IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION OF MONTANA; MONTANA ASSOCIATION OF CHURCHES; MONTANA CATHOLIC CONFERENCE; GORDON BENNETT; JOHN C. SHEEHY; SENATORS BRENT CROMLEY, STEVE GALLUS, DAN HARRINGTON, DON RYAN AND DAN WEINBERG; REPRESENTATIVES NORMA BIXBY, PAUL CLARK, GAIL GUTSCHE, JOEY JAYNE, AND JEANNE WINDHAM; MARIETTA JAEGER LANE; EVE MALO,

Petitioners,

v.

STATE OF MONTANA; DEPARTMENT OF CORRECTIONS; DIRECTOR MIKE FERRITER; WARDEN MIKE MAHONEY; ATTORNEY GENERAL MIKE MCGRATH, JOHN DOES 1-10,

Respondents.

VERIFIED PETITION FOR INJUNCTIVE RELIEF AND MEMORANDUM IN SUPPORT (ORAL ARGUMENT REQUESTED)

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I. VERIFIED PETITION FOR INJUNCTIVE RELIEF

COME NOW Petitioners pursuant to § 3-2-205(2), MCA, and Rule 17, M.R.App.P., and request a temporary restraining order and preliminary and permanent injunctions barring the administration of all executions by lethal injection in the State of Montana. Petitioners also request this Court to remand the matter to the Montana First Judicial District[1] for an evidentiary hearing on Montana's lethal injection protocol with the instruction that the district court shall permit limited discovery to allow the parties and the district court to fully investigate and review the protocol and thus arrive at a reasoned determination of its constitutionality or lack thereof. Finally, Petitioners request oral argument before this Court pursuant to Rule 17(f), M.R.App.P.

II. INVOCATION OF ORIGINAL JURISDICTION

An action for injunctive relief can be commenced in this Court if the State is a party, the public is interested, or the rights of the public are involved. § 3-22-205(2), MCA. All three criteria are satisfied here. The State is a named party. The central issue raised by this proceeding implicates the State's involvement in formulating and administering a lethal injection protocol, which is comprised of a

[1] The First Judicial District is the proper venue as the State is a named a party. § 25-2-126, MCA.

combination of drugs that various courts have determined violate the Eighth Amendment and that the American Veterinary Medical Association has deemed unacceptable for euthanizing animals. The State is also charged with the administration of the death penalty by lethal injection, which is the precise action which Petitioners request this Court to enjoin. Next, the public has both an interest and a right to know and ensure that executions carried out in the name of the people of Montana are performed properly, humanely and constitutionally. This public interest is especially apparent in the context of the State's lethal injection protocol and the imposition of the death penalty thereunder.

Furthermore, the institution of an original proceeding in the Montana Supreme Court is justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this Court an inadequate remedy. *Langford v. State* (1997), 287 Mont. 107, 111, 951 P.2d 1357, 1360; Rule 17(a), M.R.App.P. As is the situation in the instant case, the United States Supreme Court's recent ruling of *Hill v. McDonough*, 126 S.Ct. 2096 (issued June 12, 2006), discussed later in the petition, has propelled a nationwide discussion about states' lethal injection procedures and whether they subject inmates to an unconstitutional risk of cruel and unusual punishment. Because the United States Supreme Court

decided *Hill v. McDonough* less than a month ago, and the next lethal injection execution in Montana is scheduled to take place on August 11, 2006, due consideration in the trial courts is not possible. As it did in *Walker v. State*, 2003 MT 134, ¶ 31, 316 Mont. 103, ¶ 31, 68 P.3d 872, ¶ 31, this Court should exercise jurisdiction over this petition and remand the matter to district court to allow the parties to develop a record upon which the district court can base an educated conclusion as to the constitutionality of Montana's lethal injection protocol.

III. PARTIES

Petitioner Montana Association of Criminal Defense Lawyers ("MTACDL") is a non-partisan organization dedicated to the continued improvement of the criminal defense bar, and to preserving, protecting, and defending the adversary system of justice and the constitutional protections found in the Montana Constitution, the U. S. Constitution, and in the Constitutions of the Tribal Nations.

Petitioner American Civil Liberties Union Foundation of Montana ("ACLU") is a non-partisan organization, which works to ensure that all people in the State of Montana are free to think and speak as they choose and are able to lead lives free from discrimination and unwarranted government intrusion. The ACLU is guided in its work by the U.S. Bill of Rights and the Montana Bill of Rights.

Petitioner Montana Association of Churches ("MAC") is a non-

denominational organization of Christian churches. MAC recognizes the dignity of every human person by promoting human rights and principles of balanced justice.

Montana Catholic Conference serves as the public policy branch of the Catholic Church in Montana, and the liaison for Montana's Roman Catholic bishops with state and federal government. Inspired by Scripture and Catholic social teaching, the conference is committed to maintaining respect for life, and to promoting the value and dignity of all human lives.

John C. Sheehy is a former Justice of the Montana Supreme Court. Gordon Bennett is former judge for the Montana First Judicial District. As former members of the bench, they have a heightened interest in ensuring the State's lethal injection protocol is constitutional.

Senators Brent Cromley, Steve Gallus, Dan Harrington, Don Ryan, Dan Weinberg, Mike Wheat, and Representatives Norma Bixby, Paul Clark, Gail Gutsche, Joey Jayne, and Jeanne Windham are all elected Montana officials, currently serving the people of Montana. As elected representatives, these Petitioners have standing to contest potentially cruel and unusual punishment inflicted during their representation. Given a Legislator's inviolate duty to protect and promote fundamental public rights, these Petitioners have a heightened interest

in ensuring that statutory provisions for the lethal injection protocol are implemented in accordance with Montana's constitutional provisions and the public's expectation that no one will be subjected to cruel and unusual punishment.

Petitioners Marietta Jaeger Lane and Eve Malo are members of Murder Victims' Families for Reconciliation. Both have lost family members to homicide. Through their work, these Petitioners seek to support other families who have lost loved ones to homicide or execution. Towards this end, Petitioners promote nonviolence towards all people as a way to honor the lives of those already taken.

All of the Petitioners are affected by Respondents' actions in this case. Petitioners have an interest in seeing that State officials operate with the boundaries of the law, and all have an interest in ensuring that executions are not carried out in Montana in violation of the United States Constitution or Montana's Bills of Rights. Petitioners have standing to bring the matter before this Court based on both the importance of fundamental rights enumerated in the Montana Constitution, and as residents, citizens, electors and taxpayers who are concerned that a lethal injection may be performed in a cruel and unusual manner in the name of the public.

This Court has previously recognized that where fundamental rights are threatened, it is appropriate for "private parties to vindicate the public interest in

cases presenting issues of great public importance." *Committee For An Effective Judiciary v. State* (1984), 209 Mont. 105, 111, 679 P.2d 1223, 1226 (citations omitted). Petitioners have standing to bring the matter before this Court based on the importance of fundamental rights enumerated in the Montana Constitution, including prohibition against cruel and unusual punishment, and their constitutional right to know, guaranteed under Article II, Section 9 of the Montana Constitution. The Petitioners, as residents, citizens, electors and taxpayers, are concerned that a lethal injection may be performed in a cruel and unusual manner and assert their right to know the protocols employed by the Department of Corrections in the name of the people.

Fundamental rights are at stake where, irrespective of personal values regarding the appropriateness of the death penalty, the Montana Constitution demands that when the ultimate form of punishment is imposed, it must be administered in a humane manner and in accordance with the publics' right to know. As such, Petitioners seek to vindicate the rights of all Montana citizens, those threatened with cruel and unusual punishment, and those seeking to ensure that such punishment is not conducted in the name of the public behind a shroud of secrecy.

Further, this Court has previously recognized standing in "special

circumstances, presenting issues of an urgent or emergency nature..." *Grossman v. Department of Natural Resources* (1984), 209 Mont. 427, 439, 682 P.2d 1319, 1325. Here, as residents, citizens, electors and taxpayers, the Petitioners have standing before this Court to confront the government in these extraordinary circumstances, underscored by the urgency of the matter.

Respondent Mike Ferriter is the Director of the Department of Corrections ("DOC") and is named in his official capacity. Respondent Mike Mahoney is warden of Montana State Prison and is named in his official capacity. Respondent Mike McGrath is Attorney General of Montana and is named in his official capacity. Respondents John Does 1-10 are any persons who have administered a lethal injection or otherwise assisted with an execution in Montana, as well as those who are planning to administer a lethal injection or otherwise assist in the execution of David Dawson.

IV. ISSUE

Whether Montana's current method of administering lethal injections subjects death row inmates to an unconstitutional risk of suffering cruel and unusual pain during their execution, thus warranting the issuance of an injunction and a remand to district court to permit discovery and reasoned evaluation of the protocol in order to ensure that executions in Montana are humanely and

constitutionally?

V. BACKGROUND FACTS SUPPORTING INJUNCTIVE RELIEF

A. Montana's Death Penalty and Lethal Injection Protocol.

The sole method for execution in Montana is by lethal injection. § 46-19-103(3), MCA. The lone statutory provision regarding the administration of the death penalty is § 46-19-103, MCA, and is set forth below in its entirety:

> **46-19-103. Execution of death sentence.** (1) In pronouncing the sentence of death, the court shall set the date of execution, which may not be less than 30 days or more than 60 days from the date the sentence is pronounced. If execution has been stayed by any court and the date set for execution has passed prior to dissolution of the stay, the court in which the defendant was previously sentenced shall, upon dissolution of the stay, set a new date of execution for not less than 20 or more than 90 days from the day the date is set. The defendant is entitled to be present in court on the day the new date of execution is set.
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> (2) Pending execution of a sentence of death, the sheriff may deliver the defendant to the Montana state prison or the Montana women's prison for confinement, and the state shall bear the costs of imprisoning the defendant from the date of delivery.
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> (3) The punishment of death must be inflicted by administration of a continuous, intravenous injection of a lethal quantity of an ultra-fast-acting barbiturate in combination with a chemical paralytic agent until a coroner or deputy coroner pronounces that the defendant is dead.
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> (4) When an execution date is set, a death warrant signed by the judge and attested by the clerk of court under the seal of the court must, within 5 days, be prepared. The warrant and a certified copy of the judgment must be delivered to the director of the department of corrections. The warrant must be directed to the director and recite the conviction, judgment, appointed date of execution, and duration of the warrant.
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> (5) The warden of the Montana state prison shall provide a suitable and efficient room or place in which executions will be carried out, enclosed

from public view, within the walls of the state prison, and shall provide all implements necessary to the execution. The warden shall, subject to subsection (6), select the person to perform the execution, and the warden or the warden's designee shall supervise the execution. The identity of the executioner must remain anonymous. Facts pertaining to the selection and training of the executioner must remain confidential.

(6) (a) An execution must be performed by a person selected by the warden and trained to administer a lethal injection. The person administering the injection need not be a physician, registered nurse, or licensed practical nurse licensed or registered under the laws of this or any other state.

(b) The warden shall allow the execution to be observed by no more than 12 witnesses, excluding department of corrections staff necessary to carry out the execution. The witnesses must, to the extent possible, include three persons from the news media, three persons designated by the family of the victim of the crime, three persons designated by the person to be executed, and three persons chosen by the department of corrections.

(c) A proposed witness is subject to rejection by the department of corrections if the department has reason to believe that the witness:

(i) poses a risk to the safety or security of department of corrections personnel, the other witnesses, or other persons; or

(ii) is likely to disrupt proceedings due to the witness's emotional or mental state.

(7) Within 20 days after the execution, the warden shall return the death warrant to the clerk of the court from which it was issued, noting on the warrant the time it was executed.

(8) The rejection of a witness under subsection (6)(c) is not grounds for stay of the execution.

The statute prescribes no specific drugs, dosages, drug combinations, or the manner of intravenous line access to be used in the execution process; nor does the statute prescribe any certification, training, or licensure required of those who participate in the execution process. As is apparent, the statute leaves the Department of Corrections to its own devices to devise a constitutionally sound

lethal injection protocol.[2] Whether or not it has done so is the issue framed by this litigation.

Although the protocol employed by the Department of Corrections has not been disclosed, a general outline of the procedure may be inferred from prior executions in Montana, such as Terry Langford's in 1998. According to Langford's death certificate, the lethal injection consisted of three drugs: sodium pentothal; Pavulon, the brand name of pancuronium bromide; and potassium chloride. *See* Appendix, Exhibit 1, Death Certificate of Terry Allen Langford. Sodium pentothal is a short-acting barbiturate used to make the individual lose consciousness. Pancuronium bromide is a paralytic agent, which paralyzes all voluntary muscles and stops respiration. The primary purpose of Pancuronium bromide (Pavulon) in an execution is to prevent the inmate from convulsing or twitching during his death, making it easier for witnesses to watch. Potassium chloride is an extremely painful chemical which activates the nerve fibers lining the prisoner's veins and interferes with the heart's contractions, causing cardiac arrest and death.[3]

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[2] Indeed, it may be that the § 46-19-103, MCA, itself is unconstitutionally vague and ambiguous, as it does not affirmatively prescribe specific measures to ensure a humane execution.

[3] For a more detailed explanation of these drugs by a medical professional *see* Declaration of Dr. Mark Heath of Jan. 12, 2006, discussed in footnote 4.

The three-drug combination is the typical lethal injection used in the thirty-seven states which have approved lethal injection as a means of executions. Debra N. Denno, *Symposium Addressing Capital Punishment through Statutory Reform*, 63 Ohio St. L.J. 63, 98 (2002). Therefore, it is beyond speculation that Montana will continue to use a combination of these three drugs in all future executions.

B. The Three Drugs used in Montana's Lethal Injection can Result in an Excruciatingly Painful and Inhumane Death if Administered Improperly.

The improper administration of these drugs in lethal injections can yield horrific results. Medical experts familiar and proficient with the use and pharmacology of the drugs used to perform lethal injections have determined that the use of these three drugs, sodium pentothal, pancuronium bromide, and potassium chloride may result in "excruciating pain" for the inmate if improperly administered. Declaration of Dr. Mark Heath of January 12, 2006, ¶ 39.[4] Dr. Heath, who is an Assistant Professor of Clinical Anesthesiology at Columbia University in New York, explains that: "Pancuronium paralyzes all voluntary muscles, but does not affect sensation, consciousness, cognition, or the ability to

[4] Petitioners request that this Court take judicial notice of the Heath Affidavit of Jan. 12, 2006. The Heath Affidavit was submitted as an Exhibit in *Morales v. Hickman* and is part of the Court record in that case. *See* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct.Cp/Ex%20C%20to%20TRO%20Motion%20(Heath%20Decl).pdf. This Court may take judicial notice of any "[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state in the United States . . ." Rule 202(b)(6), M.R.Evid.

feel pain and suffocation" and that its "use. . . serves no rational or legitimate purpose and compounds the risk that an inmate may suffer excruciating pain during his execution" as it "places a chemical veil on the process that prevents an adequate assessment of whether or not the condemned is suffering in agony, and greatly increases the risks that such agony will ensue." Heath Dec., ¶¶ 37, 44.

Therefore, when an inmate receives an inadequate dosage of the barbituate, he may have some level of consciousness as he receives the second and third drugs, which will cause him to have the sensation of asphyxiation and cardiac arrest. Disturbingly enough, the inmate will be unable to alert those administering the drugs of his conscious state as he will have been completely paralyzed by the pancuronium bromide.

Dr. Heath is not alone. Recently, the president of the 40,000-member America Society of Anesthesiologists (ASA), Dr. Orin Guidry, issued a public statement strongly urging members to avoid any participation in lethal injection executions.[5] In a four-page "Message from the President," Guidry noted that anesthesiologists had been "reluctantly thrust into the middle" of the legal controversy over lethal injections because they may result in unnecessary and

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[5] "Message from the President" (June 30, 2006) http://www.asahq.org/news/asanews063006.htm (accessed July 10, 2006).

excruciating pain that violates the 8th Amendment's ban of cruel and unusual punishment.

C. The Likelihood that an Inmate will be Conscious or Semiconscious During his Execution is Significant and Unacceptable.

The percentage of error in the administration of a lethal injection, and the corresponding risk for excessive pain, is alarming. Toxicology reports from Arizona, Georgia, North Carolina, and South Carolina, all of which use the sequential administration of thiopental, pancuronium bromide, and potassium chloride for lethal injections, have shown that post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%) and that 21 out of 49 (43%) inmates had concentrations consistent with awareness. The Lancet, "Inadequate Anesthesia in Lethal Injection for Execution, " Volume 365; 1412-14 (April 2005). Thus, there is almost a one in two chance that an inmate will have some level of consciousness during his execution.

Given these odds, which are worse than Russian roulette, it is not surprising that even the American Veterinary Medical Association has concluded that a combination of a barbituate with a paralytic agent, the same combination that Montana used in prior executions, "is not an acceptable euthanasia agent" for

animals. Journal of American Veterinary Medical Association, Volume 218, No. 5, March 1, 2001.

D. Many Courts have Either Stayed an Inmate's Execution or Barred Death by Lethal Injection Entirely Pending Approval of the State's Lethal Injection Protocol.

Because of the concerns identified above, courts are beginning to take notice that the three-drug combination presents an unacceptable and unconstitutional risk of cruel and unusual punishment and are staying executions. Over the last several months, a number of courts have expressed grave concern over lethal injection protocols, which use the same general formula as Montana. The United States Supreme Court,[6] as well as courts in California,[7] Delaware,[8] Ohio,[9] and

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[6] *See, Hill v. McDonough*, __U.S. __, 126 S.Ct. 2096, __L.Ed.2d __(2006), http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Florida/Hill/2006.06.12%20Hill%20SCOTUS%20opinion.pdf (accessed July 10, 2006).

[7] Order on Motion to Proceed with Execution Under Alternative Condition (Feb. 21, 2006) in *Morales v. Woodford*: http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/06.02.21%20Order%20on%20Def%27s%20Motion%20to%20Proceed-1.pdf (accessed July 10, 2006).

Stipulated Order Continuing Evidentiary Hearing to September 19, 2006 (April 27, 2006) in *Morales v. Woodford*: http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/Order%20to%20Continue.pdf (accessed July 10, 2006).

[8] Order of the U.S. District Court Granting PI and Stay of Execution (May 9, 2006) in *Jackson v. Taylor*: http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Delaware/2006.05.09%20District%20Ct%20order.pdf (accessed July 10, 2006).

[9] Order of the U.S. District Court Granting Prelim. Injunction (April 28, 2006) in *Cooey, et al. v. Taft, et al.* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Ohio/2006.04.28%20CooeyHill%20Dist%20Ct%20order.pdf (accessed July 10, 2006).

Tennessee,[10] as well as the District of Columbia,[11] have stayed several executions pending investigations into the constitutionality of a State's lethal injection protocol. Also, federal courts in two states, Missouri[12] and Arkansas,[13] have recently barred all executions by lethal injection until changes are made to the lethal injection protocol. Other courts have also investigated claims based on lethal injection protocols but have not issued stays.[14]

As mentioned previously, the United States Supreme Court decided *Hill v. McDonough*, __U.S. __, 126 S.Ct. 2096, __L.Ed.2d __(2006), less than a month ago. In *Hill*, a death row inmate filed a 42 U.S.C. § 1983 claim against the director

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[10] U.S. District Court Order Granting Preliminary Injunction (May 11, 2006) in *Alley v. Little et al.:* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Tennessee/2006.05.11%20alley%20order%20.pdf (accessed July 10, 2006).

[11] *See,* Order Granting Preliminary Injunction and Staying Execution (Feb. 27, 2006) and Discovery Order (June 30, 2006) in *Roane et al. v. Gonzales*, 05-cv-02337-RWR (documents 5 and 7) in the United State District Court for the District of Columbia on PACER.

[12] District Court Order Holding Missouri Lethal Injection Protocols Violate Eighth Amendment, Ordering DOC to Draft New Protocols, and Staying All Executions Pending Court's Approval (June 26, 2006) in *Taylor v. Crawford* attached at Appendix, Exhibit 2.

[13] District Court Order Granting Preliminary Injunction and Issuing Stay of Execution (June 26, 2006) in *Nooner et al. vs. Norris et al.* attached at Appendix, Exhibit 3.

[14] Kentucky: Briefs and other court records in *Baze et al v. Rees et al.,* available at: http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Resource%20Pages/resources.ky.html

Maryland: Briefs and other court records in *Vernon Evans, Jr. v. Saar*, available at: http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Resource%20Pages/resources.md.html

North Carolina: Briefs and other court records in *Brown v. Beck,* available at: http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Resource%20Pages/resources.nc.html

Oklahoma: Orders in *Boltz v. Jones,* available at:

of Florida's Department of Corrections, alleging that the planned three-drug sequence of sodium pentothal, pancuronium bromide and potassium chloride, would cause great pain if the drugs were not administered properly during his execution. *Hill*, 126 S.Ct. at 2100. The inmate, Clarence Hill, filed a petition seeking an injunction only four days before his scheduled execution. *Id.* In his petition, Hill alleged that the "first drug injected, sodium pentothal, would not be a sufficient anesthetic to render painless the administration of the second and third drugs, pancuronium bromide and potassium chloride," and that there was "an ensuing risk. . . that he could remain conscious and suffer severe pain as the pancuronium paralyzed his lungs and body and the potassium chloride caused muscle cramping and a fatal heart attack." *Id.*

In *Hill*, the underlying issue addressed by the United States Supreme Court was whether a claim alleging cruel and unusual punishment based on a state's lethal injection protocol was cognizable under 42 U.S.C. § 1983. Holding that such a claim was valid under § 1983, but that "the equities and the merits of Hill's underlying action" was not before it, the Court remanded the case to allow Hill to challenge Florida's lethal injection protocol, and implicitly granting him a stay of execution. *Id.* at 2104.

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http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Resource%20Pages/resources.ok.html

Following on the heels of *Hill*, on June 26, 2006, a Missouri federal district court enjoined all executions by lethal injection in that state until its lethal injection protocol is revised and approved by the Court. *Taylor v. Crawford, supra* at footnote 12. Missouri uses the same three drugs in its protocol as Montana — sodium pentothal, pancuronium bromide, and potassium chloride. *Id.* In the Missouri case, the petitioner claimed that Missouri's lethal injection procedure was not carried out consistently and was subject to changes without adequate oversight. The Court allowed the petitioner to conduct limited discovery, which included a Rule 34 F.R.Civ.P. inspection and videotaped tour of Missouri's execution chamber, a deposition of the director of Missouri's Department of Corrections, and document requests which pertained to the last six executions carried out in the state. *Id.* The Court also allowed petitioner to submit interrogatories to and conduct an anonymous deposition of John Doe I, the doctor who had participated in the most recent execution. *Id.*

Following this discovery and an evidentiary hearing, the court concluded that "numerous problems" existed with the lethal injection protocol which "lead the Court to conclude that Missouri's lethal injection procedure subjects condemned inmates to an unnecessary risk that they will be subject to unconstitutional pain and suffering when the lethal injection drugs are

administered" in violation of the Eighth Amendment. *Id.* In its order staying all lethal injection executions in the state, the Court outlined several of its concerns regarding the administration of the death penalty. First, the person in charge of administering the lethal injection testified that he monitored the consciousness of an inmate by observing the inmate's facial expression, even though the videotape from the death chamber revealed that the inmate's face would actually be turned away from the person monitoring his level of consciousness. Secondly, the Court was concerned that the person in charge of the injections could change the levels to be administered at a moment's notice without any oversight and had ultimate authority to increase or decrease the dosage.

Also post-*Hill*, a federal judge in Arkansas stayed the execution of an inmate by lethal injection pending further investigation into the constitutionality of the state's execution protocol. *Nooner v. Norris et al, supra* at footnote 13. In *Nooner,* the petitioner claimed that Arkansas' protocol "create[d] a substantial risk that the first injection [of sodium pentothal] will fail to render him unconscious to the point that he will not experience intense pains and agony after the administration of the pancuronium bromide and potassium chloride." *Id.* The Court concluded, "the public interest will be serviced if the Court holds an evidentiary hearing." *Id.* The Court also recognized that although crime victims

and the general public have an interest in the timely enforcement of criminal sentences, the "failure to consider [the petitioner's] allegations would ignore the equally important public interest in the humane and constitutional application of the State's lethal injection statute." *Id.*

VI. LEGAL BASIS FOR RELIEF

The purpose of the petition is not to challenge any particular death sentence or the validity of the death penalty by lethal injection itself, but only to assure that Montana has adopted and rigorously follows a lethal injection protocol that does not subject an inmate to an inhumane death in violation of the United States and Montana Constitutions.

Based on prior executions in Montana, it is likely that the DOC's procedure for the administration of death by lethal injection subjects condemned inmates to an unconstitutional risk for pain and suffering. The procedure allows for an inmate to be conscious of being asphyxiated and injected with potassium chloride all the while he is chemically paralyzed and thus is unable to alert anyone of his pain. Until such time as the State demonstrates that its procedure for the administration of a lethal injection does not subject a person to an unacceptable risk of suffering unconstitutional pain and suffering, the DOC and the State of Montana should be enjoined from performing any executions by lethal injection.

A. The Public has a Right to Know Montana's Lethal Injection Protocol.

Representative Paul Clark of Trout Creek, Vice Chair of the Judiciary Committee, has requested the lethal injection protocols from the Department of Corrections pursuant to § 2-6-102, MCA (providing that "[e]very citizen has a right to inspect and take a copy of any public writings of this state"), and the Freedom of Information Act.[15] 5 U.S.C. § 552. To date, the Department of Corrections has not responded to this request for information.

Representative Clark, as well as any Montana citizen, has a right to review the DOC lethal injection protocol. Article II, Section 9 of the Montana Constitution provides:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The constitutional "right to know" afforded by Article II, Section 9 is only tempered by the demand of individual privacy guaranteed by Article II, Section 10 of the Montana Constitution. *Lincoln County Comm'n v. Nixon* (1998), 292 Mont. 43, 45, 968 P.2d 1141, 1143. Moreover, this Court has already held that the public

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[15] Representative Clark's Freedom of Information Request is attached at Appendix, Exhibit 4.

has a right to examine committee records of the Montana Department of Corrections. *Great Falls Tribune Co., Inc. v. Day*, 1998 MT 133, ¶ 33, 289 Mont. 155, ¶ 33, 959 P.2d 508, ¶ 33. Here, it is clear that the State cannot assert a constitutionally protected privacy interest in its lethal injection protocols. Even were the State to claim an expectation of privacy, such a claim would be deemed unreasonable. No privacy interest outweighs the public's constitutional right to know Montana's lethal injection protocol and the protocol must be produced.

B. Montana's Protocol Perpetuates "Cruel and Unusual" Punishment and Violates the Eighth Amendment.

The Eighth Amendment of the United States Constitution provides that "cruel and unusual punishments" shall not be inflicted by the State. The Eighth Amendment also:

> prohibits punishments that are incompatible with the evolving standards of decency that mark the progress of a maturing society... Executions that involve the unnecessary and wanton infliction of pain. . . or that involved torture or a lingering death. . . are not permitted. When analyzing a particular method of execution or the implementation thereof, it is appropriate to focus on the objective evidence of the pain involved. . .

Gregg v. Georgia, 428 U.S. 153, 173 (1976). The "cruelty against which the Constitution protects a convicted man is cruelty *inherent in the method of punishment*, not the necessary suffering involved in any method employed to

extinguish life humanely." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (emphasis added).

A punishment is cruel when it involves "something more than the mere extinguishment of life," such as "torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). This definition, however, "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It "forbids the infliction of unnecessary pain in the execution of the death sentence." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *accord Gregg v. Georgia*, 428 U.S. at 173 (holding that the Eighth Amendment prohibits punishments that "involve the unnecessary and wanton infliction of pain. Among the 'unnecessary and wanton' inflictions of pain are those that are nothing more than the purposeless and needless imposition of pain and suffering,") *Francis*, 329 U.S. at 463, and those that are "totally without penological justifications." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (*quoting Gregg*, 428 U.S. at 183).

Second, a court must also consider whether the risk of error that makes a punishment cruel and unusual is one that the Eighth Amendment tolerates. In capital cases, as in other cases, the teaching of the Supreme Court's cases is that Eighth Amendment adjudication cannot proceed just by correcting ugly but isolated instances of deviation from generally acceptable standards of procedure.

Rather, it must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks of inflicting inhumane punishments. *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (acknowledging that the focus of the inquiry is whether there exists 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.'" *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (holding that an Eighth Amendment challenge to a method of execution must be considered in terms of the risk of pain).

As discussed above, toxicology reports from states, which use the same three-drug combination as Montana, reveal that nearly half of all inmates executed by lethal injection (21 out of 49, or 43%) had concentrations consistent with awareness. The Lancet, *supra* at 12. This risk of pain is not only unacceptable, it is unconstitutional. The DOC must assure the public that its lethal injection procedure is adequately designed and applied to avoid undue risks of inflicting inhumane punishment. Indeed, having any level of consciousness of suffocation and cardiac arrest during your own execution, while simultaneously being chemically paralyzed, is the very essence of "physically barbarous." This barbarity is without penological justification and constitutes perhaps the cruelest and most

unusual of any punishment ever administered by a government agency.

C. Montana's Protocol Violates Fundamental Rights Embodied in Montana's Declaration of Rights.

Similarly, the Declaration of Rights set forth in Montana's Constitution requires that inmates be executed in a humane manner. Article II, Section 22 of the Montana Constitution, the state counterpart to the Eighth Amendment, prohibits "cruel and unusual punishments." Article II, Section 4 is Montana's dignity clause which provides that the "dignity of the human being is inviolable."

This Court has previously held that when Article II, Section 4 is read together with Article II, Section 22, the individual dignity clause provides Montanans with *greater protections* from cruel and unusual punishments than does the federal constitution. *See Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, ¶ 73, 68 P.3d 872, ¶ 73. Moreover, this Court has repeatedly recognized the rights found in Montana's Declaration of Rights as being "fundamental," meaning that "these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts." *Walker v. State*, ¶ 74 (citing *Dorwart v. Caraway*, 2002 MT 240, ¶ 96, 312 Mont. 1, ¶ 96, 58 P.3d 128, ¶ 96; *Butte Community Union v. Lewis*, (1986) 219 Mont. 426, 430, 712 P.2d 1309, 1311; *Kloss v. Edward D. Jones & Co.*, 2002 MT

129, ¶ 52, 310 Mont. 123, ¶ 52, 54 P.3d 1, ¶ 52, cert. denied, 538 U.S. 956 (2003). These fundamental rights belong as much to death row inmates as any Montana citizen. As this Court has also noted, "[w]hen the rights of even the most disrespected among us are ignored, all of society is diminished." *Campbell v. Mahoney*, 2001 MT 146, ¶ 57, 306 Mont. 45, ¶ 57, 29 P.3d 1034, ¶ 57.

In *Walker*, this Court ruled that a former inmate's living conditions at Montana State Prison constituted an "affront to the inviolable right of human dignity possessed by the inmate and that such punishment constitutes cruel and unusual punishment when it exacerbates the inmate's mental health condition." *Walker*, ¶ 84. These conditions included the inmate being stripped, housed in a cell with human blood and waste, and forced to sleep naked on a concrete slab without a mattress. The inmate was also deprived of drinking water and his food was served in an unsanitary manner. *Id.*, ¶ 30.

Here, the cruel and unusual punishment posed to inmates on death row by the inhumane administration of a lethal injection is far crueler than the punishment suffered by the inmate in *Walker*. In this case, there is a significant risk that the inmate will be conscious or semi-conscious during his execution and will be cognizant of being asphyxiated and experience cardiac arrest. The right of a death row inmate to a humane extermination of his life cannot and must not be ignored

by this Court. The Court is obligated by Montana's constitutional directives to ensure that any future executions by lethal injection satisfy both the Eighth Amendment as well as Article II, Sections 4 and 22. In it beyond question that to ignore the fundamental right of a death row inmate to a humane execution, and to allow the State to execute inmates in a inhumane manner, would result in a diminishment of "all of society."

D. An Injunction is Necessary to Avoid Irreparable Injury to Inmates Facing Imminent Execution.

The Court may enter a preliminary injunction where the applicant appears entitled to the relief requested, and is visited by great or irreparable injury, or the applicant's rights are being violated. § 27-19-201, MCA. First, there is a significant possibility of success on the merits given that Montana's protocol for lethal injection exposes inmates to an unacceptable risk that they will feel excruciating pain during their execution. Secondly, it is beyond question that alleged injury is both great and irreparable in that it results in needless suffering. Therefore, a preliminary injunction restraining the State from performing lethal injection executions until it demonstrates that its lethal injection procedures are constitutionally sound is proper. Moreover, the equities weigh in favor of granting the injunction. Here, if the Court orders a preliminary injunction on lethal

injection executions pending limited discovery and an evidentiary hearing, and Petitioners' allegations regarding Montana's lethal injection procedure prove true, those on Montana's death row will be spared subjection to an unconstitutional execution procedure which exposes them to unconstitutional pain and suffering. Similarly, the State's interest in enforcing the death penalty in compliance with constitutional standards will be served. If, on the other hand, the State demonstrates that its protocol is constitutionally sound, it can carry out executions without the specter that an inmate will face an unreasonable risk of suffering pain during his execution.

E. This Petition is Timely.

This petition has been filed within a month of the United States Supreme Court ruling in *Hill v. McDonough*. Furthermore, with regards to the execution scheduled in August, Petitioners recognize that "[b]oth the States and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson,* 523 U.S. 538, 556 (1998). However, this interest does not outweigh society's interest in ensuring that state executions are humane.

VII. CONCLUSION

Montana's lethal injection protocol directly applies to those citizens who are on the fringes of society, death row inmates. However, the rights of these

individuals are no less important that the rights of any other citizen of this State. Recent experiences suggest that those on the fringe of society have little protection from the State's deliberate indifference, whether as criminal defendants or as an individual facing involuntary commitment to a mental health institution.

In this case, it is especially important that this Court not allow the State show deliberate indifference to death row inmates and to shirk its duty to administer a lethal injection in a humane manner. The people of Montana, including those who have committed horrific crimes, deserve no less.

The State has a duty to perform humane executions, irrespective of a death row inmate's wishes to die. This Court must not allow a death row inmate to be subjected, voluntarily or not, to an unacceptable risk of cruel and unusual punishment at the time of his execution. The only way to ensure that Montana's lethal injection protocol is constitutionally sound is to review the protocol. Accordingly, Petitioners respectfully request the Montana Supreme Court accept jurisdiction, enjoin all executions pending the outcome of this litigation and remand this matter to a district court with the instructions that the court shall allow the petitioner to conduct limited discovery, including a Rule 34 M.R.Civ.P., inspection and videotaped tour of Montana's execution chamber, a deposition of the warden at Montana State Prison, and document requests which pertained to the

last two executions carried out in the state. Discovery should also include interrogatories to, and the anonymous depositions of, those who have participated in the two most recent executions and those who have been or will be trained for the upcoming execution of David Dawson.

Dated this 14th day of July, 2006.

Gough, Shanahan, Johnson and Waterman

Ronald F. Waterman
Attorneys for Petitioners

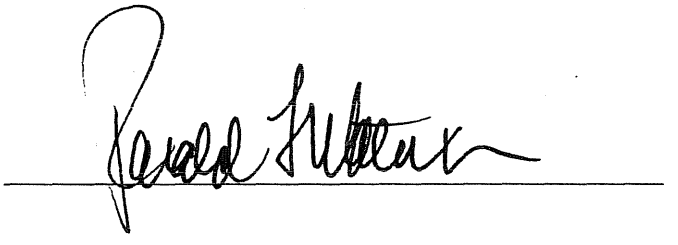
CERTIFICATE OF SERVICE

This is to certify that the foregoing was hand-delivered upon the attorneys and individuals of record at their address or addresses on the 11th day of July 2006, as follows:

Mike McGrath
Attorney General
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401

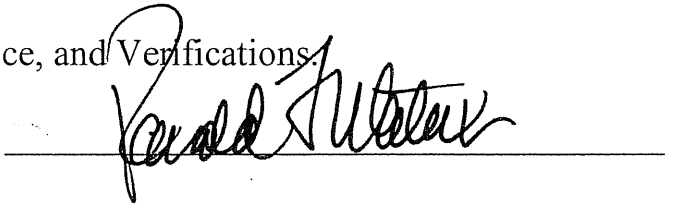
Mike Ferriter
Director
Montana Department of Corrections
Adult Community Corrections Division
P.O. Box 201301
Helena, MT 59620-1301

Mike Mahoney
Warden
Montana State Prison
500 Conley Lake Road
Deer Lodge, MT 59722



CERTIFICATE OF COMPLIANCE

Pursuant to Rules 17(b) and 27 of the Montana Rules of Appellate Procedure, I certify that this VERIFIED PETITION FOR INJUNCTIVE RELIEF AND MEMORANDUM IN SUPPORT is printed with a monospaced typeface of 14 points, is double spaced and does not exceed 7,000 words, excluding Certificate of Compliance, Certificate of Service, and Verifications.



VERIFICATION OF RONALD F. WATERMAN

I, Ronald F. Waterman, hereby declare:

1. I am the President of the Montana Association of Criminal Defense Lawyers and am a member of the State Bar of Montana and admitted to practice before all courts of this state, as well as this Court, the U.S. Court of Appeals for the Ninth Circuit, and U.S. Supreme Court. I am counsel for Petitioners in this matter. I have personal knowledge of the matters set forth in this petition and I could and would competently testify to them if called upon to do so.

2. I have reviewed the foregoing complaint. I verify that all of the alleged facts that are not otherwise supported by citations to the record or declarations to the attached petitions are true and correct to my own knowledge, except as to any matters stated in it on information and belief, which I am informed and believe are true and correct.

3. I declare under penalty of perjury under the laws of the State of Montana and the United States of America that the foregoing is true and correct.

Ronald F. Waterman

Subscribed and sworn to before me this 11th day of July, 2006, by Ronald F. Waterman.

(Notarial Seal)

NOTARY PUBLIC for the State of Montana
Print Name: Julie A. Johnson
Residing at: Helena, MT
My Commission expires: Dec. 23, 2007

VERIFICATION OF MICHAEL DONAHOE

I, Michael Donahoe, hereby declare:

1. I am the President of the Montana Association of Criminal Defense Lawyers and am a member of the State Bar of Montana and admitted to practice before all courts of this state, as well as this Court, the U.S. Court of Appeals for the Ninth Circuit, and U.S. Supreme Court. I have personal knowledge of the matters set forth in this petition and I could and would competently testify to them if called upon to do so.

2. I have reviewed the foregoing complaint. I verify that all of the alleged facts that are not otherwise supported by citations to the record or declarations to the attached petitions are true and correct to my own knowledge, except as to any matters stated in it on information and belief, which I am informed and believe are true and correct.

3. I declare under penalty of perjury under the laws of the State of Montana and the United States of America that the foregoing is true and correct.

Michael Donahoe

Subscribed and sworn to before me this 11th day of July, 2006, by Michael Donahoe.

NOTARY PUBLIC for the State of Montana
Print Name: Julie A. Johnson
Residing at: Helena, MT
My Commission expires: Dec. 23, 2007

JULIE A. JOHNSON NOTARIAL SEAL STATE OF MONTANA

VERIFICATION OF SCOTT CRICHTON

I, Scott Crichton, hereby declare:

1. I am the Executive Director of the Montana American Civil Liberty Union. I have personal knowledge of the matters set forth in this petition and I could and would competently testify to them if called upon to do so.

2. I have reviewed the foregoing complaint. I verify that all of the alleged facts that are not otherwise supported by citations to the record or declarations to the attached petitions are true and correct to my own knowledge, except as to any matters stated in it on information and belief, which I am informed and believe are true and correct.

3. I declare under penalty of perjury under the laws of the State of Montana and the United States of America that the foregoing is true and correct.

Scott Crichton

Subscribed and sworn to before me this 11th day of July, 2006, by Scott Crichton.

(Notarial Seal)

NOTARY PUBLIC for the State of Montana
Print Name: Julie A. Johnson
Residing at: Helena, MT
My Commission expires: Dec. 23, 2007

VERIFICATION OF MOE WOSEPKA

I, Moe Wosepka, hereby declare:

1. I am the Executive Director of the Montana Catholic Conference. I have personal knowledge of the matters set forth in this petition and I could and would competently testify to them if called upon to do so.

2. I have reviewed the foregoing complaint. I verify that all of the alleged facts that are not otherwise supported by citations to the record or declarations to the attached petitions are true and correct to my own knowledge, except as to any matters stated in it on information and belief, which I am informed and believe are true and correct.

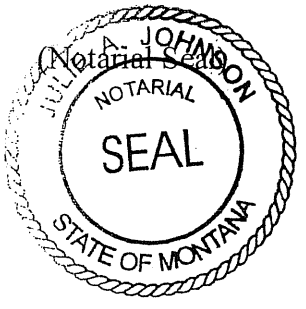
3. I declare under penalty of perjury under the laws of the State of Montana and the United States of America that the foregoing is true and correct.

Moe Wosepka

Subscribed and sworn to before me this 11th day of July, 2006, by Moe Wosepka.

NOTARY PUBLIC for the State of Montana
Print Name: Julie A. Johnson
Residing at: Helena, MT
My Commission expires: Dec. 23, 2007

(Notarial Seal)



VERIFICATION OF JOHN C. SHEEHY

I, John C. Sheehy hereby declare:

1. I am a member of the State Bar of Montana and admitted to practice before all courts of this state, as well as this Court and the U.S. Court of Appeals for the Ninth Circuit. I have personal knowledge of the matters set forth in this petition and I could and would competently testify to them if called upon to do so.

2. I have reviewed the foregoing complaint. I verify that all of the alleged facts that are not otherwise supported by citations to the record or declarations to the attached petitions are true and correct to my own knowledge, except as to any matters stated in it on information and belief, which I am informed and believe are true and correct.

3. I declare under penalty of perjury under the laws of the State of Montana and the United States of America that the foregoing is true and correct.

John C. Sheehy

John C. Sheehy

Subscribed and sworn to before me this 11th day of July, 2006, by John C. Sheehy.

NOTARY PUBLIC for the State of Montana
Print Name: RONALD F. WATERMAN
Residing at: HELENA, MONTANA
My Commission expires: AUGUST 28, 2008

(Notarial Seal)

VERIFICATION OF GORDON BENNETT

I, Gordon Bennett hereby declare:

1. I am a member of the State Bar of Montana and admitted to practice before all courts of this state, as well as this Court and U.S. Supreme Court. I have personal knowledge of the matters set forth in this petition and I could and would competently testify to them if called upon to do so.

2. I have reviewed the foregoing complaint. I verify that all of the alleged facts that are not otherwise supported by citations to the record or declarations to the attached petitions are true and correct to my own knowledge, except as to any matters stated in it on information and belief, which I am informed and believe are true and correct.

3. I declare under penalty of perjury under the laws of the State of Montana and the United States of America that the foregoing is true and correct.

Gordon P. Bennett

Gordon Bennett

Subscribed and sworn to before me this 11th day of July, 2006, by Gordon Bennett.

NOTARY PUBLIC for the State of Montana
Print Name: RONALD F. WATERMAN
Residing at: HELENA, MONTANA
My Commission expires: AUGUST 28, 2008

(Notarial Seal)

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION OF MONTANA; MONTANA ASSOCIATION OF CHURCHES; MONTANA CATHOLIC CONFERENCE; GORDON BENNETT; JOHN C. SHEEHY; SENATORS BRENT CROMLEY, STEVE GALLUS, DAN HARRINGTON, DON RYAN AND DAN WEINBERG; REPRESENTATIVES NORMA BIXBY, PAUL CLARK, GAIL GUTSCHE, JOEY JAYNE, AND JEANNE WINDHAM; MARIETTA JAEGER LANE; EVE MALO,

Petitioners,

v.

STATE OF MONTANA; DEPARTMENT OF CORRECTIONS; DIRECTOR MIKE FERRITER; WARDEN MIKE MAHONEY; ATTORNEY GENERAL MIKE MCGRATH, JOHN DOES 1-10,

Respondents.

APPENDIX TO VERIFIED PETITION FOR INJUNCTIVE RELIEF AND MEMORANDUM IN SUPPORT

Appendix

Exhibit 1..... Death Certificate of Terry Allen Langford

Exhibit 2..... District Court Order Holding Missouri Lethal Injection Protocols Violate Eighth Amendment, Ordering DOC to Draft New Protocols, and Staying All Executions Pending Court's Approval (June 26, 2006) in *Taylor v. Crawford*

Exhibit 3..... District Court Order Granting Preliminary Injunction and Issuing Stay of Execution (June 26, 2006) in *Nooner et al. vs. Norris et al.*

Exhibit 4.....Representative Paul Clark's FOI Request to Director of Department of Corrections

S IS A PERMANENT RECORD. USE TYPEWRITER WITI ESH BLACK RIBBON.
ALL SIGNATURES MUST BE IN BLACK OR NEAR BLACK INK. SEE HANDBOOK FOR INSTRUCTIONS.
MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES, VITAL RECORDS AND HEALTH STATISTICS BUREAU.

FORM V.S. 3 (1988 revision)

MONTANA
CERTIFICATE OF DEATH

Local File Number

State File Number

DECEDENT'S NAME (First)	(Middle)	(Last)	SEX	DATE OF DEATH (Month, Day, Year)
1. Terry	Allen	Langford	2. Male	3. Feb. 24, 1998

[redacted]

21a. 21b. 22. 59722

23. PART I. Enter the diseases, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line. *(See Instructions on other side)*

Approximate Interval Between Onset and Death

CAUSE OF DEATH

IMMEDIATE CAUSE (Final disease or condition resulting in death): a. Mixed Drug and Electrolyte Toxicity

DUE TO (OR AS A CONSEQUENCE OF): 1. Sodium Pentothal

Sequentially list conditions if any, leading to immediate cause. Enter **Underlying Cause** (Disease or injury that initiated events resulting in death) Last.

b. 2. Pavulon

DUE TO (OR AS A CONSEQUENCE OF): 3. Potassium Chloride

c. Judicial Execution

DUE TO (OR AS A CONSEQUENCE OF):

d.

PART II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I.

WAS AN AUTOPSY PERFORMED? (Yes or no)	24b. WERE AUTOPSY FINDINGS AVAILABLE PRIOR TO COMPLETIC OF CAUSE OF DEATH? (Yes or no.
24a. No	
WAS CASE REFERRED TO CORONER? (Yes or no)	
25. Yes	

26. MANNER OF DEATH	DATE OF INJURY (Month, Day, Year)	TIME OF INJURY	INJURY AT WORK? (Yes or no)	DESCRIBE HOW INJURY OCCURRED
☐ Natural ☐ Pending Investigation	27a. 2/24/1998	27b. 12:07AM M	27c. No	27d. Judicial Execution
☐ Accident ☐ Could not be Determined	PLACE OF INJURY—At home, farm, street, factory, office building, etc. (Specify)			LOCATION (Street and Number or Rural Route Number, City or Town, State)
☐ Suicide ☒ Homicide	27e. Montana State Prison			27f. 700 Conley Lake Road Deer Lodge, Montana 59722

CERTIFIER

28a. TO BE COMPLETED BY CERTIFYING PHYSICIAN ONLY. To the best of my knowledge, death occurred at the time, date and place and due to the cause(s) stated.

(Signature and Title)

29a TO BE COMPLETED BY CORONER ONLY. On the basis of examination and/or investigation in my opinion death occurred at the time, date and place and due to the cause(s) and manner as stated.

(Signature and Title) John M. Pohle, Coroner

DATE SIGNED (Month, Day, Year)	HOUR OF DEATH	DATE SIGNED (Month, Day, Year)	HOUR OF DEATH
28b.	28c. M	29b. Feb. 24, 1998	29c. 12:07A
NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER (Type or Print)		DATE PRONOUNCED DEAD (Month, Day, Year)	PRONOUNCED DEAD (Hour)
28d.		29d. Feb. 24, 1998	29e. 12:07A

NAME AND ADDRESS OF CERTIFIER (PHYSICIAN OR CORONER) (Type or Print)

30 John M. Pohle, Coroner, 601 Missouri Ave. Deer Lodge, Mt. 59722

REGISTRAR

LOCAL REGISTRAR'S SIGNATURE	DATE FILED (Month, Day, Year)
31a.	31b.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MICHAEL ANTHONY TAYLOR	)	
	)	
Plaintiff,	)	
vs.	)	No. 05-4173-CV-C-FJG
	)	
LARRY CRAWFORD, et al.,	)	
	)	
Defendants.	)	

ORDER

I. BACKGROUND

Plaintiff filed his Complaint on June 3, 2005, and an amended complaint on September 12, 2005 (Doc. #36)[1]. In his First Amended Complaint plaintiff sought a declaratory judgment that Missouri's method of execution by lethal injection violates the Eighth, Thirteenth and Fourteenth Amendments because it would inflict on him cruel and unusual punishment, would deprive him of life, liberty or property without due process of law and would inflict upon him a badge of slavery, in that the three drug sequence using a procedure whereby the drugs are administered through the femoral artery creates a foreseeable risk of the infliction of gratuitous pain. Plaintiff also argued that the physician's role in the execution violated medical ethics. On December 28, 2005, the Court issued an Order denying defendant's Motion to Dismiss and ruling that the case presented factual issues which would likely be resolved by either a motion for

[1] Richard Clay was previously granted leave to intervene in this action. On January 30, 2006, the Court orally granted Mr. Clay's Motion to Dismiss this action as to him without prejudice. Reginald Clemons also had a pending Motion for Leave to Intervene in this action. He has now also moved to withdraw from this action.

summary judgment or through a hearing (Doc. # 54). On January 3, 2006, the defendants notified the Court that the Supreme Court of Missouri had set plaintiff's execution date for February 1, 2006. On January 18, 2006, plaintiff filed an Application for a Court Order requesting that the Court issue an Order directing that Taylor not be executed until further order of the Court to be issued within a reasonable time after a hearing on the merits which was scheduled for February 21, 2006. On January 19, 2006, Judge Scott Wright issued an Order staying the execution until the Court could conduct the hearing (Doc. # 62). The same day, defendants appealed Judge Wright's ruling to the Eighth Circuit. On January 29, 2006, the Eighth Circuit entered an Order reversing and vacating Judge Wright's January 19, 2006 Order. The Eighth Circuit remanded the case to the Western District and directed that the Court reassign the case to another judge for an immediate hearing. The Eighth Circuit directed that an Order be issued no later than 12:00 Noon on Wednesday, February 1, 2006. This case was assigned to this Court on Monday, January 30, 2006.

On January 30-31, 2006, this Court conducted a telephonic hearing regarding plaintiff's Complaint. During the telephonic hearing, the Court heard the testimony of the following individuals: Dr. Mark Dershwitz, Dr. Jonathan I. Groner, Dr. Mark Heath and Terry W. Moore, the Director of Adult Institutions for the Missouri Department of Corrections. Plaintiff requested that the State produce John Doe Numbers One and Two (the doctor and the nurse who participated in the most recent execution), but this request was denied. Plaintiff also sought to present the testimony of Dr. Sri Melethil, a pharmacokineticist, but he was out of town and unable to appear until the morning of

February 1, 2006. After considering the evidence and the testimony of these individuals, the Court determined that neither the chemicals used by the State for lethal injection nor the procedure employed to administer these injections constituted cruel or unusual punishment. The Court noted that while the plaintiff suggested a different approach to lethal injection, he had not shown that the current method used by Missouri violated the Eighth Amendment. Further the Court was not persuaded that the use of the femoral vein for the administration of the lethal injection violated applicable standards of the Eighth Amendment. The Court also did not find that Missouri physicians who are involved in administering lethal injections were violating their ethical obligations or that the procedure was violative of the Thirteenth Amendment.

Plaintiff appealed this Court's January 31, 2006 Order, arguing that he did not have sufficient time to present his arguments to the Court during the two day telephonic hearing. Plaintiff argued that this Court had abused its discretion in not allowing him to call John Doe I and II or Dr. Melethil and also erred in denying his claims. On April 27, 2006, the Eighth Circuit remanded the case to this Court to reconvene the hearing. The Eighth Circuit gave the parties thirty days to engage in some limited additional discovery and then an additional thirty days within which the hearing was to be held and for this Court to issue its Order, amending, modifying or restating the previous judgment and certifying the same to the Eighth Circuit.

The Court allowed plaintiff to conduct the following discovery: a Rule 34 inspection and videotaped tour of Missouri's execution chamber, a deposition of Larry Crawford, Director of the Missouri Department of Corrections and document requests

which pertained to the last six executions carried out by the State of Missouri. The document requests included any execution logs, records, autopsy reports, test results and analyses of post-mortem/toxicology reports. The State also provided information regarding what specialized training the physicians and nurses undergo who participate in administration of the drugs and all documents pertaining to any fall back procedures regarding vein access and the three drug sequence. The Court also allowed plaintiff to submit interrogatories to John Doe Defendants I - V. After John Doe I submitted his interrogatory responses, plaintiff again asked the Court for permission to depose him. The Court allowed plaintiff to conduct a limited anonymous deposition of John Doe I. This deposition was conducted at the Courthouse, with only the Court and counsel present. On June 12 -13, 2006 this Court continued the hearing which was begun in January 2006. During the hearing, plaintiff presented the testimony of Dr. Mark Heath, an anesthesiologist, Dr. Stephen Johnson, an expert in central line placement and femoral line placement and Dr. Thomas Henthorn, an expert in pharmokinetics. The State presented the testimony of Dr. Mark Dershwitz, an anesthesiologist, Terry Moore, Director of Adult Institutions for Department of Corrections and Larry Crawford, Director of the Department of Corrections.

II. DISCUSSION

A. Standard

The Eighth Amendment provides that "cruel and unusual punishment" shall not be inflicted. It prohibits punishments that are "incompatible with the 'evolving standards

of decency that mark the progress of a maturing society.'" Estelle v. Gamble 429 U.S. 97, 102, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976), (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958)). As to executions, it prohibits "the unnecessary and wanton infliction of pain" as well as methods involving torture or a lingering death. See Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976). "The cruelty against which the Constitution protects a convicted man is cruelty *inherent in the method of punishment*, not the necessary suffering involved in any method employed to extinguish life humanely." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947)(emphasis added). Additionally, as the Court noted in Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994), "[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review."

B. Missouri's Execution Procedure

During the January 30-31, 2006 hearing, Terry Moore, Director of Adult Institutions for the Missouri Department of Corrections, described what he believed was the execution procedure used in Missouri. Mr. Moore testified that three drugs are administered by a board certified physician. The physician first administers five grams of sodium pentothal, also known as thiopental, which is a substance that produces anesthesia. Thereafter, the physician administers a syringe of saline to flush the IV line. Next, the physician administers pancuronium bromide, also referred to as pancuronium. This drug is a paralytic agent which prevents any involuntary movement of the body. The physician then again administers the saline solution. Finally, the third drug which is

administered is potassium chloride, which is a drug which stops the electrical activity of the heart. There was no dispute that if an inmate is not sufficiently anesthetized when the potassium chloride is administered, it will cause excruciating pain as it is administered through the inmate's veins. The inmate, however, would be unable to show that he was experiencing discomfort due to the paralyzing effects of the pancuronium bromide.

After the Eighth Circuit remanded this case, the Court allowed plaintiff to conduct additional limited discovery. In a letter sent to the Court on May 17, 2006, plaintiff's counsel informed the Court that new evidence in the form of chemical dispensary logs, which had recently been produced by the State, contradicted the State's previous representations regarding the amount of thiopental that is used during executions.

In response, counsel for the State confirmed in a letter sent to the Court on May 17, 2006 that 5 grams of sodium pentothal are used:

> As plaintiff correctly points out, defendants have stated consistently that 5 grams of sodium pentothal are used in executions in Missouri. Five grams are in fact used. The reference to the 2.5 grams noted in the drug log is not correct. The doctor and the nurse who have prepared the drugs for the last six executions and for plaintiff's stayed execution confirm that 5 grams has been used in the last six executions and was prepared for plaintiff's stayed execution. (Defendants are attempting to run down the source of the error in the record, and continue to do so.)

However, the next day on May 18, 2006, counsel for the State sent the Court another letter in which they acknowledge that a mistake had in fact been made regarding the representations as to the amount of thiopental administered. The letter stated in part:

Upon further review, defendants have just determined this afternoon,

> contrary to previous representations, that 2.5 grams of sodium pentothal was prepared and used at the last execution (not 5 grams) and that 2.5 grams was prepared for use at the execution of plaintiff (which was stayed before the femoral IV was inserted). Defendants and their counsel apologize to the Court and the parties for providing incorrect information.

(Doc. # 121).

Upon learning of this information, the Court submitted a set of interrogatories to John Doe I [2] to answer. The Court inquired whether the lethal injection protocol was codified in any publication, policy statement or state regulation. John Doe I responded that he was not aware of the protocol being written down in any form. He stated that it was his understanding at the time of Mr. Gray's execution that he had the independent authority to change the dose based on his medical judgment. He stated that this understanding was based on past contacts with predecessors of the current Director of the Department of Corrections. When the Court asked how many times the protocol has been modified since it was put into place, John Doe I responded:

> John Doe I can recall one instance when three syringes of potassium chloride were used based on the obesity of the offender. John Doe I can recall one instance when the IV was inserted in the offender's neck instead of his femoral vein based on the damage to both of his femoral veins from drug abuse. John Doe I is aware of one instance when a peripheral IV was used because John Doe I was unable to attend the execution. For the execution of Mr. Gray and the preparation for the execution of Mr. Taylor, John Doe I determined to use 2.5 grams of sodium pentothal. This determination occurred because of difficulty in dissolving powder, obtained from a new supplier, containing more than 2.5 grams in the liquid that could be accommodated in a syringe. The rate of infusion and the concentration of the dose ensured that 2.5 grams was more than sufficient to make the offender unconscious before administering the remaining drugs. Further, with regard to Mr. Taylor, John Doe I was aware that the dosage used in the execution of Mr. Gray was adequate.

(Response to Interrogatory No. 5, Doc. # 152).

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[2]Defendants have disclosed that John Doe I is the physician that mixes the drugs used during the executions.

When asked who was consulted before the dosage of thiopental was decreased, he responded that no one was consulted because he thought it was within the acceptable parameters to accomplish the goal. When questioned about his medical background, John Doe stated that although he was a board certified surgeon, he is not an anesthesiologist. The Court also allowed plaintiff to conduct an anonymous deposition of John Doe I on June 5, 2006.

When he was asked whether any part of the execution procedure was written down, John Doe I responded as follows:

A. I have never seen it. If it was, it would have been written on my recommendation.
Q. I see. Do you have any idea why it might not be written down?
A. I'm sure it's written down somewhere. If they're checking the logs of all the drugs every time we use them and recording expiration dates and number of sheets and needles that we use, I'm certain they have it written down somewhere.
Q. But in terms of the aspects of the procedure that you're responsible for, that you perform, those aren't written down, to your knowledge?
A. It might be written in there, but it would be written on by somebody observing what I was doing and using their interpretation. So if there was a written procedure that they had done I would – you know, I'm curious to see what they think I'm doing, but I don't know that they write down the individual details of how I insert an 18-gauge rather than a 22-gauge or a 14-gauge needle.
Q. I see. So people might write things down as you're doing them, but there's no guide that you follow as you're doing it?
A. Absolutely not.
Q. So you just rely on your memory?
A. Yes.
Q. And your judgment?
A. Yes.

(John Doe Depo. pp. 69-70)

During his deposition, John Doe I described how he has had to devise an improvised procedure with regard to mixing the correct dosage of thiopental:

Q. And could you take me step-by-step through that, your improvised process?
A. I'd have to see the containers because I cannot at the present time remember whether they have glass or – they are actually just two straight-walled glass bottles. One has powder in the bottom, one has liquid in the bottom, and they are designed to lock together and mix. So, I have to stick a needle through this

plastic and inject my own diluents which I know will give me no more than 50 cc's for the final product, which is what I'm aiming for for the final injection.

We have encountered problems trying to mix more than three or four grams using this method, mainly because of an inert substance possibly put in by the manufacturer to prevent mis-mixing, which I know several drug companies will do. So right now the last time I saw and talked to the Director on each of these occasions saying we either need to change what we say we're dosing or we will have to go back to the original five-gram bottle that was available when we instituted this procedure. So right now we're still improvising. And he's also having me researching an alternate drug if it comes to that.

(John Doe Depo. pp. 9-10).

When John Doe I was asked why he did not initially recall why he prepared a smaller dose of thiopental, he responded:

A. . . . But I am dyslexic and so I can recall in the operating room specific facts and details of operation and function perfectly, but in terms of copying one line to another or trying to simply copy a phone number or account number I will sometimes transpose numbers even when I'm staring at the two numbers. ***So, it's not unusual for me to make mistakes***. . . . But I am dyslexic and that is the reason why there are inconsistencies in my testimony. ***That's why there are inconsistencies in what I call drugs. I can make these mistakes, but it's not medically crucial in the type of work I do as a surgeon.***

(John Doe Depo. pp. 24-25)(emphasis added).

In describing how the drugs are administered, John Doe I stated that, " . . .the people who do the injections are nonmedical and they're in the dark so they have a small flashlight that they're able to quickly identify the syringes, make the appropriate connections and injections, disconnect, clamp the tube, and changing the number of syringes or the order of syringes was an unnecessary risk." (John Doe Depo. p. 31).

When questioned about whether he monitors anesthetic depth, John Doe I testified as follows:

Q. Did you monitor Mr. Gray's anesthetic depth during the execution?
A. I monitor – the only thing that can be monitored is facial expression, and you can judge when the effect of the drug is accomplished, and that can be seen from across a room through a window. And when that effect occurs then I know the inmate is unconscious. . . .

Q. So you said that you can see that – an inmate's facial expression from where you stand?
A. Yes. That's the only thing any anesthesiologist uses in the course of inducing a person when pentothal was still used, was you simply started injecting, look at the face, and again, it's difficult to describe, but I can tell instantly when the pentothal has taken effect. And in medical practice the instant the pentothal has taken effect they gave absolutely no more because then they move on to the actual anesthesia which has to be started before the pentothal wears off.

(John Doe Depo. pp. 41-42).

When he was asked whether he had any discussions with Director Crawford about the scope of his authority, John Doe I stated:

A. Oh, yes. We talk – I talk in his office and at the time of the execution. In fact, he's the only director I have actually gone over to his office for other reasons and visited about this. And again, he has no background in corrections and he has no background in medicine, so the other corrections officers had long backgrounds in corrections so they were aware of what we were doing and why we were doing it. Since he has no background in either field, he reiterated that he's totally dependent on me advising him what could and should and will be done, and he will back up – if I think there's a change that needs to be made, he wants me to quickly inform him so he can make the appropriate changes.
Q. I see. So, it's your understanding that if you thought a change to the execution procedure needed to be made you would – Director Crawford would defer to your opinion?
A. Absolutely.

(John Doe Depo. pp. 63-64).

C. Is Missouri's Execution Procedure Constitutional?

In Morales v. Hickman, 415 F.Supp.2d 1037 (N.D.Cal. 2006), aff'd, 438 F.3d 926 (9th Cir. 2006), cert. denied,126 S.Ct.1314,163 L.Ed.2d 1148 (2006), the Court stated:

> The Eighth Amendment prohibits punishments that are incompatible with the evolving standards of decency that mark the progress of a maturing society. . . . Executions that involve the unnecessary and wanton infliction of pain . . . or that involve torture or a lingering death . . . are not permitted. When analyzing a particular method of execution or the implementation thereof, it is appropriate to focus on the objective evidence of the pain involved. . . .*In this case, the Court must determine whether Plaintiff is subject to an unnecessary risk of unconstitutional pain or suffering such that his execution by lethal injection under California's protocol must be restrained.*

Id. at 1039 (internal citations and quotations omitted)(emphasis added). In that case the Court focused on the narrow issue of "whether or not there is a reasonable possibility that Plaintiff will be conscious when he is injected with pancuronium bromide or potassium chloride, and, if so, how the risk of such an occurrence may be avoided." Id. at 1040. This is precisely the same question which this Court must address.

After learning more about how executions are carried out in Missouri, through the interrogatories submitted to the John Doe defendants, reviewing the chemical dispensary logs, reviewing the videotape of the execution chamber and listening to the testimony of John Doe I, and to the testimony of the other expert witnesses at the June 12-13, 2006 hearing, it is apparent that there are numerous problems. For example, there is no written protocol which describes which drugs will be administered, in what amounts and defines how they will be administered. John Doe I testified that he came up with the current protocol. John Doe I also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past. He has reduced the amount of thiopental given from 5.0 grams to 2.5 grams and has also changed the location on the inmate's body where the drugs were administered. It is obvious that the protocol as it currently exists is not carried out consistently and is subject to change at a moment's notice.

The Court is also concerned that John Doe I possesses total discretion for the execution protocol. Currently, there are no checks and balances or oversight, either before, during or after the lethal injection occurs. No one monitors the changes or modifications that John Doe I makes. John Doe I even testified that the Director of the Department of Corrections, Mr. Crawford, has no medical or corrections background,

and that he is "totally dependent on me advising him." (John Doe Depo. p. 64).

In addition to the fact that there is no oversight and the responsibility for making changes or adjustments is completely vested in one individual, the Court also has concerns about John Doe I's qualifications. John Doe I readily admitted that he is dyslexic and that he has difficulty with numbers and oftentimes transposes numbers. John Doe I testified "it's not unusual for me to make mistakes. . . . But I am dyslexic and that is the reason why there are inconsistencies in my testimony. That's why there are inconsistencies in what I call drugs. I can make these mistakes, but it's not medically crucial in the type of work I do as a surgeon." (John Doe Depo. p. 25). The Court disagrees and is gravely concerned that a physician who is solely responsible for correctly mixing the drugs which will be responsible for humanely ending the life of condemned inmates has a condition which causes him confusion with regard to numbers. As the Court has learned, the process of mixing the three different drugs and knowing the correct amount of the drugs to dissolve in the correct amount of solution involves precise measurements and the ability to use, decipher, and not confuse numbers. Although John Doe I does not feel this is crucial in the type of work he does as a surgeon, it is critical when one is mixing and dissolving chemicals for a lethal injection.

In addition, John Doe I testified that although he is not an anesthesiologist, he monitors the anesthetic depth of an inmate by observing the inmate's facial expression. However, as can be seen from the videotape of the execution chamber, when the inmate is lying on the gurney in the execution room, the inmate is facing away from the Operations room where John Doe I is located. Additionally, it is dark in the Operations room and there are blinds on the window which are partially closed and obstruct the

view. This would make it almost impossible for John Doe I to observe the inmate's facial expression. This leads the Court to conclude that there is little or no monitoring of the inmate to ensure that he has received an adequate dose of anesthesia before the other two chemicals are administered.

All of these concerns lead the Court to conclude that Missouri's lethal injection procedure subjects condemned inmates to an unnecessary risk that they will be subject to unconstitutional pain and suffering when the lethal injection drugs are administered.

D. Revisions to the Execution Protocol

Having determined that Missouri's current method of administering lethal injections subjects condemned inmates to an unacceptable risk of suffering unconstitutional pain and suffering, the Court concludes that it is within its equitable powers to fashion a remedy that "preserves both the State's interest in proceeding with Plaintiff's execution and Plaintiff's constitutional right not to be subject to an undue risk of extreme pain." Morales, 415 F.Supp.2d at 1046. Director Crawford testified at the hearing that the Department of Corrections is in the process of developing a directive which would establish a protocol for administering lethal injections. However, from his testimony, it was apparent that the directive would not encompass all of the attributes which the Court finds are necessary to ensure that lethal injections are carried out humanely. Recently other courts have also faced this challenge and have modified execution procedures in those states. See e.g. Brown v. Beck, No. 5:06-CT-3018-H, (E.D.N.C. April 7, 2006)(Doc. No. 32) and Morales, 415 F.Supp.2d at 1046.

Accordingly, the Court hereby **AMENDS** its previous order of January 31, 2006 and **ORDERS** the Department of Corrections for the State of Missouri to prepare a

written protocol for the implementation of lethal injections which incorporates the following provisions:

1. Personnel

A board certified anesthesiologist shall be responsible for the mixing of all drugs which are used in the lethal injection process. If the anesthesiologist does not actually administer the drugs through the IV, he or she shall directly observe those individuals who do so. Additionally, the Operations Room shall be sufficiently lighted so that the corrections personnel can see which drugs are being administered.

2. Lethal Injection Drugs & Method of Administration

The level of thiopental administered shall not be less than 5 grams. Pancuronium Bromide and Potassium Chloride will not be administered until the anesthesiologist certifies that the inmate has achieved sufficient anesthetic depth so that the inmate will not feel any undue pain when the Potassium Chloride is injected. The State in conjunction with the anesthesiologist will have discretion to determine the most appropriate location on the inmate's body to inject the drugs. The State shall specify in the protocol how the anesthesiologist will certify that the inmate has achieved the appropriate anesthetic depth.

3. Monitoring

The State will put in place procedures which will allow the anesthesiologist to adequately monitor the anesthetic depth of the inmate. This may require the State to purchase additional equipment in order to adequately monitor anesthetic depth. The State should also consider repositioning the gurney so that the inmates's face will be visible to the anesthesiologist, using a mirror, or even allowing the anesthesiologist to be present in the room with the inmate when the drugs are injected.

4. Contingency Plan

The State's protocol shall also contain a contingency plan in case problems develop during the execution procedure.

5. Auditing Process

The Department of Corrections shall put in place an auditing process which will ensure that the individuals involved in the lethal injection process are correctly following the protocol, including administering the correct dosages of the medication, in the proper order. The Court contemplates that the State will consult with a board certified anesthesiologist in designing the auditing process.

6. Changes to the Lethal Injection Procedure

After approval by the Court, no further changes shall be made to the lethal injection protocol without seeking the prior approval of this Court. This Order contemplates consultation with a board certified anesthesiologist in arriving at a proposed written protocol. The Court will retain jurisdiction over the State's implementation of the lethal injection protocol for the next six executions or until the Court is satisfied that the protocol is being administered in a consistent fashion. The Department of Corrections shall submit its revised lethal execution protocol to this Court for review and approval on or before **July 15, 2006.** All executions in the State of Missouri are hereby **STAYED** pending approval of the protocol.

III. CONCLUSION

For the reasons stated above, the Court hereby **AMENDS** its January 31, 2006 Order and in accordance with the April 27, 2006 Order of the Eighth Circuit, this Court

hereby **CERTIFIES** this Order to the Eighth Circuit for its review and consideration.

Date: June 26, 2006
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

TERRICK TERRELL NOONER, PLAINTIFF

and

DON WILLIAMS DAVIS INTERVENOR PLAINTIFF

No. 5:06CV00110 SWW

VS.

LARRY NORRIS, Director,
Arkansas Department of Correction;
GAYLON LAY, Warden,
Arkansas Department of Correction;
WENDY KELLY, Deputy Director for
Health and Correctional Programs;
JOHN BYUS; Administrator, Correctional
Medical Services, Arkansas Department of Correction; and
OTHER UNKNOWN EMPLOYEES,
Arkansas Department of Correction DEFENDANTS

ORDER

Terrick Terrell Nooner ("Nooner") and Don Williams Davis ("Davis"), Arkansas death-row inmates, bring this action pursuant to 42 U.S.C. § 1983 claiming that the protocol for carrying out execution by lethal injection in Arkansas violates the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Plaintiffs seek a declaration that the protocol is unconstitutional, and an injunction enjoining Defendants from carrying out future executions in accordance with the protocol.

Before the Court is Plaintiff Davis's motion for a preliminary injunction (docket entry #21) asking the Court to stay his July 5, 2006 execution and permit him to litigate his constitutional claims. Defendants have responded (docket entry #28), and the matter is ready for

decision. After careful consideration, and for the reason that follow, the Court concludes that the motion for a preliminary injunction should be granted.

I.

In 1992, Davis was convicted of capital murder, burglary, and theft of property and sentenced to death. His conviction and sentence were affirmed on direct appeal,[1] and his petition for post-conviction relief in state court was denied.[2] On September 14, 2005, the Eighth Circuit affirmed denial of Davis's petition for habeas relief,[3] and on April 17, 2006, the United States Supreme Court denied Davis's petition for a writ of certiorari.[4] Plaintiff Nooner initiated this § 1983 action on May 1, 2006, and on May 4, 2006, Davis filed a motion to intervene as a party plaintiff. On May 11, 2006, Governor Mike Huckabee scheduled Davis's execution for July 5, 2006. On May 26, 2006, the Court granted Davis's motion to intervene, and on June 16, 2006, Davis filed the present motion for a preliminary injunction.

Arkansas' lethal injection statute provides that the "punishment of death is to be administered by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice." Ark. Code Ann. 5-4-17(a)(1). Arkansas law gives the Director of the Arkansas Department of Correction ("ADC") the responsibility to determine the substances to be administered and the procedures to be used in

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[1]*Davis v. State*, 314 Ark. 257 (1993), *cert. denied*, 511 U.S. 1026 (1994).

[2]*Davis v. State*, 354 Ark. 161 (2001).

[3]*Davis v. Norris*. 423 F.3d 868 (8th Cir. 2005).

[4]*Davis v. Norris*, 126 S. Ct. 1826 (2006).

any execution. *See* Ark. Code Ann. § 5-4-617(a)(2). The Director's protocol for execution by lethal injection, set forth in ADC Administrative Directive 96-06 ("AD 96-06"), calls for the administration of three chemicals in the following order: (1) a 2-gram injection of sodium pentothal (also known as thiopental), administered to cause unconsciousness; (2) 2, 50-milligram injections of pancuronium bromide, administered to cause paralysis; and (3) up to 3, 50-milliequivalent injections of potassium chloride, to stop the heart.[5] Each injection is followed by a saline flush. According to AD 96-06, the injections are administered by way of control devices located in a control room, separate from the execution chamber. The control devices are connected, by extension tubing, to IV catheters inserted into each arm of the condemned inmate. The catheters are inserted by an "IV team" and the injections are administered by executioners, whose identities are kept secret. AD 96-06 contains no provision requiring that the IV team or executioners have any type of medical training or certification.[6]

Davis alleges that the State's protocol creates a substantial risk that the first injection (2 grams of sodium pentothal) will fail to render him unconscious to the point that he will not experience intense pain and agony after the administration of pancuronium bromide and potassium chloride.

Davis's medical expert, Mark J. S. Heath, M.D., a board-certified anesthesiologist and the Assistant Professor of Clinical Anesthesiology at Columbia University in New York City, states that the ADC's lethal injection procedure creates medically unacceptable risks of inflicting

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[5]Docket entry #21, Ex. 1 (ADC Administrative Directive 96-06).

[6]The State asserts that the protocol requires the use of trained individuals for both the placement of the IV lines and the administration of chemicals. Docket entry #28, at 9. The Court has carefully reviewed ADC 96-06 and finds no such provision.

excruciating pain and suffering. *See* docket entry #21, Ex. 1 (Heath Decl.), ¶ 51. In his declaration, Dr. Heath explains that pancuronium bromide stops all movement, including that necessary to breathe, but it has no effect on the ability to feel pain, and potassium chloride burns intensely as it travels through the veins to the heart. Thus, if a condemned inmate is conscious when the pancuronium bromide and potassium chloride are administered, he or she will feel the sensations of slow suffocation and excruciating pain.

Dr. Heath maintains that the ADC's protocol creates an unacceptable risk that condemned inmates will be conscious for the duration of the execution procedure. He states that the protocol fails to comply with medical standards of care for inducing and maintaining anesthesia and the American Veterinary Medical Association's standards for the euthanasia of animals. Dr. Heath finds that the protocol fails to address several foreseeable situations in which human or technical error could result in the failure to successfully administer the 2-gram dose of sodium pentothal. Further, Dr. Heath opines that the protocol creates a substantial risk of unnecessary pain which is easily remedied.

In addition to Dr. Heath's declaration, Davis submits the declaration of a witness to the 1992 execution of Steven Hill. The witness states: "Approximately 3-5 minutes after the IV fluid began to flow, I noticed Steven struggling to breathe. He was strapped down, but his chest was heaving . . . . He appeared to be gasping for air. Within another minute, he turned a bright red color and then lay completely still." Docket entry #21, Ex. 38. Davis also submits several newspaper articles containing eye-witness accounts of ADC executions which, according to Davis, indicate that inmates remained conscious and suffered pain during their executions. *See* docket entry #21, Exs. 28, 34, 37, 42, 45, 49.

II.

The factors to consider when deciding whether to grant or deny motions for preliminary injunctions include (1) the threat of irreparable harm to the movant; (2) the state of the balance between his harm and the injury that granting the injunction will inflict on other parties involved in the litigation; (3) the probability the movant will succeed on the merits; and (4) the public interest. *See Dataphase Sys., Inc. v. CL Sys.*, 640 F.2d 109, 113 (8th Cir. 1981). Additionally, a court considering a stay of execution must apply "'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring an entry of a stay.'" *Hill v. McDonough*, 2006 WL 1584710, at *8 (U.S. June 12, 2006)(quoting *Nelson v. Campbell,* 124 S. Ct. 2117, 2126 (2004)).

The Court finds that Davis has shown that he is personally under a threat of irreparable harm. If Davis remains or becomes conscious during the execution, he will suffer intense pain that will never be rectified. The Court further finds that the balance of potential harms favors Davis. If a stay is granted and Davis's allegations prove true, he and others will be spared subjection to an unconstitutional execution procedure, and the State's interest in enforcing death penalties in compliance with constitutional standards will be served. If, on the other hand, a stay is granted and Davis's allegations are without merit, the State can carry out Davis's execution without the specter that the ADC's protocol carries an unreasonable risk of inflicting unnecessary pain.

The State argues that the equities favor the State because Davis unjustifiably delayed bringing his claims. However, Davis moved to intervene in this case before the State set his execution date and shortly after he exhausted all means for challenging his conviction. The

Court disagrees that Davis delayed pursuing his claims.[7]

Next, the Court must consider the probability that Davis will succeed on the merits. The Eighth Amendment prohibits punishments repugnant to "'the evolving standards of decency that mark the progress of a maturing society'" or those involving "'unnecessary and wanton infliction of pain.'" *Estelle v. Gamble,* 97 S. Ct. 285, 290, 290 (1976) (quoting *Trop v. Dulles*, 78 S. Ct. 590, 598 (1958)(first quote); *Gregg v. Georgia*, 96 S. Ct. 2909, 2925 (1976) (second quote)).

The State contends that Davis has not shown that he might succeed on the merits because Dr. Heath's declaration offers no information about the probability that Davis might experience unnecessary pain. However, Davis need not show a mathematical probability of success at trial

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[7]The Eighth Circuit's opinion in *Taylor v. Crawford*, 445 F.3d 1095 (8th Cir. 2006), indicates that the Court of Appeals would agree that Davis did not delay bringing his claims. In *Taylor*, Larry Crawford, sentenced to death in 1991, brought claims under § 1983, challenging Missouri's three-chemical protocol for executions by lethal injection. Like Davis, Taylor initiated his lawsuit after he exhausted his state post-conviction remedies and after his petitions for habeas relief were denied in federal court. Also similar to this case, the State of Missouri set Taylor's execution date after he commenced suit under § 1983. The district court stayed Taylor's execution, but gave no reasons for the stay, other than the court's inability to hold an evidentiary hearing before the scheduled execution date.

The Eighth Circuit reversed the stay after concluding that the State's interest in prompt execution of its judgment was not outweighed by the district court's scheduling difficulties. The Eighth Circuit ordered that the case be reassigned to a district judge who could hear the case immediately "[i]n recognition of Mr. Taylor's equally strong interest in having an evidentiary hearing on his claims prior to his execution." *Taylor*, 445 F.3d at 1098-99. The district court followed the Eighth Circuit's instructions and determined that Taylor's claims had no merit. Taylor appealed, arguing that the district court, in its haste to make a decision before Taylor's execution date, prevented him from calling medical witnesses. On appeal, the Eighth Circuit stayed Taylor's execution, concluding that it asked the district court to do too much in too little time. The Court of Appeals stated, "In view of the existing record, the importance of the issue to this plaintiff as well as others, and the likelihood of recurrence of these identical issues in future Missouri death penalty cases, we remand for . . . a continuation of the hearing . . . ." *Taylor*, 445 F.3d at 1099.

before a stay can be granted. It is enough that Davis has raised serious questions that call for deliberate investigation. *See Dataphase*, 640 F.2d at 113 ("But where the balance of other factors tip decidedly toward movant a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation.").

Finally, the Court finds that the public interest will be served if the Court holds an evidentiary hearing on Plaintiffs' claims. Crime victims and the general public have an important interest in the timely enforcement of criminal sentences. However, failure to consider Davis's allegations would ignore the equally important public interest in the humane and constitutional application of the State's lethal injection statute.

III.

For the reasons stated, Plaintiff Davis's motion for a preliminary injunction (docket entry #21) is GRANTED. IT IS HEREBY ORDERED that the State of Arkansas is STAYED from implementing an order for the execution of Don William Davis until further notice from this Court.

The Court will attempt to schedule an expedited hearing. The time of the hearing will depend on the Court's schedule as well as the schedules of others involved.

IT IS SO ORDERED THIS 26TH DAY OF JUNE, 2006.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE

TO: MT Dept of Corrections, Mike Ferriter, Director
FROM: Rep Paul Clark
RE: Lethal injection protocol

Dear Director Ferriter:

I know that you are now very involved in addressing the protocols for executions in Montana. As August 11, the scheduled date for Montana's execution of David Dawson draws nearer, it is imperative that Montana be able to make clear that the protocols utilized in this execution are consistent with the 8th amendment protection against the infliction of cruel and unusual punishment.

To that end, I am formally making application under the freedom of information act requesting specific information about the lethal injection procedures and protocols in currently in place here in Montana.

Specifically, I am wanting to know: a) whether and how the lethal injection protocol ensures that the personnel responsible for anesthesia are appropriately trained and qualified; b) whether and how the lethal injection protocol employs adequate standards for administering injections and monitoring consciousness; c) what chemicals are involved in lethal injection and what doses are used; d) whether and how the current lethal injection protocol employs adequate standards for measuring and understanding the reaction to pain; and e) whether and how lethal injection protocol makes adequate efforts to identify and address contingencies that may arise during executions.

In addition, I am requesting information to determine whether today's lethal injection protocols are the same as those used when the state executed Duncan McKenzie, and when the state took the life of Terry Langford. If there have been changes made, what are they and why were they undertaken? Thank you for taking the time to consider and answer these questions.

Sincerely, Representative Paul Clark, HD13