions. Five-days after requesting such executions, on January 16, 2018, and in response to a public records request, the State disclosed their amendment of the 2015 lethal injection protocol and the adoption of the Midazolam Option.<sup>5</sup> 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 via 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.*

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<sup>4</sup> 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.

<sup>5</sup> 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.

*Parker, et al.*, Case No. 17-6068. The State knew that they would have very little time between a possibly favorable Supreme Court ruling, and the expiration of their midazolam. 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.

The fact that the protocol that would be used to execute Mr. Miller was written, not by State actors, but by the supplier who profits from the sale of the protocol drugs,<sup>6</sup> is yet another reason not to set Mr. Miller's execution.

Mr. Miller 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. Miller and all similarly situated inmates, should be given adequate time to present petitions for

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<sup>6</sup> In the State's response to public records requests, they 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. Miller relies on them as the best evidence of how the Midazolam Option came to be.

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 to counsel for Abdur'Rahman, Johnson, Wright, and Zagorski.**

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.

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 *Edingborough 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. Miller’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 administration of 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, perhaps because the protocol was drafted by the State’s for-profit drug supplier.

The State knew, or reasonably should have known, when it chose to change its lethal injection protocol and add a Midazolam Option, that its new protocol would be challenged in court. The State also knew that the challenge would have merit because it was warned by its for-profit drug supplier 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 they knew would expire before any challenge to its use could be litigated in court. 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. Miller. 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. Miller'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. Miller told this Court that he intended to challenge the new protocol but required time to consult with experts; Mr. Miller additionally stated he would file a challenge on or before February 20, 2018—a deadline Mr. Miller 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. Miller months earlier that it intended to adopt a new lethal injection protocol that adds a Midazolam Option. Under the circumstances, Mr. Miller 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.<sup>7</sup>**

In its motion, the State tells the Court: "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,<sup>8</sup> high-risk sterile compounds, which compounded pentobarbital is, have a beyond use date of 24 hours at controlled room temperature or three days 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

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<sup>7</sup> Although this Court does not resolve factual disputes, and Mr. Miller 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.

<sup>8</sup> 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 checked March 1, 2018).

date. *See, e.g., West, et al. v. Schofield, et al.*, Case No. M2015-01952-COA-R3-CV, Technical Record, Transcript, Volume III, pp. 823-824; *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.<sup>9</sup> 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.

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<sup>9</sup> 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.

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. Miller's execution prior to June 1, 2018, and to choose the Midazolam Option, without ever giving Mr. Miller 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. Miller lives or dies. Mr. Miller has no control over these Fortune 500 companies. Nor does Mr. Miller 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.

Miller. The actions of individuals on either side of the death penalty debate are irrelevant to Mr. Miller'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. Miller has an opportunity to fully and fairly litigate his case against the new lethal injection protocol.

### **III. Tennessee Courts are to be concerned with Due Process and the rule of law.**

The February 22, 2018 botched non-execution of Doyle Hamm in Alabama<sup>10</sup> 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.

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. Miller'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.<sup>11</sup> Fair adjudication means a

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<sup>10</sup><https://www.reuters.com/article/us-alabama-execution/alabamas-aborted-execution-was-botched-and-bloody-lawyer-idUSKCN1G90Y2> (last checked March 1, 2018).

<sup>11</sup> Mr. Miller'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.

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-DPE-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. Miller 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. Miller 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) (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. Miller fair access to meaningful clemency proceedings.**

Mr. Miller 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.<sup>12</sup> Two men and one woman facing imminent execution have received executive clemency.<sup>13</sup> Thus, in this state, fully one-third 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. Miller’s clemency request. Forcing Mr. Miller to seek clemency

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<sup>12</sup> Robert Coe, Sedley Alley, Philip Workman, Daryl Holton, Stephen Henley, Cecil Johnson.

<sup>13</sup> Michael Boyd, Edward Harbison, Gaile Owens.

while at the same time litigating the Tennessee Midazolam Option under an extremely compressed timeline alongside seven other inmates is the equivalent of denying all 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.<sup>14</sup> This is a separate and untenable injustice that would result if expedited execution dates are set.

**V. Expediting Mr. Miller's execution date denies him one fair opportunity to demonstrate that trial counsel's inexcusable performance at resentencing deprived him of his right to a fair trial.**

The State offers no legitimate grounds to support its request to set Mr. Miller's execution date before June 1, 2018. If an execution date is to be scheduled, that date should only occur after Mr. Miller has had one opportunity to have a court properly consider a constitutional violation that undermines the bedrock of our judicial system. The performance of Mr. Miller's trial counsel was "inexcusably deficient." Justice requires one full opportunity at judicial review of the impact of trial counsel's failure to: (1) place evidence of Mr. Miller's horrendously abusive childhood on life's side of the sentencing scale; (2) present uncontested expert evidence of Mr. Miller's profound mental illness; and (3) present uncontested expert testimony of the direct impact severe mental illness had on Mr. Miller's ability, at the time of the crime, to behave in any way other than the tragic way he did. The

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<sup>14</sup> Governor Haslam's two predecessors were asked to make only one more clemency determination (nine), during the sixteen-years they held office.

importance to the integrity of our judicial system of affording Mr. Miller this one chance is beyond cavil.

A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"). Effective trial counsel preserves claims to be considered on appeal, *see, e.g., Fed. Rule Crim. Proc. 52(b)*, and in federal habeas proceedings, *Edwards v. Carpenter*, 529 U.S. 446, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

*Martinez v. Ryan*, 132 S. Ct. 1309 at 1317-18 (2012).

This Court's duty in protecting those bedrock principles is every bit as important as is that of the federal courts. *Sawyer v. Smith*, 497 U.S. 227, 241 (1990). Mr. Miller has turned to federal courts to vindicate that foundation of our legal system and his request remains pending rehearing. *Miller v. Mays*, Pet. For Rehr'g En Banc (6th Cir. Feb. 16, 2018). This Court has the unlimited discretion to either allow Mr. Miller time to go forward in his endeavor to secure his right to a fair trial or to order him executed while it remains unfulfilled.

It should do the former.



**VI. The State's motion should be denied and Mr. Miller's sentence should be modified to life imprisonment or a certificate of commutation should issue.**

Mr. Miller should not be executed because his conduct took place while he was insane and/or unable to form the specific intent required to convict him of first-degree murder, rendering his case not among "the worst of the worst" for which the death penalty is reserved. Permitting Mr. Miller's execution to move forward perpetuates the unfair and disproportionate application of the death penalty that he alone faces. Because Mr. Miller's trial was held before the United States Supreme Court issued its decision in *Ake v. Oklahoma*, 465 U.S. 1099 (1984), his guilt phase jury was denied the opportunity to consider readily available evidence of his insanity and/or his inability to form the required specific intent in reaching their verdict. Still further, even though Mr. Miller was resentenced after *Ake*, his trial counsel "inexcusably" (as unanimously found by the Sixth Circuit Court of Appeals) failed to present that evidence to his resentencing jury. Finally, because Mr. Miller was resentenced before the Supreme Court required a capital jury to receive a catch-all instruction for mitigating evidence. *Hitchcock v. Dugger*, 481 U.S. 393 (1987) and *Penry v. Lynaugh*, 492 U.S. 302 (1989), the resentencing jurors were unable to place the evidence of Mr. Miller's unspeakably brutal childhood on life's side of the sentencing scale. This Court is now presented with the only opportunity that any Tennessee courts will have to consider the overwhelming evidence that Mr.

Miller was not guilty of any offense for which a sentence of death may, or should, be imposed.<sup>15</sup>

The unspeakable horror which was Mr. Miller's childhood has never been disputed. Born of parents who both were hospitalized for psychiatric disorders, raped twice by dominant females, including his own mother, turned over by his grandfather to be molested by another man, specifically targeted for a period of over ten years for violent beatings by his sadistic stepfather, and shuffled between a filthy home and a mother who did nothing to meet his physical and emotional needs and an ever-changing array of social service placements (some of which were themselves marred by violence and degradation) (R.24, Att.A, Dr. Stewart Declaration ¶¶ 14-27, Apx.236-41; R.24, Att.I, Dr. Lisak Declaration ¶¶ 5-35, Apx.265-75), Mr. Miller was left permanently scarred by chronic and severe post-traumatic stress disorder (R.24, Att.A, Dr. Stewart Declaration ¶¶ 33-38, Apx.244-48). The condition manifested itself through a lifetime of psychosis (including both auditory and visual hallucinations) recurrent and intrusive distressing images, thoughts, and perceptions, hallucinations and dissociative flashback episodes (both associated and un-associated with intoxication), and dissociation in response to both internal and external stimuli (R.24, Att.A, Dr. Stewart Declaration ¶¶ 12, 33, 34, Apx.235, 244-45).

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<sup>15</sup> Due to the limited time within which Mr. Miller must respond to the State's request for execution date and the fact that, due to the confluence of the age of Mr. Miller's conviction, the available evidence of Mr. Miller's mental state at the time of the offense has only been presented in the federal courts, the evidence of Mr. Miller's mental state at the time of his conviction is provided with citation to the Joint Appendix filed in Mr. Miller's Sixth Circuit Appeal.

From his pre-teen years forward, Mr. Miller self-medicated his profound and yet untreated mental illness with prescription drugs used to control his seizures, Seconal, yellow jackets, and Tuinal, a multi colored pill known as Christmas Trees, LSD, and alcohol, which he consumed on a daily basis, even while at work (R.24, Att. A, Dr. Stewart Declaration ¶¶ 39-42, 44, Apx.248-50, 251). It was during a period of dissociation in response to the external stimulus of Ms. Standifer physically attempting to prevent him from leaving her, exacerbated by his ingestion of alcohol and LSD, that he killed her (R.24, Att.A, Dr. Stewart Declaration ¶¶ 45-51, Apx.251-54). The evidence presented at trial confirmed the influence of Mr. Miller's mental illness on his conduct the evening she died.

Described by the district court as "macabre" and "strange," (R.101, p.17-18) the circumstances of the murder reflected a spontaneous and unplanned event. Mr. Miller and Ms. Standifer were previously acquainted and had made plans to go out on the night of the murder (Add.4, TT Vol.5 p.421-24, Apx.825-28; Add.4, TT Vol.12 p.1114-15, Apx.802-03). They were seen together throughout the evening by multiple witnesses in multiple locations behaving in much the same manner as any other couple would behave (Add.4, TT Vol.5 p.426-31, Apx.830-35, p.439-45, Apx.841-47, p.452-56, Apx.851-55; Add.4, TT Vol.11 p.1079-81, Apx.809-11, p.1089-90, Apx.781-82, p.1096-97, Apx.792-93). They were seen together immediately before the murder at the local bus station by a law enforcement officer and, though inebriated, there was nothing in either's behavior which caused the officer to believe

that anything was amiss. In fact, Mr. Miller and the officer had an uneventful conversation (Add.4, TT Vol.5 p.439-45, 452-56, Apx.841-47, 851-55).

According to the officer, Mr. Miller and Ms. Standifer left the bus station in a taxi cab at approximately 9:40 p.m. (*Id.* p.439, 442, Apx.841, 844). The taxi driver testified that the couple arrived at a location later identified as the home of Calvin Thomas, a local minister with whom Mr. Miller resided, about fifteen minutes later (*i.e.*, 9:55 p.m.) (*Id.* p.468-69, Apx.839-40). As the district court observed, Mr. Miller knew that Reverend Thomas returned “like clockwork” every evening between 10:00 p.m. and 10:15 p.m., and Thomas followed that pattern on the night of the murder, arriving shortly after 10:00 p.m. (R.101, p. 32). When Reverend Thomas arrived, Mr. Miller was cleaning up the house following the murder. Ms. Standifer’s body was found near the Thomas driveway, stripped of clothing, displaying two fatal wounds to the head. In addition, she had a number of knife wounds consistent with the use of a large amount of force which were not inflicted until after her death (Add.4, TT Vol.10 p.874-75, Apx.797-98).

The circumstances of the offense were considered by Dr. Stewart, who provided expert assistance to Mr. Miller during district court proceedings. Dr. Stewart found:

48. Several factors concerning the offense reflect chaotic, unplanned action. The crime scene itself, as described by the preacher, indicated frenzied rather than cautious, deliberate actions. The body and clothing were discovered along side the driveway in an easily visible location, indicating that David did not plan how to avoid detection. After the offense occurred, David followed the preacher's instructions to remain in the house for one night rather than fleeing immediately.

David left Knoxville the day after the offense only when the preacher drove him to a highway out of town and forced him to leave.

49. David's use of intoxicants exacerbated his underlying symptoms of posttraumatic stress disorder. When his girlfriend, Lee Standifer, grabbed him, dug her fingernails into him, and said she would not let him leave her, it triggered an exaggerated response that was reminiscent of earlier forced experiences at the hands of his mother and stepfather. David's memory of events following his girlfriend's grabbing him is fractured. Although the victim was stabbed multiple times, David has no memory of stabbing her.

(R.24, Att.A, Dr. Stewart Declaration ¶¶ 48-49, Apx.253).

Dr. Stewart went on to conclude:

50. It is my professional opinion, which I hold to a reasonable degree of medical certainty, that David Miller suffers from multiple neurocognitive disorders. Each and all of these mental diseases and defects were present and acute at the time of the offense for which Mr. Miller was convicted, rendering him unable to appreciate the criminality of his acts as well as LSD (lysergic acid diethylamide) can induce illusions, hallucinations, delusions, paranoid ideations and other alterations of mood and thinking rendering him unable to conform his conduct to the requirements of the law. Mr. Miller was under extreme emotional stress at the time of the offense. At the time of the homicide, Mr. Miller responded to the victim's [sic] grabbing his arm and sudden movement without plan, thought, or recognition of the consequences of his actions. He harbored no intent to kill or malice for the victim, and his actions were taken without premeditation and without understanding or knowledge about the difference between right and wrong.

(R.24, Att.A, Dr. Stewart Declaration ¶50, Apx.253-54)<sup>16</sup> (emphasis added).

---

<sup>16</sup> Dr. Hyde's neurological examination of Mr. Miller revealed that he also suffered from multiple neurological and psychiatric factors, which tied into his criminal behavior. That, within a reasonable degree of medical certainty, suffered from frontal and temporal lobe dysfunction and polysubstance abuse at the time of the offense for which he is incarcerated on death row, and these factors directly impacted his ability to conform his conduct to the requirements of the law.

In the many years since this Court last held sway over the justice to be done in Mr. Miller's case, the truth has been revealed.<sup>17</sup>

Under Tennessee Supreme Court Rule 12.4(A), this Court's resolution of the State's current request for an execution date presents the first, and only, opportunity for this Court to do justice in light of the truth. Mr. Miller was insane, or lacked the requisite mental state to be guilty of an offense for which a sentence of death may be imposed, and in any event, his crime was so mitigated by his life history and profound mental illness that no sentence of death should be imposed.

### CONCLUSION

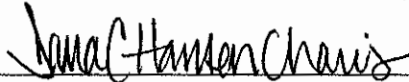
Mr. Miller respectfully requests this Court to deny the Attorney General's Motion to Set Execution Date and modify his sentence to life in prison. In the alternative, this Court should issue a Certificate of Commutation.

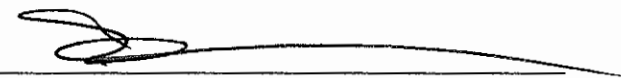
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<sup>17</sup> The neutral experts appointed at the time of trial were not informed about the horrific trauma suffered by Mr. Miller. When Mr. Miller presented the opinions of Drs. Stewart and two other psychological experts, Drs. Lisak and Hyde, during federal habeas corpus proceedings, the State of Tennessee either did not, or could not, present any contrary opinions. Mr. Miller's experts' opinions are, accordingly, uncontested.

Respectfully submitted,

FEDERAL DEFENDER SERVICES  
OF EASTERN TENNESSEE, INC.

BY:   
Dana C. Hansen Chavis, BPR # 019098  
Assistant Federal Community Defender  
Dana\_Hansen@fd.org

BY:   
Stephen M. Kissinger, WY # 5-2342<sup>18</sup>  
Assistant Federal Community Defender  
Stephen\_Kissinger@fd.org

800 S. Gay Street, Suite 2400  
Knoxville, TN 37929  
Phone: (865) 637-7979  
Facsimile: (865) 637-7999

---

<sup>18</sup> Motion to Appear *Pro Hac Vice* sent to Court for filing on February 28, 2018.

**Designation of Attorney of Record**

Upon the entry of an order granting Mr. Kissinger's Motion to Appear Pro Hac Vice in this case, Stephen Kissinger will be Mr. Miller's attorney of record upon whom service shall be made. Until such order is entered, or in the event the motion is denied, Dana Chavis shall be Mr. Miller's counsel of record. Counsel's contact information is:

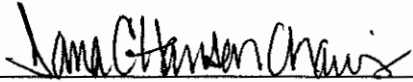
Federal Defender Services of  
Eastern Tennessee, Inc.  
800 South Gay Street, Suite 2400  
Knoxville, TN 37929  
Email: Stephen\_Kissinger@fd.org  
Dana\_Hansen@fd.org  
Phone: (865) 637-7979  
Fax: (865) 637-7999

Undersigned attorney of record prefers to be notified of any orders or opinions of the Court by email to the following email addresses: Stephen\_Kissinger@fd.org, Dana\_Hansen@fd.org and Bridget\_Stucky@fd.org.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was forwarded by United States mail, first-class postage prepaid, and by email on the 1st day of March, 2018, to the following:

Jennifer L. Smith  
Associate Solicitor General  
P.O. Box 20207  
Nashville, Tennessee 37202  
Phone: (615) 741-3487  
Facsimile: (615) 741-2009  
Jennifer.Smith@ag.tn.gov

  
\_\_\_\_\_  
Dana C. Hansen Chavis



## ATTACHMENTS

- Attachment 1: Chronology of Events relevant to State's Motion to Expedite Execution dates
- Attachment 2: September 7, 2017 email between State's drug supplier and the State of Tennessee
- Attachment 3: October 26, 2017 email between State's drug supplier and The Tennessee Department of Correction
- Attachment 4: November 28, 2017 email to Tennessee Department of Correction from one of the drug suppliers with "revisions to the protocol" attached.
- Attachment 5: *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 6: *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 7: Chronology of Public Records Requests During Past Six Months
- Attachment 8: October 18, 2017 Email between TDOC and drug supplier
- Attachment 9: Pharmacy Services Agreement

## **Attachment 1**

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

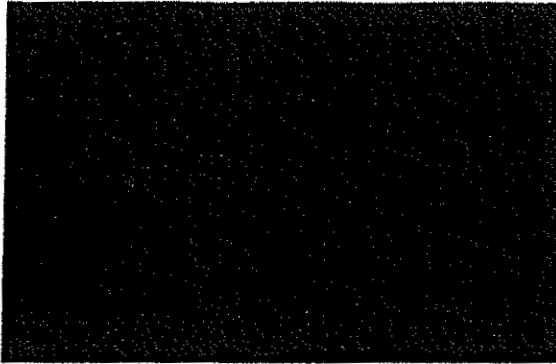
Date	Event
9/7/2017	Drug Supplier Emails TDOC stating ""Here is my concern with midazolam, being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium Chloride especially."
9/12/2017	TPRA Request 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?

[REDACTED]

Regards,

## **Attachment 5**

1 JON M. SANDS  
Federal Public Defender, District of Arizona  
2 DALE A. BAICH (OH Bar No. 0025070)  
dale\_baich@fd.org  
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Jessica\_felker@fd.org  
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8 SIDLEY AUSTIN LLP  
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9 213.896.6000 | 213.896.6600 facsimile  
10 Counsel for the Coalition and Condemned Plaintiffs

11 MARK BRNOVICH  
Attorney General  
12 (Firm State Bar No. 14000)  
JEFFREY L. SPARKS (SBN 027536)  
13 Assistant Attorney General  
Capital Litigation Section  
14 1275 West Washington  
Phoenix, Arizona 85007-2997  
15 602.542.4686 | CADocket@azag.gov

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  
O'Neil, Warden, ASPC-Eyman; Greg Fizer,  
25 Warden, ASPC-Florence; and Does 1-10,  
26 Unknown ADC Personnel, in their official  
capacities as Agents of ADC,  
27 Defendants.

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**

**IT IS SO ORDERED.**

DATED this \_\_\_\_ day of \_\_\_\_\_, 2016.

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Neil V. Wake  
United States District Judge

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## **Attachment 6**

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10 Counsel for the Coalition and Condemned Plaintiffs

11 MARK BRNOVICH  
Attorney General  
12 (Firm State Bar No. 14000)  
JEFFREY L. SPARKS (SBN 027536)  
13 Assistant Attorney General  
Capital Litigation Section  
14 1275 West Washington  
Phoenix, Arizona 85007-2997  
15 602.542.4686 | CADocket@azag.gov

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

27 Defendants.  
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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);

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

3 **IT IS SO STIPULATED.**

4  
5  
6 Dated: June 21, 2017

Sidley Austin LLP

7 s/ Mark E. Haddad

8 Mark E. Haddad

9 Attorneys for Plaintiffs

10  
11 Dated: June 21, 2017

Office of the Arizona Attorney General

12 s/ Jeffrey L. Sparks

13 Jeffrey L. Sparks

14 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

<b>Request Date</b>	<b>Response Date</b>	<b>Timeframe of Documents Actually Produced</b>
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]

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**From:** [REDACTED]  
**Sent:** [REDACTED] 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,

[REDACTED]

This document may contain information covered under the Privacy Act, 5 USC 552(a), and/or Health Insurance Portability and Accountability Act (P1104-191) 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 ("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 1**  
**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, 6<sup>th</sup> Floor, 320 6<sup>th</sup> 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:

Name:

Title:

Date:

Address:

[Redacted]

By:

Name: Tony Parker

Title: TDOC Commissioner

Date:

12/4/17

Address:

120 6<sup>th</sup> Ave. North, 6<sup>th</sup> Floor  
Nashville, TN 37243