IN THE CIRCUIT COURT
FOR FRANKLIN COUNTY
COMMONWEALTH OF KENTUCKY

THOMAS CLYDE BOWLING, and, RALPH BAZE, and BRIAN KEITH MOORE Plaintiffs, v. KENTUCKY DEPARTMENT OF CORRECTIONS, Defendant.	CIV. ACTION # _____

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This action is brought pursuant to Kentucky Rules of Civil Procedure, Rule CR 57 (declaratory judgment), CR 65.01 (injunctive relief), and CR 65.04 (temporary injunctions) for violations of KRS Chapter 13A, Administrative Procedures.

2. Plaintiffs, Thomas Clyde Bowling, Ralph Baze and Brian Keith Moore are all under a sentence of death. Plaintiffs bring this Complaint against the Kentucky Department of Corrections and ask this Court to enter a judgment declaring null and void the procedures used by the Department of Corrections to carry out a death sentence because they violate KRS 13A.100, and that the Department of Corrections be enjoined from carrying out any execution

until such time as the procedures for carrying out an execution are promulgated as a rule pursuant to KRS Chapter 13A.

2. CR 57 authorizes declaratory judgment as a form of relief and explicitly states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief."

3. CR 65.01 authorizes a temporary injunction to "restrict or mandatorily direct the doing of an act."

4. CR 65.04 authorizes a temporary injunction "during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual."

5. KRS 431.220(a) states that with one exception, "every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death."[1]

6. The Kentucky Department of Corrections (DOC) has created a Policy and Procedure Manual to regulate the operation of the Department, pursuant to KRS 196.035.

7. All Corrections Policy and Procedure provisions are incorporated by reference into the Kentucky Administrative Regulations.[2]

8. One of those procedures is entitled "Execution."[3]

9. That policy does not contain any reference to the actual procedure that is used to carry out a death sentence, but instead treats issues such as where the inmate is housed, and who is in

[1] The exception is that prisoners who received a death sentence before March 31, 1998, may choose either the method of execution as set out in paragraph (a) of KRS 431.220, or electrocution.
[2] 501 KAR 6:020.
[3] CPP 9.5

charge of carrying out certain duties such as selecting an executioner and who operates the prison on the day of the execution.[4]

10. The actual details of how an execution is carried out are written down by the Department of Corrections, but those details are not and have not been made public, nor have they become the subject of any promulgated regulation.

11. DOC is attempting to implement KRS 431.220 through a secret policy promulgated outside the procedures set out in KRS Chapter 13A.

12. DOC has created "checklists" containing the actions that must be taken before, during and after an execution. One checklist was created in 1998 after the method of execution was changed from electrocution to lethal injection. Another was created in 2002. A third was created in 2004.[5]

13. None of these "checklists" are included in DOC's Policies and Procedures Manual or adopted as separate administrative regulations.

14. DOC steadfastly refuses to make these checklists public, as evidenced by its recent refusal to turn these documents over to Plaintiff's lawyers pursuant to an open records request.[6]

15. DOC is attempting to implement a statute through secret "checklists" created by Department staff, outside KRS Chapter 13A procedures.

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[4] *Id.*

[5] These "checklists" are part of a sealed court record in *Baze v. Rees*, N0. 04-CI-1094, Franklin Circuit Court, Kentucky.

[6] Exhibit 1, Response to Brian Keith Moore's Open Records request. Further, these documents cannot be attached to this litigation because they are under seal in the Franklin Circuit Court.

16. KRS 13A.100(1) requires an administrative body[7] to promulgate administrative regulations governing:

> Each statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets; prescribes law or policy; describes the organization, procedure, or practice requirements of any administrative body; or affects private rights or procedures available to the public.

17. No internal memorandum can substitute for a regulation where one is required.[8]

18. No internal "administration" policy such as the "checklist" used to detail the procedure whereby Kentucky kills inmates can substitute for a regulation where one is required.[9]

19. This action is different from the previous Eighth and Fourteenth Amendment challenge to the chemicals and procedures for lethal injections filed by Baze and Bowling, in which the execution protocols were sealed. This action only alleges that Defendant is violating the administrative procedures act by not disclosing documents that must be disclosed before an administrative procedure can be implemented.

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[7] KRS 13A.100 uses the mandatory "shall", not the permissive "may."
[8] KRS 13A.120(6); KRS 13A.130(2)
[9] Id.

WHEREFORE, Plaintiffs, Thomas Clyde Bowling, Ralph Baze and Brian Keith Moore request that this Court declare that all Department of Corrections "checklists" or other unapproved written procedures for conducting an execution be declared null, void and unenforceable, and enter an injunction barring DOC from carrying out any execution in the Commonwealth of Kentucky until such time as it promulgates a rule pursuant to KRS Chapter 13A detailing all aspects of the procedures used to execute a defendant, and that rule passes judicial scrutiny.

RESPECTFULLY SUBMITTED,

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INTRODUCTION

Brian Keith Moore has severely compromised veins that will make it difficult if not impossible to insert an I.V. when Defendants attempt to carry out his execution. Defendants are well-aware of this problem from their own attempts to draw blood or insert an I.V. into Moore during routine medical procedures. Yet, Defendants have done nothing to solve this problem.

They plan to spend 60 minutes attempting to get two I.V.'s into Moore. If, as expected, they cannot start an I.V., they will ask Defendant Fletcher to call off the execution, reschedule it, and then force Moore to suffer the mental and physical torture of another 60 minutes of useless attempts to start an I.V. This second attempt to insert an I.V. will be the same as the first; Defendants will take no additional steps to guarantee that they will be able to insert the I.V. through peripheral access. If Defendant Fletcher refuses to call off the execution, or if Defendants are unable to insert an I.V. the second time around, they may resort to the excruciatingly painful "cut down" procedure that poses a substantial risk that Moore will bleed to death or suffocate before the chemicals are injected.[1]

Sixty minutes of sticking Moore with a needle and the use of a "cut down" procedure create an unnecessary risk of pain and suffering. In addition, requiring Moore to lay strapped to a gurney as Defendants repeatedly spend 60 minute periods attempting to insert an I.V., when they could have done so the first time around if they had properly prepared an alternative method of accessing Moore's veins, constitutes unnecessary physical and psychological pain in violation of the Constitution.

[1] In previous lethal injection litigation on behalf of Ralph Baze and Thomas Bowling, Defendants agreed to not use a "cut down" procedure to execute. Nothing currently prevents them from using a "cut down" procedure to execute Moore, or to amend their execution procedures to incorporate the "cut down" procedure. In fact, counsel for Defendants in *Baze v. Rees*, No. 04-CI-1094 (Franklin Cir. Ct. 2005), said that a cut-down would not be used in that case, but that may be an option when executing other Kentucky death-sentenced inmates.

The pain and suffering Moore will suffer if Defendants actually succeed in injecting him with sodium thiopental, pancuronium bromide, and potassium chloride has been described as the "fires of hell." This pain and suffering could be easily avoided if Defendants injected different chemicals that they know pose less risk of pain and suffering, and if Defendants refrain from injecting pancuronium bromide - - a chemical that prevents us from seeing if the inmate is in pain and that is banned for the euthanasia of household pets. This poses the question, if the risk of pain and suffering from using Defendants' lethal injection chemicals is so strong that we cannot kill a dog like this, how can we kill a human being this way?

Defendants intend to kill Moore without regard for the risks associated with the chemicals and procedures they will use to poison him, including the problems these chemicals pose if a stay of execution is granted after the lethal injection process begins. If a stay of execution is granted after sodium thiopental or pancuronium bromide has been injected, Moore could be saved. Defendants are fully aware that the effects of the first and second lethal injection chemicals are easily reversible. They have purchased a crash cart to maintain life if a stay of execution is granted under these circumstances. But through incompetence, they have not purchased the right equipment, or even the equipment counsel for Defendants told them they needed. Thus, even if they have a trained individual to use the crash cart, Moore will die, not because his lawful sentence is being carried out, but because Defendants have not fulfilled their obligation to take all reasonable steps to maintain life if a stay is granted.

In addition, Defendants' failure to disclose a full copy of their execution procedures allows them to carry out Moore's execution in a secretive manner without anyone determining if they are violating the Constitution. Our Constitution does not permit this. Each of these issues is raised in this. lawsuit, which is brought under 42 U.S.C. § 1983 for violations of the Eighth and Fourteenth

Amendments. Moore requests declaratory and injunctive relief.

SUMMARY OF ARGUMENT

A portion of a method of execution is unconstitutional when it causes excessive pain,[2] also when it violates the evolving standards of decency,[3] or when it poses an unnecessary risk of pain and suffering.[4] The words "unnecessary" and "risk" are important. A "risk" is unconstitutional when it is either more than the Constitution tolerates,[5] or when it is "unnecessary" because less risky alternatives are readily available.[6] Numerous aspects of Defendants' lethal injection procedures violate this portion of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

Because a prisoner remains under the care of the prison until death, the dying process by lethal injection must be considered a "medical need" that must be as painless as Defendants can make it. Defendants' failure to implement less painful alternative chemicals and procedures is an independent constitutional violation as it constitutes deliberate indifference towards known medical needs.[7] But the full extent of Defendants' constitutional violations is unknown because, in violation of due process, they refuse to disclose a full copy of their execution procedures and other information relevant to this litigation.[8] Finally, Defendants' failure to obtain and use the proper equipment to maintain life if a stay of execution is granted after the injection of the first and second

[2] *In re Kemmler*, 136 U.S. 436, 447 (1890).
[3] *Roper v. Simmons*, 125 S.Ct. 1183 (2005); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Trop v. Dulles*, 356 U.S. 86, 100 (1958).
[4] *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *Farmer v. Brennan*, 511 U.S. 825 (1994).
[5] *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (the inquiry is whether the procedures pose an "objectively intolerable risk of harm"); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that the Eighth Amendment analysis "requires a court to assess whether society considers the risk that the prisoner complains of" to be more than the Constitution tolerates); *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 2004) (holding that an 8th Amendment challenge to a method of execution must be considered in terms of the risk of pain).
[6] *Furman v. Georgia*, 408 U.S. 238 (1970).
[7] *C.f., Estelle v. Gamble*, 429 U.S. 97, 104 (1976).
[8] Exhibit 1 (Defendants' Response to Open Records Request).

chemicals deprives Moore of due process. Each of these constitutional violations has its roots in the casual, negligent manner in which Defendants came to adopt the chemicals and procedures they plan to use to kill Moore.

Lethal injection was first adopted as a method of execution in the United States when Oklahoma reinstated the death penalty in 1977. In 1978, Oklahoma created the first protocol for carrying out lethal injections, without conducting any medical or scientific studies on the effects of the chemicals when used in conjunction.[9] Oklahoma's protocol called for the administration of a short acting barbiturate in conjunction with a neuromuscular blocking agent.[10] Four years later, in 1982, without conducting any medical or scientific study, Texas carried out the first execution by lethal injection by administering sodium thiopental, pancuronium bromide, and potassium chloride, in succession. In the years following, numerous states adopted lethal injection and implemented the tri-chemical cocktail first used in Texas, again without conducting any medical or scientific study into the use of these chemicals individually or together in a lethal injection.[11]

In 1998, Kentucky became one of the states blindly adopting sodium thiopental, pancuronium bromide, and potassium chloride as the lethal injection chemicals.[12] A year later, without conducting any medical or scientific study concerning the effects of the chemicals when used for lethal injections or when used in combination, Kentucky carried out its first and only execution by lethal injection - - the execution of Edward Harper. The execution of Harper was problematic. Defendants had difficulty accessing his veins and were prepared to resort to the

[9] Exhibit 2 (Direct examination testimony of Professor Denno, on 4/18/05, in *Baze v. Rees*, at 23-24); exhibit 3 (Oklahoma's 1978 lethal injection protocol).
[10] Exhibit 2 (Direct examination testimony of Professor Denno, on 4/18/05, in *Baze v. Rees*, at 23-24); exhibit 3 (Oklahoma's 1978 lethal injection protocol).
[11] Exhibit 2 (Direct examination testimony of Professor Denno, on 4/18/05, in *Baze v. Rees*, at 25-28, 31-32).
[12] Exhibit 4 (Excerpts from Direct examination testimony of former Warden Parker on 4/18/05, in *Baze v. Rees*, at 132-33); exhibit 1 (Defendants' Response to Open Records Request) (listing the chemicals used in Kentucky lethal

dangerous and invasive "cut down" procedure to start an I.V.[13] There was no reason to suspect Defendants would have difficulty inserting an I.V. into Harper. Yet, they had trouble. With Moore, it is a different story.

It is difficult to start an I.V. in a person who, like Moore, has a history of intravenous drug use.[14] Due in part to drug use, Moore has severely compromised veins that have made it difficult on numerous occasions for Defendants to draw his blood.[15] Inserting an I.V. is more difficult than drawing blood. Thus, Defendants are aware that they will have great difficulty inserting an I.V. into Moore during his execution. Yet, Defendants have done nothing in anticipation of this problem.

Defendants plan to spend 60 minutes attempting to insert an I.V. into Moore.[16] This violates the Eighth Amendment because it will mutilate his body, will not increase the likelihood of starting the I.V., and will cause unnecessary pain. Resorting to a "cut down" procedure is no better. It causes excruciating pain and could result in Moore bleeding to death.[17] All of this can be avoided by having trained medical professionals start an I.V. through a percutaneous procedure if an I.V. cannot be inserted within 20 minutes.[18] In light of the likelihood that Defendants will have trouble starting an I.V. in Moore, their failure to come up with a means of guaranteeing venous access during his execution constitutes deliberate indifference. Moore should not have to undergo the psychological turmoil of being on the execution gurney for an hour of needle insertion and perhaps

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injections).

[13] *See* Exhibit 5 (Post Mortem Examination of Edward Lee Harper); exhibit 6 (Lethal Injection I.V. Site Placement Form, showing where I.V.'s were inserted in Harper); exhibit 7 (James Prichard, *Inmate is First in Kentucky to Die by Injection*, ASSOCIATED PRESS NEWSWIRES, May 26, 1999); exhibit 8 (Testimony of Defendant John Rees on 4/18/05 in *Baze v. Rees*, at 195-96).

[14] Exhibit 15 (Excerpts from direct examination testimony of Defendant Haas on 4/19/05 in *Baze v. Rees*, at 118).

[15] Exhibit 9 (Excerpts from Brian Keith Moore's prison medical records showing that Defendants have repeatedly had difficulty accessing his veins during medical procedures).

[16] Exhibit 10 (Excerpt from direct examination testimony of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees* at 30-31); exhibit 8 (Testimony of Defendant John Rees on 4/18/05 in *Baze v. Rees*, at 195-96).

[17] Exhibit 11 (*Motion for Leave to File Brief and Brief of Alabama Physicians as Amici Curiae in Support of Petitioner in Nelson v. Campbell*, at *2, *12).

being forced to endure this more than once.

If Defendants are able to insert an I.V. into Moore, they will inject him with the same chemicals used to kill Harper: sodium thiopental, pancuronium bromide, and potassium chloride.[19] None of these chemicals is a pain reliever.[20] Sodium thiopental is an ultra short acting barbiturate that renders a person unconscious for a limited period of time.[21] Pancuronium bromide is a neuromuscular blocking agent that paralyzes all voluntary muscles, thereby preventing a person from expressing pain or consciousness.[22] Potassium chloride is an extremely painful chemical that causes convulsions and stops the heart from beating.[23] As Defendants have previously acknowledged, chemicals that pose less risk of pain and suffering could be used.[24] And pancuronium bromide, which has been banned for use in euthanizing pets,[25] is not necessary to cause death.[26] Yet, Defendants' intend to use these chemicals to kill Moore.

Despite the recognized risk of pain posed by these chemicals, Defendants refuse to take basic steps to monitor for consciousness to ensure that Moore is unable to feel pain during his execution.[27] Defendants' continued use of these chemicals and their failure to monitor throughout the execution for the ability to feel pain violates the evolving standards of decency and creates an unnecessary risk of pain and suffering, in violation of the Eighth Amendment to the United States Constitution. Defendants' failure to make changes to their protocol during the past year to rectify these issues

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[18] *Id*. at *3.
[19] Exhibit 1 (Defendants' Response to Open Records Request) (listing the chemicals used in Kentucky lethal injections).
[20] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 124, 126).
[21] *Id*. at 118.
[22] *Id*. at 125-27.
[23] *Id*. at 131-33; exhibit 13 (Cross examination testimony of Mark Dershwitz on 5/2/05, in *Baze v. Rees* at 69).
[24] Exhibit 13 (Cross examination testimony of Mark Dershwitz on 5/2/05, in *Baze v. Rees* at 70).
[25] K.R.S. 312.181(17) and KAR 16:090 section (1); exhibit 23 *2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 Journal of the American Veterinary Medical Association, 669, 681 (2001).
[26] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v.* Rees at 133-34); exhibit 13 (Cross examination testimony of Mark Dershwitz on 5/2/05, in *Baze v. Rees* at 36).
[27] Exhibit 10 (Excerpts from direct examination testimony of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees*

constitutes deliberate indifference to known medical needs, in violation of the Eighth Amendment.

Finally, the effects of the first two lethal injection chemicals are reversible.[28] If a stay of execution is granted after the first or second chemical is administered, Defendants have an obligation to take affirmative steps to keep Moore alive.[29] But Defendants do not have the necessary equipment to do so.[30] Even worse, they know this and are doing nothing about it. Their reprehensible conduct in this regard evinces their deliberate indifference to known medical needs, and thus violates the Eighth Amendment to the United States Constitution.

Because Moore's execution is imminent, all of these issues are ripe for adjudication, and because none of his claims impact the validity or duration of his confinement or sentence, his claims are cognizable in a 42. U.S.C. §1983 suit.

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at 30-31).

[28] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v.* Rees at 142-44); exhibit 17 (Excerpts from direct examination testimony of Defendant Haas on 4/19/05 in *Baze v. Rees*, at 120); exhibit 16 (excerpt from Defendant Haas deposition in *Baze v. Rees*, at 33).

[29] *See In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d 207, 211 (N.J.Super. 2004

[30] Exhibit 13 (Cross examination testimony of Mark Dershwitz on 5/2/05, in *Baze v. Rees* at 74-78); *see also*, exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 151).

ARGUMENT

I. Lethal injection as it is currently carried out in Kentucky creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

A punishment is cruel and unusual in violation of the Eighth Amendment to the United States Constitution if one of six criteria is satisfied: 1) the physical pain inflicted is excessive; 2) the risk of pain is more than the Constitution tolerates; 3) the risk of pain and suffering is unnecessary in light of available alternatives; 4) the means for carrying out the execution mutilates the body; 5) the means for carrying out the execution cause unnecessary psychological suffering;[31] or, 6) the means for carrying out the execution violate the evolving standards of decency.

First, a punishment is cruel, in that it causes excessive pain, when it involves "something more than the mere extinguishment of life," such as "torture or a lingering death."[32] Degree of suffering, not duration, is the important inquiry. Extreme pain during moments of consciousness renders an aspect of an execution procedure unnecessarily cruel.[33] Suffering for as little as twenty seconds has been considered excessive.[34] The excessive pain prohibition also addresses more than the level of pain. It also bars pain that is "purposeless and needless,"[35] or "without penological justifications."[36]

Second, courts applying the Eighth Amendment do not focus on ugly isolated instances. Rather, they focus on procedures in general. The inquiry is whether the challenged procedure is

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[31] Unnecessary psychological suffering is not being raised as an issue with electrocution.
[32] *In re Kemmler*, 136 U.S. 436, 447 (1890).
[33] *See Fierro v. Gomez*, 865 F.Supp. 1387, 1410 (N.D. Cal. 1994), *remanded on other grounds by*, *Gomez v. Fierro*, 519 U.S. 918 (1996).
[34] *See Palmer v. Clarke*, 293 F.Supp.2d 1011, 1064-66 (D. Neb. 2003), *overruled on other grounds by*, *Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005); *see also*, *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (suggesting that one and a half minutes of suffering constitutes cruel and unusual punishment).
[35] *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *accord Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the 8th Amendment prohibits punishments that "involve the unnecessary and wanton infliction of pain").
[36] *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (*quoting Gregg*, 428 U.S. at 183; *citing Estelle v. Gamble*, 429 U.S. 97,

adequately designed and implemented to avoid undue risk of pain and suffering.[37] An aspect of an execution procedure that poses too great a risk of pain is unconstitutional regardless of whether alternatives exist.

Third, the Eighth Amendment to the United States Constitution "forbids the infliction of unnecessary pain in the execution of the death sentence."[38] In determining whether a punishment constitutes "unnecessary" pain or creates an "unnecessary" risk of pain and suffering, a court must judge the cruelty of the method of execution in light of currently available alternatives.[39] Any risk of pain is unnecessary if a viable alternative that poses less risk of pain and suffering exists.

Fourth, the cruel and unusual punishment clause prohibits mutilation, because "[t]he basic premise underlying the Eighth Amendment is nothing less than the dignity of man."[40] "Civilized standards . . . require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. Similarly, basic notions of human dignity command that the State minimize mutilation and distortion of the condemned prisoner's body."[41]

Fifth, the cruel and unusual punishment clause prohibits unnecessary psychological suffering.[42]

Finally, the cruel and unusual punishment clause has an "expansive and vital character."[43] Thus the clause has been interpreted "in a flexible and dynamic manner,"[44] consistent with "evolving

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103 (1976).

[37] *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (the inquiry is whether the procedures pose an "objectively intolerable risk of harm"); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that the 8th Amendment analysis "requires a court to assess whether society considers the risk that the prisoner complains of" to be more than the Constitution tolerates); *Campbell*, 18 F.3d at 687 (holding that an 8th Amendment challenge to a method of execution must be considered in terms of the risk of pain).

[38] *Francis*, 329 U.S. at 463; *accord, Gregg*, 428 U.S. at 173.

[39] *Furman v. Georgia*, 408 U.S. 238, 430 (1970 ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.").

[40] *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

[41] *Glass*, 471 U.S. at 1085 (Brennan, J. dissenting); *see Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (noting that disembowelment, public dissection, burning alive, and drawing and quartering are unnecessarily cruel).

standards of decency that mark the progress of a maturing society,"[45] evaluated "in light of contemporary human knowledge,"[46] and "informed by objective factors.'"[47]

Objective factors include historical evidence, the consensus of the international community, and legislative developments within the states.[48] "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[49] But the number of states enacting legislation is not as important as the "consistency of the direction of change."[50] When an aspect of a punishment violates the evolving standards of decency, it constitutes cruel and unusual punishment.[51]

The following aspects of Defendants' execution procedures violate one or more prongs of the cruel and unusual punishment clause: 1) the means of obtaining venous access, including attempting to insert an I.V. for up to 60 minutes, and the possible use of a "cut down" procedure if peripheral access is not possible; 2) the means for delivering the lethal injection chemicals; 3) the chemicals Defendants inject (or do not inject) during the lethal injection process; and, 4) the failure to properly monitor for consciousness and the ability to feel pain prior to and after the injection of each chemical.

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[42] *Weems v. United States*, 217 U.S. 349, 373 (1909).
[43] *Id*.
[44] *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989), *overruled on other grounds by*, *Roper v. Simmons*, 125 S.Ct. 1183 (2005).
[45] *Simmons*, 125 S.Ct. at 1190; *Atkins v. Virginia*, 536 U.S. 304, 312 (2002);*Trop*, 356 U.S. at 101; *accord Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).
[46] *Robinson v. California*, 370 U.S. 660, 666 (1962).
[47] *Atkins*, 536 U.S. at 312-316; see *also*, *Roper v. Simmons*, 125 S.Ct. 1183 (2005); *Enmund v. Florida*, 458 U.S. 782, 786-88 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

[48] *Atkins*, 536 U.S. at 312-16; *see also*, *Simmons*, 125 S.Ct. at 1198-1200 (acknowledging international law as reflective of the evolving standards of decency); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (recognizing that international law is a legitimate factor for this Court to consider as an indicator of contemporary standards)
[49] *Atkins*, 536 U.S. at 312 (*quoting Penry*, 492 U.S. at 331).
[50] *Id*. at 315.
[51] *Simmons*, 125 S.Ct. 1190, *citing*, *Trop*, 356 U.S. at 100-01.

A. Attempting to insert an I.V. for up to 60 minutes, the possibility that a "cut down procedure will be employed to obtain venous access during Moore's execution, and Defendants' failure to come up with a guaranteed method of inserting an I.V. into Moore creates an unnecessary risk of physical and psychological pain and suffering, in violation of the Eighth Amendment to the United States Constitution.

1. Facts relevant to this claim.

Obtaining venous access can be a complicated process, particularly when a person has damaged or compromised veins. Moore's years of intravenous drug use, diabetes, and poor medical condition have damaged his veins. Documented evidence, including Moore's prison medical records, establishes that Moore has compromised veins, and that nurses at the Kentucky State Penitentiary have had difficulty inserting needles to draw his blood during routine medical procedures.[52] Thus, it is reasonable to conclude that it will be difficult if not impossible to gain peripheral access to Moore's veins during his execution.[53] Even if Defendants are able to insert an I.V., Moore's damaged veins make it likely that the chemicals will not remain in his vein, but instead will leak into the surrounding tissue, causing him excruciating pain as he dies.

Defendants intend to attempt peripheral access of Moore's veins until the I.V. has been inserted or 60 minutes have elapsed.[54] Because of Moore's compromised veins, it is likely that 60 minutes will elapse prior to successfully inserting an I.V. In this situation, Defendants have two options - - calling off the execution or obtaining central venous access. In litigation involving Ralph Baze and Thomas Bowling, Defendants admitted that they were not in a position to perform a "cut

[52] Exhibit 9 (Excerpts from Moore's prison medical records showing that Defendants have repeatedly had difficulty accessing his veins during medical procedures).
[53] Peripheral access is the medical terminology for accessing a vein by inserting an I.V. in the arm. It is the routine method for obtaining venous access.
[54] Exhibit 10 (Excerpt from direct examination testimony of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees* at 30-31); exhibit 8 (Testimony of Defendant John Rees on 4/18/05 in *Baze v. Rees*, at 195-96).

down" procedure,[55] and that they would not perform one during Bowling's execution. Instead, they would ask Defendant Fletcher to reschedule the execution, where they would again spend 60 minutes attempting to obtain peripheral access to a vein.[56] What happens if Defendant Fletcher does not call off the execution or if Defendants are continuously unable to obtain peripheral access remains unknown. Possibly Defendants will attempt to access a vein through a "cut down" procedure, as they almost did when executing Edward Harper.

Defendants stuck Harper with a needle in at least three locations in attempting to insert the IV and catheter.[57] They intended to insert a needle into each arm. But, the execution team couldn't find an acceptable vein in his left arm, so the needle was inserted into a vein on the top of his left hand.[58] As a form Defendants filled out on inserting an I.V. into Harper shows, they would have performed a "cut down" procedure if necessary.[59] Unlike Harper, Moore has compromised veins. Thus, Defendants will likely not be as lucky when executing Moore, and thus will need to resort to central

access to reach his veins.[60] The two main methods of central venous access are the "cut down"

[55] Exhibit 19 (Excerpt from deposition of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees*, at 41).
[56] Exhibit 10 (Excerpt from direct examination testimony of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees* at 30-31); exhibit 8 (Testimony of Defendant John Rees on 4/18/05 in *Baze v. Rees*, at 195-96).
[57] *See* Exhibit 5 (Post Mortem Examination of Edward Lee Harper); exhibit 6 (Lethal Injection I.V. Site Placement Form, showing where I.V.'s were inserted in Harper).
[58] Exhibit 7 (James Prichard, *Inmate is First in Kentucky to Die by Injection*, ASSOCIATED PRESS NEWSWIRES, May 26, 1999); exhibit 8 (Testimony of Defendant John Rees on 4/18/05 in *Baze v. Rees*, at 195-96).
[59] Exhibit 6 (Lethal Injection I.V. Site Placement Form, showing where I.V.'s were inserted in Harper).
[60] "Obtaining central venous access is a complex medical procedure that involves serious risks and should only be performed by properly trained personnel." Exhibit 7 (*Motion for Leave to File Brief and Brief of Alabama Physicians as Amici Curiae in Support of Petitioner in Nelson v. Campbell*, at *1) (hereinafter "Alabama Physicians."). Central venous access is only attempted when a vein cannot be accessed by the ordinary method of inserting a needle, which is called "peripheral access." *Alabama Physicians* at *6. Many physical conditions increase the likelihood that peripheral access will not be possible. These conditions include: 1) obesity; 2) usage of corticosteroids, which is used to treat arthritis and

procedure and the "percutaneous" procedure.

A "cut down" procedure is an invasive medical procedure properly performed only under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain) so the patient does not feel pain. Success in using the procedure depends on the "experience of the medical practitioner performing the procedure."[61] This procedure involves using a scalpel to make a series of surgical incisions through the skin, through the underlying connective tissue, through the underlying layers of fat, and through the underlying layers of muscle, until the region surrounding a large vein is reached. The incisions can be several inches deep, sometimes causing blood vessels to have to be closed either by the use of cautery or the use of ligatory suture.[62] The need to close off blood vessels is not the only complication that may occur during a "cut down" procedure.

Some of the more serious complications include the excruciatingly painful and life-threatening conditions of severe hemorrhage (with accompanying sense of cardiovascular collapse), pneumothorax (with accompanying sense of asphyxiation, chest pain, and terror), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia).[63]

The "cut down" procedure is rarely used in medical settings today because it has been supplanted by the percutaneous technique[64] for obtaining venous access, which is less invasive, less

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lupus; 3) diabetes treated with insulin; 4) edema; and, 5) a history of intravenous drug abuse.

[61] *Alabama Physicians* at *2.

[62] *Alabama Physicians* at *9.

[63] *Alabama Physicians* at *2, *12.

[64] Percutaneous technique is also referred to as percutaneous central line placement, percutaneous central access, and percutaneous central venous cannulation.

painful, faster, cheaper, and safer.[65] This procedure involves "inserting a needle through the skin and into the vein, then passing a thin wire through the lumen of the needle, then removing the needle over the wire to leave the wire placed in the vein, and then finally advancing a thin flexible catheter over the wire into the vein."[66]

Both the "cut down" and percutaneous procedures are complicated. Additional training beyond that for inserting an I.V. is necessary to perform a "cut down" procedure.[67] In addition, many physicians do not have the experience and credentials to place a central catheter through either a "cut down" procedure or a "percutaneous technique," or treat the complications that are associated with a "cut down" procedure.[68] Performance of a "cut down" procedure can be achieved only by "thorough knowledge of the procedure and attention to its many details. . . . Detailed knowledge of anatomy is necessary to go deeply into an arm, leg, or chest to locate large, uncompromised veins."[69] Furthermore, experience and training is necessary to determine which vein to access.[70] Accordingly, "cut down" procedures are not performed except in the most exceptional circumstances by physicians with specialized training in central venous access.[71]

In Alabama, physicians perform "cut down" procedures to access veins for executions. A physician was planning to perform a "cut down" procedure on David Nelson until the United States Supreme Court granted a stay of execution. But Kentucky law forbids a physician from performing a "cut down" procedure or any other form of central venous access if it involves accessing a vein for

[65] *Alabama Physicians* at *3.
[66] *Alabama Physicians* at *8-9.
[67] Exhibit 22 (Excerpt from Deposition of Nurse Chanin Hiland in *Baze v. Rees*, at 10).
[68] *Alabama Physicians* at *7.
[69] Exhibit 18 (*Brief of Laurie Dill, M.D. et al., as Amici Curiae in Support of Petitioner in Nelson v. Campbell* at *4).
[70] *Id.*
[71] *Id.*

an execution.[72] As Defendants conceded in 2004, they are not prepared to carry out a "cut down" procedure.[73] Thus, any "cut down" procedure or any other central venous access procedure utilized to execute Moore will be performed by a non-physician member of the execution team who is not specifically trained in central venous access.

2. Attempting to insert an I.V. for up to 60 minutes, resorting to a "cut down" procedure, and attempting to carry out Moore's execution without a guaranteed way to insert an I.V. violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

a. attempting to insert an I.V. for up to 60 minutes needlessly causes pain and mutilation of the body.

According to Dr. Heath, a nationally recognized anesthesiologist, attempting to insert an I.V. for up to 60 minutes is useless and extremely painful, because it should only take two to three minutes to insert an I.V.[74] After 20 minutes of attempting to insert an I.V., the execution team will have exhausted all available locations to insert a needle.[75] Thus, attempting to insert a needle for more than twenty minutes is useless as there is little to no chance that the execution team will be able to insert an I.V. after 20 minutes,[76] particularly in Moore's case where due to his bad veins, it is already known that Defendants are unlikely to be able to insert an I.V. through peripheral access. According to Dr. Heath, suffering attempts to insert an I.V. for 60 minutes would be painful.[77] Thus, the execution team is needlessly inflicting pain for at least 40 minutes of trying to insert an

[72] *Compare*, Ala. Code section 15-18-82.1 (expressly stating that a physician, nurse, or pharmacist is not required to assist in any aspect of an execution); *with*, K.R.S. section 431.220 (prohibiting a physician from having any involvement in an execution other than to pronounce death.
[73] Exhibit 19 (Excerpts from former Warden Haeberlin's Deposition in *Baze v. Rees*, at 41).
[74] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v.* Rees, at 171-72).
[75] *Id*. at 172-73, 176.
[76] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v.* Rees at 176).
[77] *Id*. at 176.

I.V., in violation of the cruel and unusual punishment clause.[78]

Yet, the cruel and unusual punishment clause will be violated before the execution team spends twenty minutes attempting to insert an I.V. Well before the twenty minutes have elapsed, the condemned inmate will be in "a lot of pain and discomfort."[79] Thus, requiring the execution team to spend 60 minutes attempting to insert an I.V., which almost certainly will be necessary during Moore's execution, constitutes torture in violation of the cruel and unusual punishment clause.[80]

b. Defendants' use of the extremely painful "cut down" procedure to carry out Moore's execution despite available alternatives creates an unnecessary risk of pain and suffering, in violation of the Eighth Amendment Cruel and Unusual Punishment Clause.

It is beyond dispute that a "cut down" procedure is an extremely painful invasive surgical procedure for accessing a person's veins. As previously discussed, it involves using a scalpel to cut two inches into the body to reach a vein. Complications include hemorrhaging, cardiac arrest, and many other complications that can cause death.[81] These complications and the underlying pain from the incisions are exacerbated when the "cut down" procedure is performed by a person who is not experienced in performing a central venous access procedure, as would be the case during lethal injections in Kentucky. All of this could be avoided by using the safer, quicker, cheaper, and less painful means of obtaining central venous access - - the percutaneous procedure.[82] In determining whether the "cut down" procedure constitutes unnecessary pain and suffering, the procedure must be analyzed in light of readily available alternatives that pose less risk of pain than a "cut down"

[78] *See Resweber*, 329 U.S. at 463.
[79] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v.* Rees at 172).
[80] *See Kemmler*, 136 U.S. at 447; *Palmer*, 293 F.Supp.2d at 1064-66 (twenty seconds of pain and suffering constitutes cruel and unusual punishment).
[81] Alabama Physicians at *2, *12.
[82] *Id.* at *3.

procedure.[83] The percutaneous procedure is a viable and preferred alternative to the "cut down" procedure. Accordingly, Defendants use of a "cut down" procedure and their failure to ensure that central venous access will not be obtained through a "cut down" procedure constitutes cruel and unusual punishment.

c. in light of Moore's compromised veins, attempting to insert an I.V. without a guaranteed means of accessing his veins constitutes unnecessary psychological suffering, in violation of the Eighth Amendment.

As discussed previously, Moore's damaged veins will make it difficult if not impossible for Defendants to insert an I.V. through peripheral access during his execution, and even if they are able to do so, a reasonable probability exists that Moore's damaged veins will prevent the chemicals from remaining in his vein throughout the execution. No one, including Moore, knows if Defendants will be successful at carrying out his execution when they strap him to the gurney. Defendants will have difficulty inserting the I.V., and Moore likely will be strapped to the gurney for 60 minutes as Defendants attempt to insert an I.V. Moore knows all of this. He also knows that Defendants could have an unqualified individual attempt a cut-down procedure. He also knows that after 60 minutes, Defendants could unstrap him from the gurney, send him back to his cell, and bring him back to the execution chamber on another day for another 60 minute attempt to insert an I.V. This vicious cycle could go on inevitably. The psychological suffering inflicted by lying strapped to a gurney for 60 minutes while Defendants attempt to insert an I.V. and not knowing if that will happen again is immense.

Potentially, Moore will be fully prepared to die, only to possibly be removed from the gurney and brought back again, and again.

[83] *See Furman v. Georgia*, 408 U.S. 238, 430 (1970) (Powell, J., dissenting) ("[N]o court would approve any method of

Defendants are fully responsible for this psychological suffering. Despite knowledge that they likely will have trouble inserting an I.V. in Moore, they plan to reschedule the execution if they are unable to insert an I.V. This is wholly unnecessary. They could prepare for an alternative method of inserting an I.V., such as a percutaneous procedure. Their failure to do so creates a risk that unnecessary psychological suffering will be inflicted on Moore, in violation of the Eighth Amendment to the United States Constitution. Thus, Defendants should be prohibited from carrying out Moore's execution until they have adopted a procedure that guarantees they will be able to access his veins during his execution.

B. Defendants' means for delivering the lethal injection chemicals and the lack of training of the execution team create an unnecessary risk of pain and suffering in violation of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

The lethal injection chemicals are injected by a person with no training in injecting lethal injection chemicals.[84] This causes numerous problems. As the package insert for sodium thiopental states, it should be administered only "by individuals experienced in the conduct of intravenous anesthesia."[85] If the thiopental comes in contact with the pancuronium bromide, the thiopental will precipitate out of solution.[86] Making matters worse, Moore's bad veins create a strong likelihood that the chemicals will not remain in his vein throughout the execution. Also, the chemicals are injected from a room outside the execution chamber.[87] The executioner, a person with no training

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implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.").
[84] Exhibit 24 (Excerpt from direct examination testimony of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees* at 29).
[85] Exhibit 20 (Package Insert for sodium thiopental).
[86] Exhibit 21 (William D. Morton, M.D. and Jerrold Lerman, M.D., *The Effect of Pancuronium on the Solubility of Aqueous Thiopentone*, Canadian Journal of Anaesthesia (1987)); exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v.* Rees at 121).
[87] Exhibit 25 (Excerpt from direct examination testimony of former Warden Phil Parker on 4/18/05 in *Baze v. Rees* at 114, 116).

in mixing or injecting lethal injection chemicals,[88] pushes a plunger that sends the chemicals into a tube that travels approximately five feet before reaching the condemned inmate.[89] Such a tube would never be used in a hospital setting because the anesthesiologist needs to be right at the bedside in order to monitor to make sure the I.V. is flowing properly.[90]

The speed at which the chemicals are pushed through the plunger impacts how quickly the chemical will get into the vein, whether the force of the flow of the chemical will dislodge the I.V., and whether the chemicals will induce the desired effect.[91] Yet, the executioner has no training in any of this.[92] The use of an executioner untrained in injecting lethal injection chemicals and the risks associated with injecting chemicals through a tube located in another room approximately five feet away from the execution could be easily avoided if an individual trained in injecting the lethal injection chemicals injected the chemicals directly into the condemned inmate's veins. Defendants' failure to do so creates an unnecessary risk of pain and suffering, in violation of the Eighth Amendment to the United States Constitution.

C. Individually, and in combination, the chemicals used in Kentucky lethal injections violate the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

[88] Exhibit 24 (Excerpt from direct examination testimony of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees* at 29).
[89] *Id*. at 28-29.
[90] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v.* Rees at 161-64).
[91] *Id*. at 162; exhibit 20 (Package Insert for sodium thiopental).
[92] Exhibit 24 (Excerpt from direct examination testimony of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees* at 29).

Defendants intend to kill Moore by poisoning him with a combination of three chemicals.[93] Because Kentucky's death penalty statute does not specify the lethal injection chemicals or the type of chemicals to be administered, [94] Defendants are not mandated by statute to administer the current chemical cocktail. Thus, each or all of the current chemicals could be eliminated from Defendants' execution procedures and replaced with other chemicals without calling into question the validity of Kentucky's death penalty statutes or requiring Defendants to expend a large amount of money. The three chemicals are sodium thiopental, pancuronium bromide, and potassium chloride.[95] Each of these chemicals can be fatal, but potassium chloride acts the quickest and thus causes death before the other two chemicals can do so.[96] Thus, potassium chloride is the only chemical necessary to cause death in Defendants' lethal injection process.[97]

Each of the three chemicals poses a risk of pain and suffering that could be easily avoided by using alternative chemicals.[98] Thus, the use of each of Kentucky's lethal injection chemicals violates the Eighth Amendment.

1. the failure to administer an analgesic

Analgesics are the class of drugs that relieve pain.[99] In surgical procedures, a barbiturate is administered to render a person unconscious and an analgesic to prevent a person from feeling pain.[100] None of the three chemicals Defendants inject during lethal injections relieves pain.[101] Thus, administering the three lethal injection chemicals without first administering an analgesic

[93] Exhibit 1 (Defendants' Response to Open Records Request).
[94] K.R.S. §431.220 ("death sentence shall be executed by a continuous intravenous injection of a substance or combination of substances sufficient to cause death").
[95] Exhibit 1 (Defendants' Response to Open Records Request).
[96] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 133-34, 142).
[97] *Id*.
[98] *Id*. at 161.
[99] *Id*. at 99-100.
[100] *Id*. at 100-102, 159.
[101] *Id*. at 118.

creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment.

2. pancuronium bromide

Pancuronium bromide, the second chemical administered, is a long-acting neuromuscular blocking agent that paralyzes all voluntary muscles.[102] It does not relieve pain or cause death during lethal injections.[103] Rather, it makes people appear motionless and asleep even if they are feeling pain.[104] Defendants' use of pancuronium bromide serves no legitimate function during an execution, since potassium chloride causes death long before pancuronium bromide could do so.[105] Instead, it prevents people from seeing if the inmate is in pain and causes the inmate to suffer the agony of suffocation. Thus, pancuronium bromide creates an unnecessary risk of pain and suffering and violates evolving standards of decency, because it is banned for the euthanasia of pets.

a. creating an unnecessary risk of pain and suffering

Experiencing the effects of pancuronium bromide is "like being tied to a tree, having darts thrown at you, and feeling the pain without any ability to respond."[106] In the words of Carol Weihrer, who was conscious during a surgical procedure but paralyzed by a neuromuscular blocking agent,[107] the pain is like the "absolute fires of hell."[108] The agony caused by pancuronium bromide

[102] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 125-27); exhibit 14 (Direct examination testimony of Dr. Dennis Geiser by avowal on 4/20/05 in *Baze v. Rees* at 56-58).
[103] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 124, 126); exhibit 14 (Direct examination testimony of Dr. Dennis Geiser by avowal on 4/20/05 in *Baze v. Rees* at 56-58).
[104] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 125-27); exhibit 14 (Direct examination testimony of Dr. Dennis Geiser by avowal on 4/20/05 in *Baze v. Rees* at 56-58).
[105] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 133-34, 142).
[106] Exhibit 26 (Dr. Geiser Aff. in *Abdur'Rahman v. Bell*); *accord*, exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 107).
[107] Exhibit 27 (Direct examination testimony of Carol Weihrer on 4/20/05 in *Baze v. Rees* at 25-28).

and the inability to express the excruciating pain caused by pancuronium bromide and potassium chloride is unnecessary since potassium chloride (not pancuronium bromide) causes death.[109] Thus, pancuronium bromide serves no legitimate purpose in lethal injections.[110]

Defendants may assert that pancuronium bromide is necessary because it collapses the lungs and prevents the public from seeing convulsions caused by potassium chloride. Neither of these purported purposes is legitimate. With potassium chloride causing death long before any of the other chemicals does so,[111] there is no need to collapse the lungs. And, preventing the public from seeing convulsions caused by potassium chloride is not a legitimate purpose recognized by the Eighth Amendment.[112] Even if it is a legitimate purpose, the convulsions could be avoided by using a different chemical to stop the heart.[113] Thus, the use of pancuronium bromide serves no purpose in an execution, and creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment since a lethal injection can be carried out without using pancuronium bromide.

b. violating evolving standards of decency.

Recent research and legislation regarding animal euthanasia proves that the use of pancuronium as a lethal injection chemical violates evolving standards of decency. Specifically, using pancuronium to euthanize animals would violate Kentucky law, the law of 30 other states, and national standards for veterinarians.

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[108] *Id.* at 27, 28.
[109] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 133-34, 142).
[110] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 133-34).
[111] *Id.* at 133-34, 142.
[112] *See, e.g., California First Amendment Coalition v. Woodford*, 2000 WL 33173913 (N.D. Ca. 2000) (recognizing that "the public's perception of the amount of suffering endured by the condemned and the duration of the execution is necessary in determining whether a particular execution protocol is acceptable under the cruel and unusual punishment clause") (exhibit 28); *Abdur'Rahman v. Sundquist*, No. 02-2236-III (Tenn. Chancery Ct. 2003) (noting that pancuronium bromide serves no legitimate purpose in a lethal injection where potassium chloride is administered) (exhibit 29).
[113] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 161); exhibit 13 (Cross

Currently, Kentucky and 30 other states have passed laws that either expressly or implicitly preclude the use of a neuromuscular blocking agent in euthanizing animals.[114] In 2000, the leading professional association of veterinarians, the American Veterinary Medical Association, promulgated guidelines for euthanasia that explicitly forbid the use of a neuromuscular blocking agent during euthanasia when a sedative (anesthetic or barbiturate) has been administered.[115] Since legislatures began prohibiting using neuromuscular blocking agents with sedatives, no legislature or other governing body has expressly condoned this practice or repealed statutes forbidding it.

Given the consistency in the regulations, and the number of states disallowing this chemical combination for euthanasia of animals, using pancuronium bromide in conjunction with thiopental is outside the bounds of evolving standards of decency. Human beings are animals and should be treated at least as well as other animals. The recent alterations of euthanasia protocols for animals underscore the inhumanity of using pavulon to execute human beings. A euthanasia practice widely considered unfit for a dog is certainly unfit for humans.

c. Moore has a right for the public to see the effects of the chemicals

The evolving standards of decency test includes an analysis of legislative trends.[116] A legislature is supposed to represent the interests of the people. Thus, for the public to determine if a

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examination testimony of Dr. Mark Dershwitz on 5/2/05 in *Baze v. Rees* at 70).

[114] Fla. Stat. §§ 828.058 and 828.065; Ga. Code Ann. § 4-11-5.1; Me.Rev.Stat. Ann. tit. 17, § 1044; Md.Code Ann., Criminal Law, § 10-611; Mass.Gen.Laws § 140:151A; N.J.S.A. 4:22-19.3; N.Y.Agric. & Mkts § 374; Okla. Stat., Tit. 4, § 501; and, Tenn.Code Ann. § 44-17-303. In 1998, Kentucky became one of many states that implicitly banned such practices. K.R.S. section 312.181 (17) and KAR 16:090 section 5(1). The other states that implicitly ban using a sedative in conjunction with a neuromuscular blocking agent for euthanasia are: Ala. Code 34-29-131; Alaska Stat. 08.02.050; Ariz. Rev. Stat. 18-9-201; Conn. Gen.Stat. § 22-344a; Del.Code Ann., Tit. 3, § 8001; 510 Ill. Comp. Stat., ch. 70, § 2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Mich. Comp. Laws 333.7333; Mo. Rev. Stat. 578.005(7); Neb. Rev. Stat. 54-2503; Nev. Rev. Stat. Ann. 638.005; Ohio Rev. Code Ann. 4729.532; Or. Rev. Stat. 686.040(6); R.I. Gen. Laws § 4-1-34; S.C. Code Ann. § 47-3-420; Tex. Health & Safety Code, § 821.052(a); W. Va. Code 30-10A-8; Wyo. Stat. Ann. 33-30-216.

[115] Exhibit 23 (*2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 Journal of the American Veterinary Medical Association, 669, 681 (2001)).

[116] *See, e.g.*, *Atkins*, 536 U.S. at 312 (*quoting Penry*, 492 U.S. at 331).

portion of a method of execution is cruel and unusual punishment, the public must see what is really happening to the condemned inmate. Because cruel and unusual punishment cannot be inflicted on Moore, he has a constitutional right for the public to see all evidence that could impact their decision on whether a portion of punishment violates evolving standards of decency. By preventing anyone from seeing if Moore will be in pain during his execution and any convulsions caused by potassium chloride, the use of pancuronium bromide in his execution violates the Eighth Amendment to the United States Constitution and due process

d. conclusion

Our society has come to believe that execution by lethal injection is a painless process, where the inmate just goes to sleep and never wakes up. Pancuronium bromide makes it look that way whether it is true or not. By paralyzing all voluntary muscles, pancuronium bromide prevents the condemned inmate from alerting anyone to the fact that he is suffering pain. It is for this reason that a supermajority of states and the American Veterinary Medical Association prohibit the use of pancuronium bromide in conjunction with a barbiturate to euthanize an animal. The same standard should apply when executing humans. Pancuronium bromide is not necessary to cause death and thus serves no role in the lethal injection process. Instead, it creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment. Thus, pancuronium bromide must be removed from the chemical cocktail used in lethal injections.

3. potassium chloride.

Potassium chloride, the final chemical, is an extremely painful chemical that causes a burning sensation throughout the body as it causes convulsions and stops the heart, resulting in

death.[117] The pain is so severe that the American Veterinary Association states that the "administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscles, and loss of response to noxious stimuli."[118] The excruciating pain (and the convulsions) caused by potassium chloride can be avoided by replacing potassium chloride with "many non-painful ways of stopping the heart."[119] Thus, the risk of pain from potassium chloride is unnecessary, making Defendants' continued use of potassium chloride as a lethal injection chemical violative of the cruel and unusual punishment clause of the Eighth Amendment.

4. **sodium thiopental**

Sodium thiopental is an ultra-short acting barbiturate that must be mixed from a solid to a liquid before use.[120] It is administered in hospital settings to render patients unconscious prior to giving them a longer-acting barbiturate.[121] Since thiopental was first used in lethal injections, it has been replaced in the medical setting by propafol, a safer and easier drug to administer.[122]

In Defendants' execution procedure, sodium thiopental is the first chemical injected.[123] It is intended to prevent the inmate from feeling pain. But thiopental has little to no pain relieving properties and begins to wear off in a matter of minutes.[124] Thus, there is a substantial risk that

[117] *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 307 (Tenn. 2005) (recognizing that potassium chloride will cause extreme pain and suffering in a person who is able to feel pain); Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 118, 132-33); exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 69.

[118] Exhibit 23 (*2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 Journal of the American Veterinary Medical Association, 669, 681 (2001).

[119] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 118); exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 70).

[120] Exhibit 20 (Package insert on sodium thiopental); exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 121).

[121] *Id.* at 120-21.

[122] *Id.* at 121.

[123] Exhibit 1 (Defendants' Response to Open Records Request).

[124] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 124).

thiopental will not serve its desired purpose, making it likely that a condemned inmate could feel pain during execution.

Ensuring that a sufficient amount of thiopental is administered to prevent a person from feeling pain is a complicated process. For instance, if the wrong size catheter is used, the thiopental will go into a different part of the body, thereby not rendering the inmate unconscious but causing excruciating pain.[125]

In addition, "individual response to the drug is so varied that there can be no fixed dosage."[126] Thus, the dosage of thiopental has to be measured with precision.[127] The amount of thiopental to be administered depends on the size of the inmate and the concentration of thiopental administered. "Dose is usually proportional to body weight and obese patients require a larger dose than relatively lean patients of the same weight."[128] "The volume of dilutent for chemicals should be 1) at least large enough so that all the chemicals will be dissolved, and 2) sufficiently dilute so that it will not irritate the inmate's vein and cause the inmate pain."[129] "Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation."[130] Defendants take none of these variables into consideration. Instead, they administer the same dose of thiopental to all inmates and leave the administration of the lethal injection chemicals to an executioner with no training in injecting or preparing the lethal injection chemicals.[131] As a result, there is an unnecessary risk that the lethal

[125] *See, e.g.*, *id.* at 162.
[126] Exhibit 20 (Package insert on sodium thiopental).
[127] *Id.*
[128] *Id.*; exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 115-16).
[129] Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 106, 119 (2002); exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 169-71).
[130] *Chaney v. Heckler*, 718 F.2d 1174, 1191 (D.C. Cir. 1983).
[131] Exhibit 1 (Defendants' Response to Open Records Request) (listing the dose of sodium thiopental they will inject into Moore); exhibit 24 (Excerpt from direct examination testimony of former Warden Glenn Haeberlin on 4/19/05 in *Baze v.*

injection chemicals are not reaching the condemned inmate's bloodstream in an amount sufficient to prevent the inmate from feeling pain.

An individual who is unconscious can wake up from painful stimuli.[132] Thus, a larger concentration of thiopental is necessary to prevent a person from feeling pain than is necessary to prevent a person simply from moving or responding to verbal stimuli.[133] According to the standard text on toxic drugs, at least 39-42 mg/L of thiopental in the bloodstream is necessary to prevent a person from responding to painful stimuli.[134] A wealth of data analyzing concentrations of thiopental in executed inmates and how long it takes condemned inmates to stop breathing establishes that, in an alarming number of executions, not enough thiopental is reaching the inmate to prevent the inmate from feeling the pain and suffering caused by pancuronium bromide and potassium chloride.

Toxicology results of executed inmates in Arizona, North Carolina, and South Carolina have revealed that the levels of thiopental in the blood of executed inmates are frequently far lower than the 39-42 mg/L required to guarantee that a person will not feel pain.[135] Thus, it appears that many

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Rees at 29).

[132] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 98-99).

[133] *Id*. at 99.

[134] Exhibit 30 (Excerpt from Randall C. Baselt, Ph.D., Disposition of Toxic Drugs and Chemicals in Man (7th ed.)).

[135] Exhibit 31 (Toxicology Reports on inmates executed in Arizona: John Brewer, finding 2.7 mg/L of thiopental in his bloodstream and noting that 2.7 mg/L is below the therapeutic range; James Clark, finding 25 mg/L of thiopental in his bloodstream; Jimmie Jeffers, finding 8.2 mg/L of thiopental in his bloodstream; Jose Jesus Ceja, , finding 8.8 mg/L of thiopental in his bloodstream; Ignacio Ortiz, finding 7.8 mg/L of thiopental in his bloodstream; Anthony Chaney, finding 2.8 mg/L of thiopental in his bloodstream, and noting that 2.8 mg/L is below the therapeutic range); exhibit 32 (Toxicology Reports on inmates executed in North Carolina: Arthur Martin Boyd, Jr., finding 2.6 mg/L of thiopental in his bloodstream; Michael Earl Sexton, finding 3.7 mg/L of thiopental in his bloodstream; Clifton Allen White, executed in North Carolina, finding 17 mg/L of thiopental in his bloodstream; Ronald Wayne Frye, finding 8.2 mg/L of thiopental in his bloodstream; David Junior Ward, executed in North Carolina, finding 17 mg/L of thiopental in his bloodstream; Desmond Keith Carter, finding trace levels of thiopental in his bloodstream); exhibit 33 (Toxicology Reports on inmates executed in South Carolina: Sylvester Lewis Adams, finding 32 mg/L of thiopental in his bloodstream; Fred Kornahrenes, finding 23 mg/L of thiopental in his bloodstream; Michael Torrence, finding 13.43 mg/L of thiopental in his bloodstream; Cecil D. Lucas, finding 23.09 mg/L of thiopental in his bloodstream; Frank Middleton, finding 33 mg/L of thiopental in his bloodstream; Michael Elkins, finding 27 mg/L of thiopental in his bloodstream; Earl Matthews, Jr., finding 28 mg/L of thiopental in his bloodstream; John Arnold, finding 16 mg/L of thiopental in his bloodstream; John

condemned inmates were in pain during their execution, including Eddie Harper, the one inmate executed by lethal injection in Kentucky. Toxicology results from Harper show that he had between 3 and 6.5 mg/L of thiopental in his body[136] - - well below the minimum level of thiopental necessary to prevent a person from feeling pain.

Recently disclosed information in other states suggests that inmates are likely to be conscious during their execution. With four executions carried out in North Carolina between November 2005 and January 20, 2006, the North Carolina Department obtained and had tested blood from the condemned inmates for the purpose of determining whether the condemned inmate was receiving sufficient anesthesia prior to the administration of pancuronium bromide and potassium chloride.[137] The results of the toxicology analysis show that the last four inmates executed in North Carolina were likely in pain during their execution.

Toxicology results of blood samples taken from the left femoral vessel of Steven Van McHone indicate sodium thiopental levels of 1.5 mg/L and 21 mg/L.[138] Similar test results from Elias Syriani show 4.4 mg/L, 11 mg/L and 12 mg/L of thiopental.[139] With Kenneth Boyd, the toxicology results show 11 mg/L and 29 mg/L.[140] And, with Perrie Dyon Simpson, the toxicology

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Plath, finding 28 mg/L of thiopental in his bloodstream; Sammy Roberts, finding 19 mg/L of thiopental in his bloodstream; J.D. Gleaton, finding 31 mg/L of thiopental in his bloodstream; Larry Gilbert, finding 7.1 mg/L of thiopental in his bloodstream; Louis Truesdale, Jr., finding 7.5 mg/L of thiopental in his bloodstream; Andrew Smith, finding 21 mg/L of thiopental in his bloodstream; Ronald Howard, finding sample unsuitable for quantitation; Joe Atkins, finding 12 mg/L of thiopental in his bloodstream; Leroy Drayton, finding 9.9 mg/L of thiopental in his bloodstream; David Rocheville, finding 17 mg/L of thiopental in his bloodstream; Kevin Young, finding 3.4 mg/L of thiopental in his bloodstream; Richard Johnson, finding 7.8 mg/L of thiopental in his bloodstream; Anthony Green, finding 19 mg/L of thiopental in his bloodstream; and, Michael Passaro, finding 6.1 mg/L of thiopental).

[136] Exhibit 34 (Toxicology results on Edward Lee Harper); exhibit 35 (Direct examination testimony of Michael Ward on 4/18/05 in *Baze v. Rees* at 181).

[137] Exhibit 36 (*Brown v. Beck*, No. 5:06-ct-03018-H (E.D. N.C. 2006), Order dated April 7, 2006) (noting that blood was drawn from the last four inmates executed in North Carolina at the order of the North Carolina Department of Corrections for the purpose of determining whether the inmates were able to feel pain during their executions).

[138] Exhibit 37 (Toxicology results on inmates executed in North Carolina between November 2005 and January 20, 2006).

[139] *Id*.

[140] *Id*.

results show 8.7 mg/L, 12 mg/L and 42 mg/L.[141] As these toxicology results and those obtained before it show, the use of sodium thiopental during a lethal injection creates an unnecessary risk that the condemned inmate will feel pain during the lethal injection, because Defendants are unable to ensure that enough sodium thiopental (39-42 mg/L) to prevent the inmate from feeling pain is in the inmate's body throughout the execution process.

Similarly, evidence recently obtained concerning lethal injections in California show that at least the last two men executed in California were likely conscious and feeling pain while executed.[142] Although the five gram dose of sodium thiopental used in California should cause respiration to cease within a minute,[143] California death-sentenced inmates were breathing for up to twelve minutes after the injection of sodium thiopental.[144] This evidence prompted a federal district court judge in California to prohibit a lethal injection unless trained medical personnel confirmed that the condemned inmate could not feel pain throughout the execution or they administered pentobarbital as the only chemical.[145]

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[141] *Id.*

[142] Experts disagree on how to read postmortem blood samples, which are subject to a phenomenon called "postmortem redistribution." But, recent evidence from California suggests strongly that the defense experts are correct, and that, for whatever reason, not enough sodium thiopental is getting into the prisoners' bloodstream to stop them from feeling excruciating pain. In addition, the results from the blood drawn from recently executed inmates in North Carolina for the purpose of determining whether the inmates were able to feel pain during their executions support Defendants' claim that administering sodium thiopental creates an unnecessary risk of pain and suffering.

[143] *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004) (*quoting* Declaration of Mark Dershwitz).

[144] Exhibit 38 (Execution Logs on inmates executed in California: Jaturun Siripongs, respiration did not cease until five minutes after the injection of sodium thiopental; Manuel Babbitt, respiration did not cease until five minutes after the injection of sodium thiopental; Darrel Keith Rich, respiration did not cease until two minutes after the injection of sodium thiopental; Stephen Wayne Anderson, respiration did not cease until five minutes after the injection of sodium thiopental; Stanley Tookie Williams, respiration did not cease until between six and twelve minutes after the injection of sodium thiopental; and, Clarence Ray Allen, respiration did not cease until nine minutes after sodium thiopental after the injection of sodium thiopental); exhibit 39 (*Morales v. Hickman*, No. 5:06-cv-00219-JF (N.D. Cal. 2006)) (Order, dated Feb. 14, 2006, Denying Conditionally Plaintiff's Motion for Preliminary Injunction) (discussing the length of time executed death row inmates in California were observed breathing after the injection of sodium thiopental). Similarly, Edward Harper did not die until five minutes after the sodium thiopental was injected and two minutes after the pancuronium bromide was injected. *See* exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 138-42).

[145] Exhibit 39 (*Morales v. Hickman*, No. 5:06-cv-00219-JF (N.D. Cal. 2006)) (Order, dated Feb. 14, 2006, Denying Conditionally Plaintiff's Motion for Preliminary Injunction).

And, in Delaware, on November 4, 2005, condemned inmate Brian Steckel spoke for nearly 12 minutes after the injection of sodium thiopental and stated that he did not think so much time would elapse before the chemicals took effect, before finally succumbing to the sodium thiopental and beginning to shake violently.[146] Obviously, he did not stop breathing within one minute of the injection of sodium thiopental.

Defendants are likely to dispute the conclusions resulting from this evidence. In doing so, they will probably rely on Dr. Dershwitz, an anesthesiologist, who has testified in previous lethal injection litigation in Kentucky and numerous other states. Dr. Dershwitz's credibility is currently suspect as a result of misrepresentations he recently made, and his hypotheses that have been proven to be incorrect.

For instance, in previous litigation in Kentucky, Dershwitz testified that the BIS Monitor would be useless for monitoring for consciousness because the large dose of potassium chloride would cause the monitor to malfunction and go blank.[147] Yet, last week, Dershwitz presented an affidavit in North Carolina that said that a BIS Monitor would be able to determine if an inmate was able to feel pain during an execution.[148] In his North Carolina affidavit, he made no reference to his contradictory testimony in Kentucky or that the potassium chloride would render the BIS Monitor useless.[149] Dershwitz's half-truths and misleading testimony lead to one conclusion - - that Dershwitz is not credible when it comes to issues involving lethal injection.

Further evidence of Dershwitz's lack of expertise and willingness to say whatever is

[146] Exhibit 40 (Sean O'Sullivan, *Steckel's Execution Didn't Go Quickly*, The News Journal—Delaware Online, November 5, 2005)).
[147] Exhibit 41 (Excerpt from direct examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 29-31).
[148] Exhibit 42 (Third Affidavit of Dr. Dershwitz, in *Brown v. Beck*, No. 5:06-ct-03018-H (E.D. N.C. 2006)).
[149] *Id*.

necessary to increase the likelihood that an execution will take place is shown by the California execution data discussed previously. According to Dershwitz, the injection of thiopental should stop an inmate's breathing within about a minute.[150] But the previously discussed data from California proves that this is not the case.[151]

Dr. Dershwitz's conclusions about consciousness after an injection of three grams of sodium thiopental are also problematic. Although Dershwitz has no expertise in the effects of massive doses of a chemical and has conducted no studies on sodium thiopental,[152] Dershwitz claims that 50% of the population will be rendered unconscious by 7 mg/L of sodium thiopental.[153] Applying this prediction to toxicology results from numerous inmates executed by lethal injection shows that many inmates were likely conscious during their execution and that some of these inmates had a likelihood of consciousness of 90% or more.[154]

Yet, Dershwitz maintains that the dose of sodium thiopental administered during Kentucky lethal injections is so large that it will render an inmate unconscious for hours. This conclusion is faulty because Dershwitz: 1) assumes that the full dose of thiopental enters the bloodstream and fails to take into consideration numerous variables, including the concentration of thiopental administered; 2) bases his conclusion on the amount of thiopental necessary to prevent a person from responding to verbal commands, rather than the higher amount of thiopental necessary to

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[150] *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004) (*quoting* Declaration of Mark Dershwitz).
[151] Exhibit 38 (Execution Logs on inmates executed in California: Jaturun Siripongs, respiration did not cease until five minutes after the injection of sodium thiopental; Manuel Babbitt, respiration did not cease until five minutes after the injection of sodium thiopental; Darrel Keith Rich, respiration did not cease until two minutes after the injection of sodium thiopental; Stephen Wayne Anderson, respiration did not cease until five minutes after the injection of sodium thiopental; Stanley Tookie Williams, respiration did not cease until between six and twelve minutes after the injection of sodium thiopental; and, Clarence Ray Allen, respiration did not cease until nine minutes after sodium thiopental after the injection of sodium thiopental); exhibit 39 (*Morales v. Hickman*, No. 5:06-cv-00219-JF (N.D. Cal. 2006)) (Order, dated Feb. 14, 2006, Denying Conditionally Plaintiff's Motion for Preliminary Injunction) (discussing the length of time executed death row inmates in California were observed breathing after the injection of sodium thiopental).
[152] Exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 53-54).
[153] *Id*. at 55-56.

prevent a person from feeling pain;[155] and, 3) bases his conclusions on studies involving the administering thiopental in conjunction with another barbiturate.[156] Thus, this Court should disregard the findings of Dr. Dershwitz.

In addition, Dr. Dershwitz's opinion on how much sodium thiopental will be in the body differs depending on which state he is testifying in and what inconsistency in his testimony has been pointed out to him since he last testified. According to Dr. Dershwitz's most recent testimony, in North Carolina, 40 mg/L of thiopental should be in the body ten minutes after an injection of three grams of thiopental.[157] This testimony is a bit odd since, in June of 2004, Dershwitz testified, in Maryland, that 30.15 mg/L of thiopental should be in the body five minutes after an injection of three grams of thiopental, and, as he has stated in numerous states, the amount of thiopental in the body should decrease over time.[158] In prior Kentucky litigation, Dershwitz testified that 65 mg/L of thiopental should be in the body after Kentucky injects three grams of sodium thiopental,[159] and that the concentration of thiopental would be much lower if the inmate was obese,[160] as is true with Moore. Dershwitz's numbers resulting from his fuzzy mathematical equations are so all over the place that it is as if he is just pulling numbers out of a hat. By comparing his testimony in Maryland to North Carolina, it becomes clear that his charts show that thiopental levels increase over time, despite his repeated testimony to the opposite. One of two things must be clear, either Dershwitz changes his calculations to explain inconsistencies in his testimony, or Dershwitz does not know what he is doing. Applying Dershwitz's calculations to actual executions shows this.

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[154] Exhibit 43 (Graphs showing probability of consciousness based on Dershwitz's predictions).
[155] Exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 51-52).
[156] *Id.* at 80-82.
[157] Exhibit 36 (*Brown v. Beck*, No. 5:06-ct-03018-H (E.D. N.C. 2006), Order dated April 7, 2006).
[158] Exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 91-97); exhibit 44 (Dershwitz Affidavit in *Oken v. Sizer*).
[159] Exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 91).

In litigation in Maryland involving Steven Oken, Dershwitz testified that 30.15 mg/L of thiopental should be in Oken's veins after five minutes.[161] Even if Dershwitz was right, 30.15 mg/L of thiopental was not enough thiopental to ensure that Oken did not feel pain. It is not close to the 39-42 mg/L that is needed.[162] Yet, when Maryland conducted toxicology results to prove Dershwitz's contentions, the toxicology results did the opposite. Oken only had 10 mg/L of thiopental in his body.[163] As discussed above, similar results recently caused a federal judge in North Carolina to stop an execution unless the department of corrections could prove that trained medical personnel would be present to ensure that the inmate would be unable to feel pain prior to and at the time of the administration of pancuronium bromide and potassium chloride.[164] Prior toxicology results in North Carolina, South Carolina, and Kentucky also support the conclusion that not enough thiopental is reaching the condemned inmate's body. Thus, Dershwitz's conclusions are unreliable. Contrary to his contentions, by injecting sodium thiopental under the current execution procedures, Defendants are creating an unnecessary risk of pain and suffering.

Regardless of the likelihood of the risk that a condemned inmate will be able to feel pain during an execution, there is no basis to subject an inmate to this risk by injecting sodium thiopental. Thiopental could be replaced by pentobarbital, a long acting barbiturate that is used almost exclusively in Oregon in assisted suicide cases.[165] Because the risk of pain and suffering associated with the use of thiopental is easily avoidable, it is unnecessary and thus violates the cruel and unusual punishment clause of the Eighth Amendment.

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[160] *Id.* at 93-94.
[161] Exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 91-95); exhibit 44 (Dershwitz Affidavit in *Oken v. Sizer*).
[162] Exhibit 30 (Excerpt from Randall C. Baselt, Ph.D., Disposition of Toxic Drugs and Chemicals in Man (7th ed.)).
[163] *Evans v. Saar*, 412 F.Supp.2d 519, 525 (D. Md. 2006).
[164] Exhibit 36 (*Brown v. Beck*, No. 5:06-ct-03018-H (E.D. N.C. 2006), Order dated April 7, 2006).
[165] 2006 Annual Report under the Oregon Death With Dignity Act (documenting the number of people who died by

5. the risk of pain and suffering from each of the chemicals could be avoided

Regardless of how big the risk is that Moore, or any other death-sentenced inmate, will feel pain during his execution, the risk is unnecessary and must be avoided. Numerous options are available. Defendants could replace potassium chloride with a less painful chemical that will stop the heart.[166] They could eliminate pancuronium bromide from the chemical cocktail. They could replace sodium thiopental with a long acting barbiturate. Or, they could use pentobarbital as the only lethal injection chemical. With all these options available, the risk associated with the chemicals Defendants intend to use to kill Moore are unnecessary. Because the risks are unnecessary, they violate the Eighth Amendment cruel and unusual punishment clause. Thus, Defendants should be prohibited from executing Moore until they decide to use different chemicals to carry out the lawfully imposed sentence of death.

D. The lack of monitoring to ensure that a condemned inmate is unconscious from the time period just prior to injecting pancuronium until death creates an unnecessary risk of pain and suffering in violation of the cruel and unusual punishment clause.

Sometimes a paralytic agent must be administered for a particular type of surgical setting, like eye surgery or brain surgery.[167] In these situations, the medical profession takes additional precautions to monitor for consciousness throughout the surgical procedure to avoid the nightmarish possibility that a patient would wake and feel pain, but, due to paralysis, be unable to express it.[168] Many of these precautions should be used to monitor for consciousness during an execution. The Eighth Amendment demands nothing less.

An individual injected with sodium thiopental is capable of feeling pain if the inmate regains

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assisted in Oregon, the chemicals that were ingested, and any side effects that were suffered).

[166] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 118); exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 70).

[167] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 106).

adequate consciousness during the execution, if the thiopental begins to wear off, or if the level of thiopental in the body is below the amount necessary to maintain general anesthesia (level of consciousness that prevents a person from feeling pain).[169] Normally, this would be easy to detect because people react to pain by moving or crying out.[170] But, as previously discussed, the second chemical administered during lethal injections, pancuronium bromide, paralyzes all voluntary

muscles.[171] Thus, if pancuronium bromide is used in a lethal injection, as it is in Kentucky, alternative methods of monitoring for the ability to feel pain are necessary.[172]

Prior to injecting pancuronium bromide, checking for consciousness can be done by checking the corneal reflexes, or pinching a person to see if the person responds.[173] But these tests do not work once a person has been injected with a paralytic agent, such as pancuronium bromide.[174] At this point, the following equipment would aid in monitoring consciousness after pancuronium bromide has been injected: blood pressure monitoring; EKG machine (if located in the execution chamber and being read throughout the execution not just to determine death); and an EEG monitor.[175] Defendants use none of this equipment to monitor for consciousness,[176] nor do they have anyone adequately trained in monitoring for consciousness, with or without the listed equipment, at the execution chamber. Defendants' failure to monitor for consciousness, particularly since they

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[168] *Id*. at 106-112.
[169] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 104, 127, 143).
[170] *Id*. at 116, 124.
[171] *Id*. at 125.
[172] *Id*. at 108, 128.
[173] Exhibit 14 (Direct examination testimony of Dr. Geiser by avowal on 4/20/05 in *Baze v. Rees* at 61); exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 47).
[174] Exhibit 14 (Direct examination testimony of Dr. Geiser by avowal on 4/20/05 in *Baze v. Rees* at 61); exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 107-11).
[175] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 107-11).
[176] *See, e.g.*, exhibit 10 (Excerpts from direct examination testimony of former Warden Haeberlin on 4/19/95 in *Baze v. Rees*, at 30-31; exhibit 52 (Cross examination of Defendant Rees on 5/2/05 in *Baze v. Rees* at 124).

have decided to administer an extremely painful chemical (potassium chloride), creates a risk of pain and suffering that is completely unnecessary, because it could be alleviated by using less painful chemicals and by having adequately trained personnel properly monitor for the ability to feel pain.

II. If a stay of execution is granted after the first or second lethal injection chemical is administered, Defendants have an affirmative duty to render adequate medical care to reverse the effects of the chemicals. Defendants' failure to have the necessary equipment and trained medical personnel at the execution chamber to render life-maintaining medical treatment if such a stay is granted deprives Moore of due process.

Once a stay of execution is granted, the execution is no longer sanctioned. This is true even if the stay is granted (or notice of the stay is received at the prison) after the first or second chemical is administered.[177] In essence, the injection of the first lethal injection chemical would have been in error. Thus, the stay creates an affirmative obligation under due process and contemporary standards of decency and morality to take measures to give the inmate a chance to continue living.[178]

If the proper equipment is on hand, medical personnel trained in reversing the effects of sodium thiopental and pancuronium bromide, and certified in cardiac life support - - not EMT's, phlebotomists, pyschiatrists, or doctors of general medicine - - would have relatively little difficulty maintaining life after the first two chemicals have been injected.[179] Because the effects of sodium thiopental and pancuronium bromide are reversible,[180] Defendants' failure to have the necessary

[177] *See In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d 207, 211 (N.J.Super. 2004).
[178] *See In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211.
[179] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 142-44).
[180] *Id*.; exhibit 17 (Excerpts from direct examination testimony of Defendant Haas on 4/19/05 in *Baze v. Rees*, at 120);

equipment and adequately trained personnel to reverse the effects of these chemicals violates due process and fundamental fairness.[181]

After litigation began on behalf of Ralph Baze and Thomas Bowling, Defendants took some steps to prepare for the need to reverse the effects of the lethal injection chemicals. They added a crash cart to their execution protocol. That step, however, is wholly inadequate. A crash cart is only as good as the equipment on the crash cart and the medical training of the people operating that equipment.

To determine what to have on the crash cart, counsel for Defendants prepared a list of equipment necessary to reverse the lethal injection chemicals. But as Dr. Heath and Dr. Dershwitz testified in *Baze*, the document prepared by counsel for Defendants does not come close to being comprehensive enough for someone to use in maintaining life after the first two chemicals have been injected.[182] After questioning about a crash cart began in *Baze*, Defendants produced an inventory of the items on the crash cart. Surprisingly, the crash cart was missing some of the equipment mentioned by counsel for Defendants. But even with that equipment, as Defendants' own expert, Dr. Dershwitz, admitted, the crash cart would be insufficient to maintain life after the first two chemicals were injected. According to Dr. Dershwitz, the following medications would be essential: medications to increase blood pressure and contract the heart; insulin; neostigmine; and artificial ventilation.[183] None of these medications are part of Defendants' crash cart.[184] Defendants' failure to have the proper equipment available at the execution chamber and their failure to ensure that they

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exhibit 16 (excerpt from Defendant Haas deposition in *Baze v. Rees*, at 33).

[181] *See In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d 207 (N.J.Super. 2004).

[182] Exhibit 12 (Direct examination testimony of Dr. Mark Heath on 4/20/05 in *Baze v. Rees* at 150-51; exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 73-76).

[183] Exhibit 13 (Cross examination testimony of Dr. Dershwitz on 5/2/05 in *Baze v. Rees* at 75-76.

have someone available to operate the equipment that is trained in reversing the effects of the lethal injection chemicals violates due process.

Although, "the grant of a stay of execution communicated to prison authorities after the lethal injection has been administered is not a likely event, it can happen,"[185] and has happened. Dr. Heath has testified about two cases that he is aware of where this happened.[186] Thus, as Defendants' recognized by adding a crash cart to its lethal injection protocol, "it is a foreseeable occurrence. And should it occur, there can be no justification for depriving that inmate a chance at life."[187] A matter of minutes can be the difference between life and death. Prompt medical attention is necessary to maintain life. Defendants not only are currently unwilling to allow a properly trained physician to perform life saving measures, but they also do not have the necessary equipment nearby for a physician to use in attempting to save a life. Defendants' failure (and seeming refusal) to take reasonable steps to preserve a condemned inmate's life if stay is granted after the lethal injection process violates due process, fundamental fairness, and the basic respect for human dignity underlying the Eighth Amendment to the United States Constitution.

III. Defendants' failure to prepare an alternative means of accessing Moore's veins in light of the fact that venous access will be difficult because of his compromised veins, their refusal to utilize readily available alternative chemicals and procedures that lessen the risk of pain and suffering and their failure to implement adequate life maintaining procedures in case of a stay of execution constitute deliberate indifference in violation of the cruel and unusual punishment clause of the state and federal constitutions.

Deliberate indifference to medical needs of a prisoner, including a refusal to lessen the risk of pain and suffering, constitutes the unnecessary and wanton infliction of pain, proscribed by the

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[184] *Id*. at 77-78.
[185] *In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211.
[186] Exhibit 46 (Excerpt from cross examination testimony of Dr. Mark heath on 4/20/05 in *Baze v. Rees* at 222-23). In addition, Clarence Hill was strapped to the execution gurney when the Supreme Court of the United States granted him a stay of execution in January 2006.
[187] *In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211.

Eighth Amendment.[188] "Deliberate indifference" means "the official was subjectively aware of the risk."[189] Thus, "to state a cognizable claim, a [plaintiff] must allege acts or omissions sufficiently harmful to evidence deliberate indifference,"[190] by establishing that "the official knows of and disregards an excessive risk to inmate health or safety."[191]

Defendants are quite aware of the fact that Moore suffers from compromised veins,[192] which will make it difficult if not impossible to gain peripheral access to his veins. In light of this, attempting to insert an I.V. for up to 60 minutes, rather than deciding to employ an alternative method of venous access constitutes deliberate indifference to known medical needs, in violation of the Eighth Amendment to the United States Constitution. At the same time, resorting to a "cut down" procedure when they have admitted, as recently as late 2004, that they are not qualified to perform a "cut down" procedure,[193] is deliberate indifference. Defendants' failure to come up with a guaranteed means for accessing Moore's veins also evinces their deliberate indifference.

Deliberate indifference is also evinced through the chemicals and procedures Defendants use for injecting the chemicals. Through lethal injection litigation in other states and a state court lethal injection challenge in Kentucky on behalf of two other death-sentenced inmates, Defendants have been made aware of the risk of pain associated with the chemicals and procedures they use for carrying out lethal injections. They have been informed of alternative chemicals that could be used, and the necessary equipment for maintaining life if a stay of execution is granted after the first or second chemical is administered. Yet, they have made no changes to their execution procedures to

[188] *Estelle v. Gamble*, 429 U.S. 97 104 (1976). Because a prisoner remains under the care of the prison until death, the dying process by lethal injection must be considered a "medical need" that must be as painless as Defendants can make it.
[189] *Farmer*, 511 U.S. at 837.
[190] *Gamble*, 429 U.S. at 106.
[191] *Farmer*, 511 U.S. at 837.
[192] Exhibit 9 (Excerpts from Brian Keith Moore's prison medical records).

lessen the risk of pain. Instead, Defendants have made haphazard changes to their execution protocol without consulting medical professionals, in an attempt to avoid liability.[194] By failing to take measures to correct the unnecessary risk of pain and suffering associated with their lethal injection process and by failing to ensure they have the equipment to maintain life if a stay of execution is granted after the first or second chemical is administered, Defendants have shown deliberate indifference towards known risks of inflicting unnecessary pain in their lethal injection process.

As Commissioner of the Department of Corrections, Defendant Rees has oversight authority over how lethal injections are carried out in Kentucky. Defendant Rees also was involved in adopting Oklahoma's lethal injection protocol - - the first lethal injection protocol in the country.[195] No medical or scientific tests were conducted on the effects of the chemicals Oklahoma adopted for lethal injection.[196] Other states looked at the Oklahoma protocol and the Texas protocol used in the first lethal injection, and followed suit - - creating lethal injection protocols that called for the administration of sodium thiopental, pancuronium bromide, and potassium chloride.[197]

In 1998, former Warden Parker decided what chemicals to use for Kentucky lethal injections and what amount to administer.[198] He based his decision entirely on what other states used, and believed, incorrectly, that all other states used the same chemicals.[199] He never consulted an

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[193] Exhibit 19 (Excerpt from deposition of former Warden Glenn Haeberlin on 4/19/05 in *Baze v. Rees*, at 41).
[194] Exhibit 47 (Excerpt from direct examination testimony of former Warden Haeberlin on 4/19/05 in *Baze v. Rees*, at 16-17) (did not consult medical about the changes to the protocol made during litigation, including changing the dose of thiopental from 2-3 grams, requiring the I.V. team to attempt to insert an I.V. for 60 minutes, and adding a crash cart); *see generally*, exhibit 8 (Testimony of Defendant Rees in *Baze v. Rees*); exhibit 52 (Cross examination of Defendant Rees on 5/2/05 in *Baze v. Rees* at 122-24).
[195] Exhibit 8 (Testimony of John Rees on 4/18/05 in *Baze v. Rees* at 189).
[196] Exhibit 2 (Direct examination testimony of Professor Denno on 4/18/05 in *Baze v. Rees* at 23-24).
[197] *Id.* at 25-28, 31-32.
[198] Exhibit 50 (Excerpts from direct examination testimony of former Warden Parker on 4/18/05 in *Baze v. Rees* at 130-35).
[199] *Id.*

anesthesiologist or any other medical personnel to determine whether the chemicals he chose would serve its intended purpose, whether alternative chemicals existed, or even to find out if other chemicals existed that would pose less risk of pain and suffering.[200] Instead, he blindly chose sodium thiopental, pancuronium bromide, and potassium chloride as the lethal injection chemicals, solely because Oklahoma did something like that twenty years earlier and other states had done the same.

Nothing changed when Defendants were made aware of the unnecessary risk of pain associated with the chemicals and procedures they use for carrying out lethal injections, even though they were also made aware of alternatives. Oregon has legalized assisted suicide and requires annual reports under its Death with Dignity Act. According to these reports, pentobarbital, a long acting barbiturate, has been used to cause death in most cases, with little to no side effects.[201] Defendants, however, never looked into this, despite being informed of it.[202] In addition, they were told that New Jersey does not use a paralytic agent during lethal injections. They did not look into this either. Why? According to Defendants, they were unaware that New Jersey does not use pancuronium bromide.[203] Since 27 other states use the same chemicals during lethal injections, they saw no reason to learn why sodium thiopental, pancuronium bromide, and potassium chloride are used in lethal injections.[204] What other states do, however, does not alleviate Defendants from the obligation to avoid creating a risk of unnecessary pain and suffering. Defendants' failure to recognize this and take corrective measures evinces their deliberate indifference, in violation of the Eighth Amendment.

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[200] *Id*.
[201] Exhibit 46 (Oregon Death With Dignity Act Report).
[202] Exhibit 52 (Cross examination of Defendant Rees on 5/2/05 in *Baze v. Rees* at 124).
[203] Exhibit 51 (Excerpts from direct examination testimony of former Warden Haeberlin on 4/19/05 in *Baze v. Rees* at 46).

Defendants' deliberate indifference is more egregious now than it was prior to the state court lethal injection trial on behalf of two other death-sentenced inmates. During that trial, testimony was presented that by replacing sodium thiopental with pentobarbital, the risk of pain and suffering would be substantially decreased. Testimony also established that by using pentobarbital, death could be caused without administering any other chemicals. Testimony also established pancuronium bromide was not necessary to cause death, and as their own expert admitted, less painful chemicals than potassium chloride could be used to stop the heart. Further, testimony established that Defendants could easily monitor for consciousness throughout the execution, and as undisputed testimony from their own expert established, maintaining life after the first and second chemical is administered is not difficult. But Defendants have not obtained the proper equipment. Their expert testified to what equipment would be necessary. Despite all of this, in the nearly one year since the state court lethal injection trial, Defendants have not changed their lethal injection chemicals, have not done anything to enable them to monitor for consciousness throughout the execution, and have not obtained the proper equipment for maintaining life after the first or second chemical have been administered. Defendants' failure constitutes deliberate indifference, in violation of the Eighth Amendment to the United States Constitution

IV. Fundamental notions of fairness and due process mandate that Defendants provide Moore with a copy of their execution procedures so Moore can make a choose between lethal injection and electrocution, and to determine the extent to which their constitutional rights are being violated.

Condemned inmates sentenced to death prior to March 31, 1998, are given the right to choose between lethal injection and electrocution.[205] Although Defendants were court ordered to disclose their execution procedures (under seal) in other lethal injection litigation, they have denied

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[204] *Id.*

Moore access to the execution procedures,[206] claiming, in part, that the procedures are exempt from discovery because they are pending appeal in another case.[207] Without access to the execution procedures, Moore is unable to intelligently exercise his right to choose between methods of execution. In addition, without access to the protocols, Moore is unable to determine if constitutional violations involving Defendants' lethal injection procedures exist that are not alleged in this action, or if additional facts that would support Moore's claims are contained within Defendants' execution procedures. Thus, by depriving Moore of access to the execution procedures, Defendants are violating fundamental notions of fairness and procedural due process under the Fourteenth Amendment to the United States Constitution.

A. Disclosure of Defendants execution procedures is necessary to make a meaningful choice between electrocution and lethal injection.

In order for Moore's Kentucky statutory right to choose between lethal injection and electrocution to have any meaning, Moore must have enough information to make a knowing and intelligent choice. A knowing and intelligent choice can only be made if Moore is notified of the procedures Defendants intend to utilize in carrying out his execution by lethal injection and electrocution. It is only through this information that Moore can make a knowing and intelligent decision as to which method of execution will be less painful. Therefore, it is imperative that this Court order Defendants to disclose to Moore a complete copy of the execution procedures for lethal injection and electrocution.

B. Fundamental notions of fairness and Due Process require that Defendants provide Moore with a complete copy of the execution procedures.

Procedural due process demands that citizens be given a meaningful opportunity to contest a

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[205] K.R.S. section 431.220.
[206] Exhibit 1 (Defendants' Response to Open Records Request).
[207] *Id*.

constitutional violation.[208] The central meaning of procedural due process is clear:

> parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.[209]

Procedural due process takes on a heightened meaning in capital cases.

"Because death is a different kind of punishment from any other which may be imposed in this country,"[210] the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment Cruel and Unusual Punishment Clause prevent a criminal defendant from being executed based on secret information (information that he was unaware of and unable to obtain due to no fault of his own), *id*., or information which he was not given an opportunity to rebut.[211] If a condemned inmate cannot be sentenced to death based on secret information, then likewise, the condemned inmate cannot be executed under a secret procedure that the condemned inmate had no notice of or opportunity to challenge.[212]

In addition, inmates facing the death penalty are entitled to notice when there has been a post-conviction change in mode of execution.[213] And, "it is clear that in innumerable death penalty cases the execution protocols have been examined by courts for their compliance with constitutional requirements."[214] Court review of the execution procedures presupposes knowledge of the contents

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[208] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[209] *Id*. at 533 (*quoting*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).
[210] *Gardner v. Florida*, 430 U.S. 349, 357 (1977).
[211] *Simmons v. South Carolina*, 512 U.S. 154 (1994).
[212] *See*, *Oken v. Sizer*, 32 F.Supp.2d 658, 664-65 (D.Md. 2004), *reversed on other grounds by*, *Sizer v. Oken*, 542 U.S. 916 (2004).
[213] *See, e.g.*, *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997); *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998); *Sims v. Florida*, 754 So.2d 657, 665 (Fla. 2000); *DeShields v. State*, 534 A.2d 630, 639 n. 7 (Del.1987); *State v. Fitzpatrick*, 684 P.2d 1112, 1113 (1984).
[214] *Oken*, 321 F.Supp.2d at 664-65 (*citing by e.g.*, *Nelson*, 541 U.S. 637 (2004); *In re Williams*, 359 F.3d 811 (6th Cir.2004); *Poland v. Stewart*, 117 F.3d 1094 (9th Cir.1997); *Campbell v. Wood*, 18 F.3d 662 (9th Cir.1994); *Cooper v.*

of those procedures.[215] Thus, it is clear that a procedural right exists to know the procedures that will be used in carrying out an execution by any method. What procedures are required is determined by a balancing test.

The "process due in any given circumstance is determined by weighing 'the private interest that will be affected by the official action against the government's asserted interest 'including the functions involved and the burdens the Government would face in providing greater process.'"[216]

Defendants claim that their execution procedures must remain confidential in order to protect security. Moore's interest is making sure that he will not suffer excruciating pain during his execution. In other words, he seeks a death in accord with the dignity of man.[217] Although Defendants' interest is weighty, it is not as strong as the interest in ensuring a dignified death, particularly in light of evidence demonstrating that Defendants are not currently capable of carrying out a humane lethal injection. Thus, the weighing of the respective interests favors disclosing the entire execution procedures so that Moore does not have to take Defendants' word that his Eighth Amendment rights will not be violated.[218]

Aside from the traditional due process argument, the public has a right to know the full protocol for any method of execution, because under current Supreme Court of the United States

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Rimmer, 2004 WL 231325 (N.D.Cal.2004), *aff'd*, 358 F.3d 655; *Cal. First Amendment Coalition v. Woodford*, 2000 WL 33173913 (N.D.Cal.2000), *aff'd*, 299 F.3d 868; *Jones v. McAndrew*, 996 F.Supp. 1439 (N.D.Fl.1998); *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz.1995).

[215] *Oken*, 321 F.Supp.2d at 664-65.

[216] *Hamdi*, 542 U.S. at 529 (*quoting*, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[217] *See Gregg v. Georgia*, 428 U.S 153, 176 (1976).

[218] *See Oken*, 321 F.Supp.2d at 665; *see also*, *Nelson v. Campbell*, 541 U.S. 637 (2004) (requiring the Alabama Department of Corrections to disclose its execution procedures as part of the remand order to determine if the use of a cut down procedure during a lethal injection violates the Eighth Amendment).

case law, a determination of what is cruel or unusual depends on evolving standards of decency. By withholding their lethal injection protocol, Defendants are - - in effect - - freezing the current protocol for lethal injection. The public cannot form a bad opinion regarding a procedure, or an aspect of that procedure, if it knows nothing about it (or is led to believe inaccurate information). The less the public knows, the more likely it is to not demand changes to portions of a method of execution. An integral part of Eighth Amendment law is the evolving standards of decency. The evolving standards of decency analysis cannot be conducted on all aspects of Defendants' lethal injection procedures unless the public has the opportunity to view the execution protocol. Thus, the failure to disclose a full copy of the execution protocols deprives Moore of the opportunity to have a full adjudication of his constitutional claims.

V. This lawsuit is cognizable as a 42 U.S.C. § 1983 action.

42 U.S.C. § 1983 provides, in pertinent part, for the protection of "any rights, privileges, or immunities secured by the Constitution and laws" against infringement by the states. When these rights are violated, section 1983 creates an action for damages and injunctive relief for the benefit of "any citizen of the United States" against the state actor responsible for the violation. In accordance with the remedial nature of the statute, the scope of section 1983 must be "liberally and beneficially construed."[219] Section 1983 is not available for claims that go to the core of habeas corpus, i.e., challenging the fact of conviction or the duration of a sentence and that request injunctive relief in the form of relief from confinement or sentence.[220] Because Moore's claims challenge particular aspects of how his execution will be carried out, not the validity of his conviction or sentence, his legal claims are cognizable in a 1983 action.

[219] *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (*quoting Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 684 (1978).

Moore's ability to maintain this narrow suit in a 1983 proceeding rather than as a habeas proceeding turns upon whether his claims "necessarily imply the invalidity of their conviction[s] or sentence[s]."[221] During the past two years the Supreme Court of the United States decided three cases determining whether a particular cause of action fell within the province of 1983 or had to be characterized as a habeas petition, including *Nelson v. Campbell*,[222] which dealt with the means for obtaining venous access to carry out a lethal injection. Each of these cases makes it clear that Moore's action is cognizable as a 1983 action.

Last year, in *Wilkinson v. Dotson*,[223] the Supreme Court held that an action challenging Ohio's parole procedures was cognizable in a 1983 suit, because the action did not challenge the "fact or duration of . . . confinement and seek either immediate release from prison or the shortening of the term of confinement."[224] The Court's holding in *Dotson* reiterates its ruling a year earlier in *Muhammad v. Close*,[225] where the Court held that the "requirement to resort to state post conviction litigation and federal habeas corpus before filing a civil suit for injunctive relief is not, however, implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence."[226]

In *Muhammad*, a prisoner filed a section 1983 suit against a prison official alleging that he had been charged with an institutional infraction that subjected him to a mandatory pre-hearing lockup.[227] The Court held that "these administrative determinations do not as such raise any implication about the validity of the underlying conviction, and although they may affect the

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[220] *Nelson v. Campbell*, 541 U.S. 637 (2004).
[221] *Heck v. Humphrey*, 512 U.S. 475, 487 (1994).
[222] 541 U.S. 637 (2004).
[223] 125 S.Ct. 1242 (2005).
[224] *Id*. at 1246 (internal citations omitted).
[225] 540 U.S. 749 (2004).
[226] *Id*. at 751.

duration of the time to be served that is not necessarily so."[228] Accordingly, the Court held that the suit was properly filed under section 1983.

Like *Muhammad*, Moore's suit for injunctive relief cannot be "construed as seeking judgment at odds with his conviction [or sentence]."[229] Moore does not challenge his death sentence or the constitutionality of lethal injection *per se*. His complaint, memorandum of law, and motion for a temporary restraining order are clear on this. He seeks only to bar Defendants from executing him in the manner they currently intend (the use of chemicals and procedures that create an unnecessary risk of pain and suffering, Defendants' deliberate indifference towards this, and their failure to use the proper equipment to maintain life if a stay of execution is granted after the injection of the first and second chemical). Thus, under *Muhammad*, Moore's suit does not challenge Defendants' right to execute him by lethal injection. Therefore, Moore's present suit must be allowed to proceed as an independent civil action.

Any doubt about the meaning of *Muhammad* and its implications for Moore was clarified in *Nelson v. Campbell*,[230] where the Court cited *Muhammad* for the proposition that its holding is "consistent with [its] approach to civil rights damages actions."[231] In *Nelson*, the Court addressed the issue of "whether section 1983 is an appropriate vehicle for petitioner's Eighth Amendment claim seeking a temporary stay and permanent injunctive relief" on the grounds that the particular means for effectuating petitioner's death sentence by lethal injection violated the Eighth Amendment

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[227] *Id*. at 752.
[228] *Id*. at 754.
[229] *Id*. at 754-55.
[230] 541 U.S. 637 (2004).
[231] *Id*. at 646-47.

Cruel and Unusual Punishment Clause.[232]

In addressing this issue, the Court noted that "a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself."[233] On the other hand, the Court held that "[a] suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself' because "by altering its method of execution, the State can go forward with the sentence."[234] Moreover, "merely labeling something as part of an execution procedure is insufficient to insulate it from a section 1983 attack."[235] Rather, a three-part test should be used to determine whether a claim challenges a method of execution: 1) whether the challenged procedure is a statutorily mandated part of the execution; 2) whether the protocol is necessary for administering the lethal injection; and, 3) whether the plaintiff is attempting to preclude execution by alternative methods.[236] Applying these principles to Nelson's challenge to a particular aspect of the lethal injection procedure, the Court held that his claim was properly filed under section 1983 because the allegation "that venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary."[237]

Applying the *Nelson* test to Moore's action establishes that his action is cognizable in 1983. First, like Nelson, venous access is at issue in carrying out Moore's execution. Second, neither the means of obtaining venous access nor the chemicals Defendants use to carry out a lethal injection

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[232] *Id*. at 639.
[233] *Id*. at 644. The *Nelson* Court also stated that it was not deciding the difficult question of whether a challenge to a method of execution on its face could only be brought in a habeas action. Thus, in light of *Nelson*, whether a *per se* challenge to a method of execution is permissible in a 1983 action - - an issue that seemed foreclosed prior to *Nelson* - - is now an open issue.
[234] *Id*. at 645-46.
[235] *Id*. at 645.
[236] *Id*. at 644-47.
[237] *Id*. at 642-47.

are mandated by statute. Third, Defendants' current protocol is not necessary for carrying out lethal injection. Finally, Moore is not trying to prevent his execution by alternative methods. Rather, he has conceded that lethal injection is constitutional on its face and has presented viable alternative chemicals to administer and procedures to utilize that will pose less risk of unnecessary pain and suffering. Thus, as discussed in Moore's complaint and this memorandum of law, he satisfies the requirements to proceed in a 1983 action.

In the past, arguments have been made that *Nelson* is limited to the use of a "cut down" procedure or other methods of obtaining venous access. While those issues are at play in this case, *Nelson* does not limit Moore's 1983 action to the process of inserting an I.V. This contention is further undermined by reference to the two certiorari questions presented in *Nelson*. The court, however, limited its consideration to the first question, which asked:

> Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. section 1983, which does not attack a conviction or sentence, is simply because the person is under a sentence of death – to be treated as a habeas corpus case subject to the restriction on successive petition which categorically precludes review of any constitutional violation not related to innocence, or can be maintained as section 1983 action?

The second question asked, "whether a cut-down procedure which involves pain and mutilation, conducted prior to an execution by lethal injection, violates the Eighth Amendment to the United States Constitution?[238] By expressly limiting the issue for consideration to the first question presented,[239] the Court made it clear that it meant to address all situations that did "not attack a conviction or sentence." Therefore, any suggestion that *Nelson* is limited to a "cut-down" procedure is inaccurate. If *Nelson*'s reach is circumscribed to merely a cut down procedure, the Court would

[238] *See Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit,* in *Nelson v. Campbell*.
[239] *Nelson v. Campbell*, 124 S.Ct. 835 (2003) (order granting petition for writ of certiorari).

have granted review on the second question (which focused exclusively on the use of a cut-down procedure). Instead, *Nelson* dealt directly with the procedural question of the proper forum for claims that do not directly challenge the state's ability to carry out an execution, and established that

a federal district court retains subject matter jurisdiction to hear all section 1983 claims filed by a prisoner under a state sentence provided that the claim does not imperil execution of the sentence.

By recognizing section 1983 as a proper vehicle to bring such claims, the Court could not have believed that only cut down cases are cognizable under section 1983. Rather, Justice O'Connor's opinion contemplates that other "method – of – execution claims" will be brought through the Court, but "it need not reach the difficult question of how to categorize method – of – execution claims generally."[240]

These aspects of the Court's opinion do not support the conclusion that the only means-of-effectuating-a-death-sentence claims that can be raised are "cut down cases." Rather, these aspects of *Nelson* suggest that the Court is well aware that there will be other manner of method – of – executions suits in the future and will reserve ruling on those cases for another day.

In short, if *Nelson* extends only to lethal injection cut down cases, the Court certainly would have closed the "floodgates" by granting certiorari on merely the second question. This it did not do. Instead, it recognized a procedural mechanism in section 1983 and a federal district court's subject matter jurisdiction over those claims when brought by death sentenced prisoners. Such action by the United States Supreme Court, as many post-*Nelson* courts have recognized, clearly "opens" the courthouse door to more than death sentenced inmates with bad veins.

For example, in *Oken v. Sizer*,[241] the court allowed a challenge under §1983 to the manner of inserting the I.V. line:

> a challenge to the manner of administration of an IV line in a death setting as little different from its administration in a non-death setting. Both instances involve inserting an IV into the individual, infusing chemicals, monitoring vital signs, and making appropriate adjustments as circumstances may require. The procedures relate to each other in much the same fashion as a cut-down procedure in a non-death setting relates to such a procedure in a death setting.[242]

For this reason, the court held that Oken's challenge to the particular means for effectuating a sentence of death was a challenge to the conditions of confinement rather than the fact of his conviction, because as the Supreme Court concluded in *Nelson*, to conclude otherwise would be to impermissibly "treat petitioner's claim differently solely because he has been condemned to die."[243] Numerous other courts have reached the same conclusion.[244] As these cases demonstrate, *Nelson* stands for the proposition that Moore's claim, which does not challenge lethal injection on its face, is cognizable as a civil action.

Even assuming, *arguendo*, that Moore's claim is a challenge to the method of execution, that does not preclude this Court from reviewing the merits of the claim. *Nelson* expressly left open the question whether challenges to the method of execution are cognizable in a civil proceeding. Thus, whether a method of execution claim is cognizable in a civil action is an open question that this Court must review in the first instance if Moore's claim is considered to challenge more than the

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[240] *Nelson*, 541 U.S. at 644.
[241] 321 F.Supp.2d 658 (D.Md. 2004), *reversed on other grounds by*, *Sizer v. Oken*, 542 U.S. 916 (2004).
[242] *Id*. at 662.
[243] *Id.* at 645.
[244] *See, e.g.*, *Harris v. Johson*, 376 F.3d 414, 416 (5th Cir. 2004) ("Method of execution actions may be brought in a 1983 suit instead of a habeas petition); *Reid v. Johnson*, 105 Fed.Appx. 500 (4th Cir. 2004) (permitting a 1983 challenge to

conditions of his confinement.

VI. Moore's challenge to the lethal injection procedures and chemicals are ripe for adjudication.

Moore's claims are ripe for adjudication and are the proper subject upon which this Court may exercise jurisdiction. Defendants, however, may assert, as they have in prior lethal injection litigation in Kentucky, that Moore is somehow "too early" in seeking to invoke this Court's jurisdiction and must await a death warrant. Any suggestion that Moore's claims are "unripe" is disingenuous because had Moore waited until he was under death warrant before filing this claim, "defendants undoubtedly would have claimed [he was] here too late and [was] engaged in an 'obvious attempt at manipulation' and 'abusive delay.'"[245] Thus, "any attempt to delay adjudication of this claim [would be] both puzzling and, in any event, unfounded."[246]

According to the Supreme Court of the United States, a case is ripe for judicial decision where the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rules.[247] Predominantly legal issues are fit for decision even when further factual development would be helpful.[248] As the Sixth Circuit has noted, ripeness is determined by 1) "whether the issues at stake are fit for judicial decision; and 2) the extent of the hardship to the parties of withholding

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lethal injection chemicals).

[245] *Jones v. McAndrew*, 996 F.Supp. 1439, 1437 (N.D. Fla. 1998) (*quoting, Gomez v. United Dist. Court*, 503 U.S. 653, 654 (1992).

[246] *Id*. (holding that a challenge to the constitutionality of electrocution procedures is ripe prior the scheduling of an execution date); *accord, Treesh v. Taft*, 122 F.Supp.2d 881, 886-87 (S.D. Ohio 2000).

[247] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds*, by *Califano v. Sanders*, 430 U.S. 99 149 (1977).

[248] *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

court consideration."[249] "In the context of a pre-enforcement challenge, a case is ripe for review only

if the probability of the future event occurring is substantial and of sufficient immediacy and reality."[250] Moore's legal claims satisfy each of these requirements.

First, the issues before this Court are the pure legal questions of whether Defendants' lethal injection procedures and chemicals create a risk of unnecessary pain and suffering, in violation of the Eighth Amendment to the United States Constitution, whether Defendants' failure to maintain the necessary equipment for maintaining life if a stay of execution is granted after the first and second chemical have been administered deprives Moore of the right to life, and whether Defendants are deliberately indifferent to these issues. These claims arise directly from Defendants' execution procedures and lethal injection litigation on behalf of Ralph Baze and Thomas Bowling. There is nothing speculative regarding the chemicals and procedures that Defendants intend to use to carry out Moore's execution. But, even to the extent that further factual development concerning the procedures would be helpful, Moore's claims are pure legal issues that are ripe without further factual development.[251]

Second, the probability that Moore will be executed in the manner intended by Defendants is substantial. Currently, there are no legal impediments to Moore's execution other than the remote possibility that a court may reverse his death sentence. If no court intervenes and the Governor does not commute Moore's sentence, Moore will be executed in the manner intended by Defendants. Defendants have no ability to choose not to execute Moore. Thus, the probability that Moore will be executed under the questionable procedures and utilizing unconstitutional chemicals is substantial.

[249] *Cleveland Branch, National Association for the Advancement of Colored People v. City of Parma*, 263 F.3d 513, 533 (6th Cir. 2001); *accord, Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1362 (6th Cir. 1995).

Third, there is little question that Moore satisfies the hardship prong. The hardship prong has never required actual enforcement. Rather, immediacy of the threat of enforcement is all that is required, and, where enforcement is certain, ripeness is satisfied even when a delay in enforcement is present.[252] Defendants have requested execution warrants for Moore in the past and may again request a warrant for his execution soon. This alone demonstrates that Moore's claims are ripe for adjudication. In addition, this case likely could not be decided within the usual 30 day period between the signing of an execution warrant and the scheduled execution. Accordingly, waiting for an execution warrant could prevent Moore from ever having enough time to adequately litigate the issue. Thus, the necessity of litigating the claim as soon as possible could never be more important.

Finally, the nature of the harm (death) that will be imposed on Moore if these claims are not adjudicated is unique. Unlike most other type of plaintiffs requesting injunctive or declaratory relief, Moore will not survive the alleged violation of his constitutional rights. If he is ever to have his day in court, it must be here and now while there is adequate time to litigate the merits of the claim, conduct discovery, and hold an evidentiary hearing. Accordingly, any assertion by Defendants that this litigation can only go forward under the difficult conditions imposed by a scheduled execution is disingenuous and must be rejected.

CONCLUSION.

Although Moore has been convicted of a heinous crime, Moore is a human being, and should

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[250] *People Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998).
[251] *See Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).
[252] *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("Where the inevitably of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justifiable controversy that their will be a time delay before the disputed provisions will come into effect."); *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 507-08 (1972) (express statement that prosecutions would not begin until construction of necessary infrastructure, which would take years to complete, did not alter the fact that enforcement was inevitable)

be treated better than an animal. All Moore is asking for is a death in accord with the dignity of humankind, as guaranteed by the Constitution. The chemicals and procedures Defendants intend to use to kill him treat him worse than a dog. Surely, something that is too dangerous to use on a dog cannot confirm with the dignity of humankind. Defendants' failure to do anything about this, despite being fully aware of the problems, suggests that they just do not care. The Constitution and this Court, however, must care. The allegations contained in Moore's complaint and supported in this Memorandum are substantial and deserve serious consideration by this Court. Declaratory and injunctive relief must be granted.

RESPECTFULLY SUBMITTED,

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April 19, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing

MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT

(LETHAL INJECTION BRIEF)

to be served via first class mail, postage prepaid on the following individuals:

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