UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Melvin Wayne White,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Gary Johnson,	)	
Executive Director,	)	
Texas Department of Criminal Justice,	)	
	)	
Doug Dretke	)	No. _____
Director, Correctional Institutions Division	)	(death-penalty case)
Texas Department of Criminal Justice,	)	
	)	
Charles O'Reilly,	)	
Senior Warden, Huntsville Unit	)	
Huntsville, Texas,	)	
	)	
and,	)	
	)	
Unknown Executioners;	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF COMPLAINT

Plaintiff seeks relief under 42 U.S.C. § 1983 from violations by state actors of rights secured by the United States Constitution. Plaintiff requests relief from two threatened injuries by defendants. First, plaintiff requests that this Court enter a permanent injunction prohibiting defendants from injecting him with three chemicals that (1) unnecessarily increase the risk of torture during the execution; and (2) are superfluous and wholly unnecessary to effect lethal injection. Second, plaintiff requests that this Court enter an injunction prohibiting defendants

from utilizing any invasive medical procedures to gain venous access for the lethal injection, at least until and unless plaintiff is made aware under what circumstances and standards those procedures will occur and those standards are sufficient to protect plaintiff's medical needs.

This Memorandum proceeds in three parts. In Part I, plaintiff establishes his first claim that the defendants are acting with deliberate indifference in unnecessarily increasing the risk plaintiff will experience torture during the administration of his death sentence by injecting him with wholly unnecessary drugs, in violation of his Eighth and Fourteenth Amendment rights to remain free from cruel and unusual punishment. In Part II, plaintiff shows that the violation outlined by his first claim may be redressed under 42 U.S.C. § 1983 and that he is entitled to the equitable relief sought. In Part III, plaintiff establishes that the defendants are acting with deliberate indifference to his medical needs by failing to provide any protocol for gaining venous access and by potentially resorting to an invasive medical procedures to gain venous access without adequate safeguards, also in violation of plaintiff's Eighth and Fourteenth Amendment rights to remain free from cruel and unusual punishment.

I. LETHAL INJECTION, AS DEFENDANTS ADMINISTER IT IN TEXAS, POSES AN INTOLERABLE AND FORESEEABLE RISK OF CAUSING UNNECESSARY PAIN, TORTURE, AND LINGERING DEATH, IN VIOLATION OF THE EIGHTH AMENDMENT.

The Eighth Amendment's proscription against cruel and unusual punishment forbids the infliction of unnecessary pain in the execution of a sentence of death. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (opinion of Reed, J.); *Fierro v. Gomez*, 865 F. Supp. 1387, 1413 (N.D. Cal. 1994) (execution by lethal gas in California held unconstitutional where evidence indicated "death by this method is not instantaneous. Death is not extremely rapid or within a matter of seconds. Rather . . . inmates are likely to be conscious for anywhere from

fifteen seconds to one minute from the time that the gas strikes their face" and "during this period of consciousness, the condemned inmate is likely to suffer intense physical pain" from "air hunger"; "symptoms of air hunger include intense chest pains . . . acute anxiety, and struggling to breath"), *aff'd,* 77 F.3d 301, 308 (9th Cir. 1996), *vacated on other grounds*, 519 U.S. 918 (1996). Further, "[p]unishments are cruel when they involve . . . a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). A punishment is particularly constitutionally offensive if it involves the ***foreseeable*** infliction of suffering. *Furman v. Georgia*, 408 U.S. 238, 273 (1973), citing *Resweber*, *supra* (had failed execution been intentional and not unforeseen, punishment would have been, like torture, "so degrading and indecent as to amount to a refusal to accord the criminal human status"). Due to the anticipated chemicals defendants intend to inject in plaintiff, it is not only foreseeable but also predictable that unnecessary pain, torture, and lingering death will result. The deliberate indifference to this risk of unnecessary pain violates plaintiff's Eighth Amendment rights.

A. The combination of chemicals defendants intend to use to execute plaintiff creates an intolerable risk of unnecessary suffering and torture.

It is anticipated that defendants intend to carry out plaintiff's lethal injection by injecting him with a combination of three chemical substances: sodium thiopental, or sodium pentothal (an ultrashort-acting barbiturate); pancuronium bromide, or Pavulon (a curare-derived agent which paralyzes all skeletal or voluntary muscles, but which has no effect whatsoever on awareness, cognition or sensation); and potassium chloride (an extraordinarily painful chemical which activates the nerve fibers lining the inmate's veins and which can interfere with the rhythmic contractions of the heart and cause cardiac arrest). Each of these chemicals individually is wholly unnecessary and creates intolerable risks in the administration of lethal injection; in

combination, those risks are enhanced even further. The use of these chemicals, alone or together, cannot pass constitutional muster. Far from producing a rapid and sustained loss of consciousness and humane death, this particular combination of chemicals may cause the inmate to consciously suffer an excruciatingly painful and protracted death.

1. The assumed execution protocol.

Plaintiff White does not know precisely how defendants will execute him by lethal injection, because defendants keep their lethal injection protocol a secret. *See* Exhibit 1 (Letter from James L. Hall to Alberta Phillips, Jan. 2, 2004). In a recent lawsuit, however, defendants provided to the Court in written pleadings a short description of the procedure:

> The process provides for three chemical agents to be administered as follows: first, two needles (one is a back-up) are inserted into each arm of the condemned inmate and connected to several intravenous drip bags containing a saline solution. Next, a lethal dose (3 grams) of sodium thiopental is given to sedate the inmate. Then, the intravenous tube is flushed with saline solution. Next, pancuronium bromide (20 milligrams) is administered to collapse the offender's diaphragm and lungs. The intravenous tube is flushed again with saline solution. And finally, potassium chloride (70 milliliters) is administered to stop the offender's heart.

Defendants' Supplemental Response in Opposition to Request for Expedited Discovery, *Aldrich v. Johnson*, No. 04-2955 (S.D.Tex. 2004). It should be noted, however, that defendant's source of this information is a Houston Chronicle article and does not purport to be derived from the lethal injection protocol, if any, maintained by defendants themselves. Lise Olsen and Mike Tolson, *'Stakes are High' in Death Appeals*, HOU. CHRON., Dec. 12, 2003, at A1. The Chronicle's source, in turn, is the Texas Department of Criminal Justice (TDCJ) and the Death Penalty Information Center.[1] It is unclear which facts are derived from which source, as well as

[1] The article defendants cited to asserts that the injection of the sodium thiopental takes 30 seconds, that of the pancuronium bromide 45 seconds, and that of the potassium chloride 30 seconds. Yet, according to a website

whether the description of the procedure is even accurate. The above outlined process, if remotely accurate, is rife with problems that threaten to inflict unbearable, yet undetectable, pain during the lethal injection.

a. Sodium thiopental.

Sodium thiopental, or sodium pentothal, is a short-acting barbiturate that is ordinarily used to render a surgical patient unconscious for mere minutes, only in the induction phase of anesthesia, specifically so that the patient may re-awaken and breathe on his own power if any complications arise in inserting a breathing tube pre-surgery. Dr. Mark Heath, Assistant Professor of Clinical Anesthesia at Columbia University, submitted a declaration in connection with a Maryland case challenging the same combinatory use of chemicals as defendants use. Dr. Heath's declaration explained the surgical use of sodium thiopental:

> When anesthesiologists use sodium thiopental, we do so for the purposes of temporarily anesthetizing patients for sufficient time to incubate the trachea and institute mechanical support of ventilation and respiration. Once this has been achieved, additional drugs are administered to maintain a "surgical depth" or "surgical plane" of anesthesia (i.e., a level of anesthesia deep enough to ensure that a surgical patient feels no pain and is unconscious for the duration of the surgical procedure). The medical utility of thiopental derives from its ultrashort-acting properties: if unanticipated obstacles hinder or prevent successful incubation, patients will quickly regain consciousness and will resume ventilation and respiration on their own.

Exhibit 2 (Declaration of Dr. Mark Heath, filed in *Oken v. Sizer, et. al.*, No. 24-C-004242, (Cir. Ct. Balt. City 2004).

Because of its brief duration, sodium thiopental may not provide a sedative effect throughout the entire lethal injection. Dr. Dennis Geiser, the chairman of the Department of

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maintained by defendants, an inmate is usually pronounced dead seven minutes after the first injection begins. *See* Death Row Facts, available at http://www.tdcj.state.tx.us/stat/drowfacts.htm.

large Animal Clinical Sciences at the College of Veterinary Medicine at the University of Tennessee, has explained:

> Sodium thiopental is not a proper anesthetic for use in lethal injection. Indeed, the American Veterinary Medical Association standards for euthanasia indicate that the ideal barbituric acid derivative for animal euthanasia should be potent, long acting, stable in solution, and inexpensive. Sodium pentobarbital (not sodium thiopental) best fits these criteria. Sodium thiopental is a potent barbituric acid derivative but very short acting with one therapeutic dose.

Exhibit 3 (Affidavit of Dr. Dennis Geiser, in the case of *Texas v. Jesus Flores*, No. 877,994A).

Due to the chemical combination defendants are anticipated to use, there is also a probability that the second chemical, pancuronium bromide, will neutralize the short sedative effect of the sodium thiopental. Dr. Mark Heath stated:

> Sodium thiopental is an ultrashort-acting barbiturate that if administered in inadequate dosage begins to wear off almost immediately.... Sodium Thiopental is not used to maintain a patient in a surgical plane of anesthesia for purposes of performing surgical procedures. It is unnecessary, and risky, to use a short-acting anesthesia in the execution procedure. If the solution of sodium thiopental comes into contact with another chemical, such as pancuronium bromide, the mixture of the two will cause the sodium thiopental immediately to crystallize. These factors are significant in the risk of the inmate not being properly anesthetized, especially since no-one checks that the inmate is unconscious before the second drug is administered.

Exhibit 2.

These concerns with the usage of sodium thiopental are heightened by the lack of medical personnel, the lack of proper monitoring of the inmate during the process, the lack of inmate-specific dosing of the barbiturate, and especially defendant's anticipated failure to ensure the injection is continuous throughout the procedure. Plaintiff anticipates defendants will ***not*** utilize continuous injection of sodium thiopental. Plaintiff believes, in accordance with the assumed protocol outlined above, that defendants will inject him with a one-time dose of sodium

thiopental through an intravenous tube, which will be flushed prior to injection of the second and third chemicals.

Defendant's anticipated refusal to administer a continuous injection of sodium thiopental is in fact inconsistent with the accepted standards of many states that employ lethal injection, including that of Oklahoma, the state that provided the model for lethal injection protocol throughout the rest of the nation. Oklahoma, by statute, requires that lethal injection be achieved by "a ***continuous***, intravenous administration" of chemicals. Okla. Stat. Ann. tit. 22, § 1014 (West 2003). Colorado, Connecticut, Georgia, Idaho, Kentucky, Maryland, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, Pennsylvania, South Dakota, Utah, Virginia, and Wyoming all similarly mandate that the injection be continuous. Colo. Rev. Stat. § 18-1.3-1202 (2004); Conn. Gen. Stat. Ann. § 54-100 (West 2001); Ga. Code Ann. § 17-10-38 (2004); Idaho Code § 19-2716 (Michie 2004); Ky. Rev. Stat. Ann. § 431.220 (Michie 1999); Md. Code Ann., Correctional Services § 3-905 (1999 & Supp. 2004); Miss. Code Ann. § 99-19-51 (1999 & Supp. 2004); Mont. Code Ann. § 46-19-103 (2004); N.H. Rev. Stat. Ann. § 630:5 (1996 & Supp. 2004); N.J. Stat. Ann. § 2C:49-2 (West 1995); N.M. Stat. Ann. § 31-14-11 (Michie 2004); Pa. Stat. Ann. tit. 61, § 3004 (West 1999 & Supp. 2005); S.D. Codified Laws § 23A-27A-32 (Michie 1998); Utah Code Ann. § 77-19-10 (Supp. 2005); Va. Code Ann. § 53.1-233 (Michie 2005); Wyo. Stat. Ann. § 7-13-904 (Michie 2005). Texas statutory law is silent with respect to the method of administration, although it arguably does require continuous administration in that it mandates that death be caused "by intravenous injection ... ***until such convict is dead.***" Tex. Code Crim. Proc. art. 43.14 (Vernon Supp. 2004-2005). *See also* Ind. Code Ann. § 35-38-6-1 (Michie Supp. 2004); La. Rev. Stat. Ann. § 15:569 (West 2005); Mass. Gen. Laws ch. 279, § 60

(1998 & Supp. 2005); N.Y. Correction Law § 658 (McKinney 2003); Wash. Rev. Code § 10.95.180 (West 2002).

Defendant's intent to refrain from continuously administering sodium thiopental is especially problematic because of its nature as an ultrashort-acting barbiturate.

> The use of a continuous administration of the ultrashort-acting barbiturate is essential to ensure continued and sustained unconsciousness during the administration of pancuronium and potassium chloride. ... It is my opinion based on a reasonable degree of medical certainty that, given [the selection of] an ultrashort-acting barbiturate, this failure to require a continuous infusion of thiopental places the condemned inmate at a needless and significant risk for the conscious experience of paralysis during the excruciating pain of both suffocation and the intravenous injection of potassium chloride.

Exhibit 2 (Declaration of Dr. Mark Heath, filed in *Oken v. Sizer, et. al.*, No. 24-C-004242, (Cir. Ct. Balt. City 2004)).

The lack of involvement of medical personnel and proper monitoring increases the risk of pre-injection mixing of the sodium thiopental with the second paralytic agent, causing the sodium thiopental to precipitate out of solution and become inactive, thereby "enhanc[ing] the risk that the inmate will be conscious during the execution." *Id.* On the necessity of ensuring that dosing is determined on an individuated basis, Dr. Heath has stated:

> As with most drugs, a person's body composition and physiological attributes (size, weight, and drug tolerance) causes the inmate to react differently to the chemicals. Thus, some prisoners may need a higher concentration of sodium thiopental than others before losing consciousness. [The] failure to account for each inmate's physiological composition creates a significant probability that the inmate will not be unconscious when the other chemicals are administered causing the inmate to suffer an excruciatingly painful death.

Id. And according to Dr. Geiser:

> [T]he dosage of thiopental sodium must be measured with some degree of precision, and the administration of the proper amount of the dosage will depend on the concentration of the drug and the size and condition of the subject. Additionally, the drug must be administered properly so that the full amount of

> the dosage will directly enter the subject's blood stream at the proper rate. If the dosage is not correct, or if the drug is not properly administered, then *it will not adequately anaesthetize the subject, and the subject may experience the untoward effects of the neuromuscular blocking agent. . .*

Exhibit 4 (Affidavit of Dr. Dennis Geiser, in the case of *Abu-Ali Abdur' Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. granted*, 535 U.S. 1016 (U.S. April 22, 2002), cert. dismissed, 537 U.S. 88 (U.S. Dec 10, 2002) (emphasis added)).[2] Concluding on the risk concerning the use of sodium thiopental and a paralytic agent by medically untrained personnel, Dr. Heath states:

> The method of administering thiopental also raises significant concerns. If thiopental is not properly administered in a dose sufficient to cause death or at least the loss of consciousness for the duration of the execution procedure, then it is my opinion held to a reasonable degree of medical certainty that the use of pancuronium places the condemned inmate at risk for consciously experiencing paralysis, suffocation, and the excruciating pain of the intravenous injection of high dose potassium chloride.

Exhibit 2.

b. Pancuronium bromide.

The second chemical involved in the lethal injection process, pancuronium bromide, or Pavulon, is a derivative of curare that acts as a neuromuscular blocking agent. Pancuronium "paralyzes all voluntary muscles, but does not affect sensation, consciousness, cognition, or the ability to feel pain and suffocation." Exhibit 2 (Declaration of Dr. Mark Heath, filed in *Oken v. Sizer, et. al.*, No. 24-C-004242, (Cir. Ct. Balt. City 2004). If, as is probable in the lethal injection practice defendants intend to use, the sedative effect of the sodium thiopental is ineffective or

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[2] The problems inherent in defendants' use of sodium thiopental and pancuronium bromide cannot be directly discounted because of TDCJ's sudden administrative decision in 1989 to cease conducting autopsies of executed individuals. Defendants' failure to collect any post-mortem data precludes defendants from presenting any direct evidence to argue that the dosage of sodium pentothal injected into the veins of Texas condemned inmates still provides therapeutic levels of sodium pentothal: the terrible specter of inadequate anesthesia can never be ruled out for any Texas condemned inmate.

neutralized, the pancuronium bromide would serve both to *inflict* and to *mask* the excruciating pain of the condemned inmate.

> If administered alone, a lethal dose of pancuronium would not immediately cause a condemned inmate to lose consciousness. It first would totally immobilize the inmate by paralyzing all voluntary muscles and the diaphragm, ***causing the inmate to suffocate to death while experiencing an intense, conscious desire to inhale***. Ultimately, consciousness would be lost, but it would not be lost as an immediate and direct result of the pancuronium. Rather, the loss of consciousness would be due to suffocation, and would be preceded by the torment and agony caused by suffocation. Depending on the physiological attributes of the individual it may take from one to several minutes before suffocation leads to unconsciousness.

Id. (emphasis added).

In *Abdur' Rahman v. Bell*, Dr. Geiser asserted that while Pavulon paralyzes skeletal muscles, including the diaphragm, it has *no effect on consciousness or the perception of pain or suffering*. Administration of Pavulon is ***like being tied to a tree, having darts thrown at you, and feeling the pain without any ability to respond.*** Exhibit 4 (emphasis added). This assertion is corroborated by the experience of eye surgery patient, Carol Weihrer. During Ms. Weihrer's surgery the sedative she received was ineffectual and Ms. Weihrer was conscious of the entire surgery. Due to the administration of a neuromuscular blocking agent like pancuronium bromide, however, she was unable to indicate her consciousness to doctors:

> I experienced what has come to be known as Anesthesia Awareness, in which I was able to think lucidly, hear, perceive and feel everything that was going on during the surgery, but I was unable to move. It burnt like the fires of hell. It was the most terrifying, torturous experience you can imagine. The experience was worse than death.

Exhibit 5 (Affidavit of Carol Weihrer, in the case of *Texas v. Jesus Flores*, No. 877,994A).

In short, the second chemical, pancuronium bromide, or Pavulon, in the lethal injection protocol serves no purpose other than to guarantee that the condemned inmate will be forced into

a total chemical straightjacket and gag while he consciously experiences the third chemical—potassium chloride—ravaging his internal organs. Unlike in a surgical context where paralysis during delicate procedures serves a legitimate and beneficial surgical purpose (preventing the patient from unconsciously moving), in the execution process where delicate surgical procedures near vital internal organs are not being performed, where the end sought is death rather than the preservation of life, and where the "patient" is rendered sufficiently immobile for the task by strapping him onto a gurney, paralysis serves ***no*** rational purpose. A paralytic agent will, however, serve to make the execution *appear* humane to witnesses, indicating its presence in the chemical cocktail has more to do with appeasing the executioners and witnesses than effectuating the death sentence by lethal injection.

> It is my opinion based on a reasonable degree of medical certainty that the use of pancuronium effectively nullifies the ability of witnesses to discern whether or not the condemned prisoner is experiencing a peaceful or agonizing death. Regardless of the experience of the condemned prisoner, whether he or she is deeply unconscious or experiencing the excruciation of suffocation, paralysis, and potassium injection, he or she will appear to witnesses to be serene and peaceful due to the relaxation and immobilization of the facial and other skeletal muscles.

Exhibit 2 (Declaration of Dr. Mark Heath, filed in *Oken v. Sizer, et. al.*, No. 24-C-004242, (Cir. Ct. Balt. City 2004). Persons viewing the lethal injection procedure and the public will never realize that a cruel fraud is being perpetrated upon them: instead of witnessing an inmate quiet and motionless while being "put to sleep," they may in fact be witnessing the cover-up of a deliberate act of excruciating torture for which only the inmate is fully conscious.

c. Potassium chloride.

Finally, the use of potassium chloride itself raises important Eighth Amendment concerns, in that it, too, is wholly unnecessary to effect an execution by lethal injection. If injected alone, or in an inmate who has not been rendered sufficiently anesthetized, potassium

chloride would cause excruciating pain. And, if administered to a conscious inmate after a paralytic agent, that pain would be undetectable to witnesses.

> If administered alone, without prior administration of an anesthetizing dose of pentothal or other anesthetic agent, a lethal dose of potassium chloride would not immediately cause a condemned inmate to lose consciousness. It would first cause excruciating pain as it traveled through the venous system to the heart, and, once it reached the heart, it would cause a painful cardiac arrest that would deprive the brain of oxygen and rather quickly (but not immediately) cause death. If pancuronium was administered prior to the potassium chloride, any visible signs of pain or agony caused by the potassium would be completely masked and undetectable to onlookers or witnesses.

Exhibit 2 (Declaration of Dr. Mark Heath, filed in *Oken v. Sizer, et. al.*, No. 24-C-004242, (Cir. Ct. Balt. City 2004).

B. The danger of lethal injection as practiced creating unnecessary suffering and torture is greatly increased by failure of defendants to establish necessary training, qualifications, and expertise and standards of discretion for personnel performing injection and to establish safeguards during injection procedure.

Defendants, to the extent they have one at all,[3] keep their written lethal injection protocol a secret. Some information on defendants' lethal injection *practices* has been made public, however. A former senior Texas Department of Criminal Justice (TDCJ) official who witnessed 219 executions gave an interview to researchers about what happens when defendants undertake to administer a lethal injection, some details of which were published in the medical journal, *The Lancet*, in April 2005.

Through the former official it was discovered that the unknown executioners, "typically one to three emergency medical technicians or medical corpsmen," have no training in anesthesia. After placement of the intravenous lines, the executioners step behind a wall or curtain and remotely administer the drugs to the conscious inmate. According to the former

[3] *See* Exhibit 1 (Letter from James L. Hall to Alberta Phillips, Jan. 2, 2004).

official, defendants undertake no direct observation, physical examination, or electronic monitoring for anesthesia purposes. Nor do defendants make any attempt afterward to assess the depth of anesthesia of the executed inmate. *See* Leonidas G. Koniaris, et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, THE LANCET 2005; 365:1412. Defendants are believed to limit physicians' services to pronouncing death.

The risk of inflicting severe and unnecessary pain and suffering upon plaintiff in the lethal injection process is particularly grave because it is believed the meager procedures and protocols designed by defendants fail to establish the necessary training, qualifications and expertise required of the personnel performing the critical tasks during the lethal injection and do not establish appropriate criteria and standards that personnel must rely upon in exercising their discretion when conducting the lethal injection. Nor does the protocol include safeguards regarding the manner in which the lethal injection is to be carried out, especially with respect to whether the drugs are appropriately administered so as to ensure plaintiff is anesthetized.[4] Perhaps most importantly, there are no apparent answers to critical specific questions governing a number of crucial tasks and procedures in defendants' lethal injection procedure such as:

(a) the minimum qualifications and expertise required for the different personnel performing the tasks involved in the lethal injection procedure after the catheter is inserted;

(b) the methods for obtaining, storing, mixing, and appropriately labeling the drugs, the minimum qualifications and expertise required for the person who will determining the concentration and dosage of each drug to give, and the criteria that shall be used in exercising this discretion;

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[4] Defendants also fail to provide any protocol regarding how they obtain the controlled substances in a manner that ensures the drugs are effective, how to store the drugs in a manner to keep them effective, how to "mix" the drugs, or how to store and label the drugs once they have been prepared and transported to the execution chamber.

(c) the manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

(d) the manner in which the heart monitoring system shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

(e) the manner in which the condition of the condemned prisoner will be monitored to confirm that proceeding to the next procedure would not inflict severe and unnecessary pain and suffering on the condemned prisoner;

(f) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to order the staff to divert from the established protocols if necessary to avoid inflicting severe and unnecessary pain and suffering on the condemned prisoner, and the criteria that shall be used in exercising this discretion; and

(g) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to ensure that appropriate procedures are followed in response to unanticipated problems or events arising during the lethal injection procedure, and the criteria that shall be used in exercising this discretion.

The consequences of this failure to develop adequate protocol, procedures, and standards will likely result in the unnecessary and wanton infliction of severe pain and suffering.

C. Euthanasia practices that include the use of a sedative in conjunction with a neuromuscular blocking agent violate evolving standards of decency.

Recent research in, and subsequent legal changes regarding, animal euthanasia casts serious doubt as to whether defendants' lethal injection protocol passes constitutional muster. The leading professional association of veterinarians has promulgated guidelines for euthanasia that preclude the practice. Additionally, at least nineteen states, including Texas, have passed laws that preclude the use of a sedative in conjunction with a neuromuscular blocking agent. A euthanasia practice widely considered unfit for a dog is certainly unfit for humans as well,

especially in light of the fact that defendants may easily accomplish the same result with a more humane injection protocol. Given the consistency in the statutory regulation of euthanasia, the method currently practiced by defendants is outside the bounds of evolving standards of decency. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

The American Veterinary Medical Association Panel on Euthanasia published its latest report on acceptable animal euthanasia methods in 2001. *See* Exhibit 6 (*2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 Journal of the American Veterinary Medical Association, 669, 681 (2001)). That report found that intravenous injection of a barbituric acid derivative is the preferred method for euthanasia of nonhuman primates, dogs, cats, other small animals, and horses. *Id.* at 680. According to the Panel, "Desirable barbiturates are those that are potent, longacting, stable in solution, and inexpensive. Sodium pentobarbital best fits these criteria and is most widely used, although others such as secobarbital are also acceptable." *Id.*

Texas has recently passed legislation criminalizing inhumane methods of euthanizing animals, including the use of neuromuscular blocking agents such as pancuronium bromide. Tex. Health & Safety Code, § 821.052(a) (Vernon Supp. 2004-2005). With this legislation, Texas has joined numerous states with laws recognizing that use of these chemicals would be inhumane in the euthanasia of dogs and cats. *See* Fla. Stat. Ann. §§ 828.058, 828.065 (West 2000 & Supp. 2005); Ga. Code Ann. § 4-11-5.1 (1995); Me. Rev. Stat. Ann. tit. 17, § 1044 (West Supp. 2004); Md. Code Ann., Criminal Law, § 10-611 (2002); Mass. Gen. Laws ch. 140 § 151A (2002); N.J. Stat. Ann. § 4:22-19.3 (West 1998); N.Y. Agric. & Mkts. § 374 (McKinney 2004); Okla. Stat. Ann. tit. 4, § 501 (West 2003); Tenn. Code Ann. § 44-17-303 (Supp. 2004). Other

States have implicitly prohibited such practices. *See* Colo. Rev. Stat. Ann. §§ 18-9-201(2.7), 35-80-102(7) (West 2004); Conn. Gen. Stat. § 22-344a (2001); Del. Code Ann. tit. 3, § 8001 (2001); 510 Ill. Comp. Stat. Ann. 70/2.09 (Supp. 2003); Kan. Stat. Ann. § 47-1718(a) (2000); Ky. Rev. Stat. Ann. § 321.181(17) (Michie Supp. 2004); 201 Ky. Admin. Regs. 16:090, § 5(1) (2005); La. Rev. Stat. Ann. § 3:2465 (West 2003); Mo. Rev. Stat. §§ 578.005, 578.007 (2003); Mo. Code Regs. Ann. tit. 2, § 30-9.020(F)(5) (2005); R.I. Gen. Laws § 4-1-34 (1998); S.C. Code Ann. § 47-3-420 (Law Co-op Supp. 2004).

The American Veterinary Medical Association has now explicitly forbidden the combinatory use of a sedative with a neuromuscular blocking agent during euthanasia as well as stressed that

> [i]t is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously. Administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli.

Exhibit 6.

These recent alterations of euthanasia protocol for animals underscore the inhumanity of the lethal injection defendants intend to administer to plaintiff. It can hardly be disputed that if certain euthanasia techniques are banned as overly cruel to animals, those same practices must violate our current standards of decency regarding the execution of humans.

II. THE DEFENDANTS' CONDUCT IS COGNIZABLE UNDER 42 U.S.C. § 1983.[5]

A. 42 U.S.C. § 1983 provides redress for violations of the Eighth and Fourteenth Amendments.

Section 1983 provides, in pertinent part, for the protection of "any rights, privileges, or immunities secured by the Constitution and laws" against infringement by the states. When these rights are violated, § 1983 creates an action for damages and injunctive relief for the benefit of "any citizen of the United States" against the state actor responsible for the violation. In accordance with the remedial nature of the statute, the coverage of 1983 must be "liberally and beneficently construed." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (*quoting Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 684 (1978)). The United States Supreme Court has, therefore, "given full effect to [the statute's] broad language" by recognizing that § 1983 provides a remedy "against all forms of official violation of federally protected rights." *Id.* at 444. The plaintiff's allegations clearly raise violations of rights secured by the Eighth and Fourteenth Amendments to the United States Constitution, provisions for which § 1983 provides a remedy. *See Farmer v. Brennan*, 511 U.S. 825 (1994); *Estelle v. Gamble*, 429 U.S. 97 (1976).

B. This Court has authority to grant the injunctive relief requested to enforce the Eighth and Fourteenth Amendments to the United States Constitution.

42 U.S.C. § 1983 allows a court to grant equitable relief for violations of the Constitution and laws, and § 1983 is an appropriate vehicle for plaintiff's Eighth Amendment claim seeking a permanent injunction prohibiting defendants from administering the chemicals they currently intend. In *Nelson v. Campbell*, 541 U.S. 637 (2004), the United States Supreme Court addressed

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[5] Because plaintiff's claim with respect to defendants' indifference towards his medical needs in obtaining venous access, *infra*, is clearly cognizable under 42 U.S.C. § 1983 pursuant to *Nelson v. Campbell*, 541 U.S. 637 (2004), this section will deal entirely with plaintiff's allegations regarding the necessity of the chemicals defendants intend to inject him with.

the relationship between § 1983 and habeas corpus. "Section 1983 authorizes a 'suit in equity, or other proper proceeding for redress' against any person who, under color of state law, 'subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution.'" *Id.* at 643. Relief under section 1983, however, must yield under certain circumstances to the more specific federal habeas statute. *Id.* Claims challenging the fact of conviction or the duration of a sentence and which request injunctive relief in the form of relief from confinement or sentence strike at the "core" of habeas corpus and thus are not cognizable when brought pursuant to § 1983. *Id.* On the other hand, claims that challenge the conditions of a prisoner's confinement fall outside of that core and may be brought pursuant to § 1983. *Id.*

Nelson involved a civil rights claim brought under 42 U.S.C. § 1983 by David Nelson, an Alabama inmate sentenced to die by lethal injection. Years of drug abuse had compromised Nelson's veins to the point where they were inaccessible by standard techniques. *Nelson*, 541 U.S. at 640. The Warden responsible for carrying out the execution informed Nelson that a "cut-down" procedure would be utilized to access his veins. *Id.* at 641. Nelson sued to prevent the use of this procedure, alleging that it constituted cruel and unusual punishment in violation of the Eighth Amendment. Nelson sought injunctive relief, both preliminary and permanent. In his prayer for relief, Nelson also sought an order "staying [his] execution." *Id.* at 648.

The district court in *Nelson* dismissed the complaint on the ground that it constituted an unauthorized successive habeas application. The Eleventh Circuit affirmed. The Supreme Court reversed and allowed Nelson's challenge to the cut-down procedure to proceed under 42 U.S.C. § 1983.

The Supreme Court did not decide generally how to characterize what it termed "method-of-execution" challenges. *Nelson*, 541 U.S. at 644. Rather, it left open the issue of whether Section 1983 can be used to challenge a procedure that is a ***necessary*** part of administering lethal injections. *Id.* But, Nelson's particular challenge was allowed to proceed under Section 1983 because the cut-down procedure was not "a statutorily mandated part of the lethal injection protocol;" the cut-down procedure was alleged by Nelson to be unnecessary; and Nelson made clear that he was not seeking to preclude execution by alternative methods. *Id.* at 644-47. Thus, whether a suit challenging some aspect of an execution is cognizable under § 1983 and *Nelson* depends upon: (1) whether the challenged protocol is a statutorily mandated part of the execution; (2) whether the challenged protocol is necessary for administering lethal injection; and (3) whether the plaintiff is seeking to preclude execution by alternative methods. *Id.*

In the instant case, plaintiff does not challenge either the fact of his conviction or his sentence. After a trial in which plaintiff was found guilty of capital murder, the Court pronounced a sentence of "death" as authorized by § 12.31 of the Texas Penal Code. The Texas Penal Code does not specify the means by which a sentence of "death" is to be carried out. Article 43.14 of the Texas Code of Criminal Procedure, however, does provide Texas' current means of execution. That article provides:

> Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the institutional division of the Texas Department of Criminal Justice.

Tex. Code Crim. Proc. art. 43.14 (Vernon Supp. 2004-2005). In this suit, plaintiff does not challenge the general power of the defendants to carry out plaintiff's sentence of "death" by

"intravenous injection of a substance or substances in a lethal quantity sufficient to cause death." Plaintiff only challenges in this claim the particular substances that defendants have themselves decided to inject plaintiff with.

First, the combination of chemicals selected by defendants is not a statutorily mandated part of plaintiff's sentence or execution.[6] The Texas legislature specifically left the details of the "execution procedure" to the Director of the Institutional Division of the Texas Department of Criminal Justice. Texas statutory law mandates only that defendants intravenously inject substances in a lethal quantity sufficient to cause death. Therefore, a finding of unconstitutionality would not require "statutory amendment or variance" nor impose significant costs on the State and the administration of its penal system.[7] *See Nelson*, 541 U.S. at 644.

Second, the challenged protocol is not necessary for administering lethal injection. Indeed, the gravamen of plaintiff's claim, as in *Nelson*, is that defendants intend to inject him with entirely frivolous chemicals – including one that will act to paralyze him, will not contribute towards his death, and will intolerably and unnecessarily increase the risk of pain during the execution by acting to dilute the initial short-acting anesthetic. Additionally, the combination of chemicals chosen by defendants is not a necessary component of lethal injection. It is true that plaintiff must be injected with some chemical or some combination of chemicals to effect his sentence of death by lethal injection, but this particular combination – and indeed each drug

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[6] To the extent that the specific chemical combination and administration of the chemicals used by defendants is considered part of plaintiff's sentence, the sentence becomes constitutionally problematic as a result of defendant's secretiveness surrounding the execution process. Certainly, due process and the Eighth Amendment at a minimum prevents a person from having a sentence pronounced upon him that is at all times kept secret by the State until the moment of execution.

[7] Indeed, because defendants do not even publish any lethal injection protocol, a finding of unconstitutionality would impose very little administrative costs upon them to alter their execution protocol to come into compliance with the Eighth Amendment.

individually – is wholly unnecessary. Third, plaintiff is not seeking to preclude execution by alternative methods. Plaintiff does not object to defendants executing him by lethal injection in a manner that comports with the Eighth Amendment: utilizing a combination and quantity of a drug or drugs – administered according to an approved protocol that includes sufficient safeguards – that ensures needless pain is not inflicted upon him and minimizes the risk of torture. In short, in a manner that at minimum comports with veterinarians' standards for euthanizing pets. Plaintiff is not "unable or unwilling to concede acceptable alternatives" to the current injection protocol. *Id.* at 645.

Each of the factors that led the Supreme Court to allow Nelson's case to proceed under Section 1983 is present here. This claim, like *Nelson*, does not present the question of how generally to characterize method-of-execution claims.[8] Rather, *Nelson* is directly applicable and is not distinguishable in any meaningful way. Plaintiff's lethal injection claim, therefore, is properly brought pursuant to 42 U.S.C. § 1983.

C. Plaintiff is equitably entitled to the permanent injunctive relief he seeks.

Nelson and, more recently, the Fifth Circuit's decision in *Harris v. Johnson*, 376 F.3d 414 (5th Cir. Jun. 30, 2004), considered equitable factors in the course of their opinions. Neither of these cases may be relied upon to dispose of plaintiff's first claim in this action.

In *Harris*, the plaintiff, a death-sentenced inmate with a scheduled execution, filed suit raising a claim similar to plaintiff's first claim. After the district court granted a temporary

[8] Should this Court decide that plaintiff does present a method-of-execution challenge, it still must answer the question the Supreme Court explicitly left open in *Nelson*: whether method-of-execution challenges may properly be brought pursuant to 42 U.S.C. § 1983. *See Nelson*, 124 S.Ct. at 2124 ("If on remand and after an evidentiary hearing the District Court concludes that use of the cut-down procedure...is necessary for administering the lethal injection, the District Court will need to address the broader question, left open here, of how to treat method-of-execution claims generally.").

restraining order precluding defendants from executing Harris with the chemical combination that he challenged, the Fifth Circuit vacated the injunction and ordered the suit dismissed. *Harris*, 376 F.3d 414 (5th Cir. 2004).

The *Harris* Court began by noting that Harris had been on death row for 18 years yet had chosen to file suit against the defendants only when his execution was "imminent." 376 F.3d at 417. It assumed he waited this long to challenge a lethal injection protocol "that the state has used for an even longer period of time" than his wait on death row and that Harris could not claim he was "unaware of the state's intention to execute him by injecting the three chemicals he now challenges." *Id.* The *Harris* Court then proceeded to reject four arguments proffered by Harris "to explain the reasonableness of putting off his claim until this time." *Id.* at 417-19. The *Harris* Court did not offer its own rationale as to Harris' ineligibility for equitable relief other than the imminence of his execution.

Harris held that plaintiff's lethal injection claim[9] should be dismissed because his execution was imminent at the time he raised this claim. The Fifth Circuit's decision in *Harris*, however, was wrongly decided, misreads the Supreme Court's decision in *Nelson*—upon which it relied—by conflating equitable entitlement to injunctive relief with entitlement to overly-broad requests for stays of execution,[10] and ultimately turned the requirements for injunctive relief on their head and ignored longstanding federal standing and ripeness doctrine.

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[9] Plaintiff's first claim in this action with respect to the drugs defendants intend to inject is his lethal injection claim.

[10] In *Nelson*, the Supreme Court sharply distinguished between treatment of requests for narrow injunctive relief and requests for stays of execution, because Nelson had asked for *both*. *Nelson*, 541 U.S. at 647-48. Nelson requested permanent and temporary injunctive relief "to enjoin the State's use of the cut-down, not his execution by lethal injection." *Id.* at 648. In a separate request, however, Nelson "explicitly requested that the District Court stay his execution, seemingly without regard to whether the State did or did not resort to the cut-down." *Id.* It is that third request—to stay an execution even if unnecessary to redress the complaint—for which an inmate who makes a

In fact, plaintiff *is* equitably entitled to the prospective injunctive relief he seeks with respect to his first claim, and, ironically, the imminence of his execution is actually a *prerequisite* for such relief. Indeed, imminence of execution is a *prerequisite* even for *federal jurisdiction* in this case.

1. Imminence of execution is a prerequisite for federal jurisdiction.

Plaintiff has filed his complaint at the earliest time at which any Article III federal court could possibly consider it. In order for an Article III court to have jurisdiction under the Constitution, there must be a case or controversy. U.S. CONST. art. III, § 2, cl. 1. The case-or-controversy requirements "state fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984). The doctrines of standing and ripeness are both elements of case-or-controversy requirements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[I]rreducible constitutional minimum" of standing "is an essential and unchanging part of the case-or-controversy requirement."); *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003) (ripeness doctrine is drawn from Article III limitations on judicial power and may be considered on a court's own motion). Together, these two doctrines require that a plaintiff who seeks to challenge the conditions of his execution –

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last minute claim can be deemed equitably disentitled. *Id.* ("By asking for broader relief than necessary, petitioner undermines his assertions that: (1) his § 1983 suit is not a tactic for delay, and (2) he is not challenging the fact of his execution, but merely a dispensable preliminary procedure."). Plaintiff here is not requesting broader relief than is necessary to redress his complaint, and he is not requesting a stay of execution. As a result, the Supreme Court's pronouncements in *Nelson* regarding equitable entitlement to last-minute requests for stays of execution, erroneously relied upon by the Fifth Circuit in *Harris*, simply do not apply here. Plaintiff's first claim cannot be dismissed on the basis of *Harris* or *Nelson*.

conditions that are at the sole discretion of defendants – must wait until after his state and federal appeals have run their course and execution becomes imminent.[4]

a. Defendants have sole discretion over the lethal injection protocol and are free to alter it at any time.

Under Texas law, defendants are given by statute the authority and duty to establish and administer a lethal injection protocol.[5] *See* TEX. CODE CRIM. PROC. art. 43.14 (Vernon's 2003). The lethal injection protocol determined by the Director of TDCJ has never been published or formally promulgated and may be unilaterally changed – including the combination of chemicals – at the discretion of the defendants. According to defendants themselves, "Information about execution procedures is held in the strictest confidence, is generally not reduced to writing, and is known to only a few people within the Department."[6] *See* "Death Row Facts," available at http://www.tdcj.state.tx.us/stat/drowfacts.htm. *See* Exhibit 1 (Jan. 2, 2004, letter from James Hall to Alberta Phillips). Thus, defendants have been free throughout the last twenty years to alter their confidential execution procedures, including their selection and administration of

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[4] At a hearing on the motion for a temporary restraining order in *Harris*, the defendants would not concede that such a claim, if brought earlier, would not be subject to ripeness and standing challenges.

[5] Article 43.14 of the Texas Code of Criminal Procedure provides:

> Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the institutional division of the Texas Department of Criminal Justice.

TEX. CODE CRIM. PROC. art. 43.14 (Vernon's 2003).

[6] The only thing known about defendants' execution protocol is the information revealed on their website:

> Lethal Injection Consists Of:
> Sodium Thiopental (lethal dose - sedates person)
> Pancuronium Bromide (muscle relaxant-collapses diaphragm and lungs)
> Potassium Chloride (stops heart beat)

chemicals, at any time ***and without informing anybody***. No individual death row inmate therefore has any legitimate expectation that this specific protocol will be used to execute him until his execution date nears and defendants continue to utilize it. Had plaintiff brought this challenge years before his execution date as *Harris* suggests he should have, his complaint would not have satisfied Article III of the Constitution.

b. Imminence of execution is a prerequisite for standing.

In order to possess standing, an individual plaintiff "must have suffered an injury in fact– an invasion of a legally protected interest which is (a) concrete and particularized, and (b) *actual or **imminent***, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added; internal citations and quotations omitted). *See also McConnell v. Federal Election Com'n*, 124 S.Ct. 619, 707 (2003) (actual or imminent injury required for standing); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (same); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (same); *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) (same); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998) (same); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (same); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (same); *U.S. v. Hays*, 515 U.S. 737, 742-43 (1995) (same); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (same); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (same); *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 331 (5th Cir. 2002); *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 386 (5th Cir. 2003). Thus, had plaintiff brought this suit any earlier, he would not have had standing to challenge the lethal injection protocol which may or may not have been used on him because the injury was not yet real or imminent.

As the Supreme Court explained in *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983):

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he *has sustained or is* ***immediately*** *in danger of sustaining* some direct injury as the result of the challenged official conduct and *the injury or threat of injury must be both real and* ***immediate***, not conjectural or hypothetical.

Lyons, 461 U.S. at 101-02 (internal citations and quotations omitted; emphasis added); *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998). *Lyons* involved a plaintiff who sued the City of Los Angeles and four of its police officers when he was injured as a result of being placed in a chokehold without provocation. Besides damages, the plaintiff also sought a permanent injunction against the City barring the use of such control holds in the future.

The Court decided that although this particular plaintiff had suffered the chokehold in the past, he could not demonstrate a likelihood that he would suffer it again in the future and hence there was no case or controversy with respect to his request for injunctive relief. In other words, there was no "real and immediate threat." 461 U.S. at 105. The Court went on to state that "past wrongs do not in themselves amount to that real and immediate injury necessary to make out a case or controversy." *Id.* at 103. That defendants have employed the same lethal injection protocol for more than twenty years against other people does not, therefore, confer standing on any given plaintiff.[11] The plaintiff himself must immediately be threatened with such conduct.

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[11] It should be noted there is no evidence whatsoever that defendants have maintained the same lethal injection protocol for twenty years. The Fifth Circuit in *Harris* merely assumed – without evidence – that defendants had not. In fact, defendants *have* changed what they refer to as their "execution procedures" many times. Whether these changes have altered the lethal injection protocol itself is unknown, because it is kept a secret.

Until now, plaintiff was not personally under any imminent or immediate threat from defendants' prior conduct. He could not know ten years ago, let alone one or two years ago, how defendants would threaten to execute him, since this was at all times confidential and within their discretion to alter at any time. Having passed through his appeals just one week ago and defendants now threatening to execute him with a superfluous and unnecessary combination of chemicals, he only presently had standing to seek injunctive relief against them.

c. Imminence of execution is a requirement for ripeness.

Ripeness is a doctrine designed, inter alia, to prevent the courts from entangling themselves in abstract disagreements over administrative policies, and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807 (2003). As the Supreme Court explained in *United Public Workers v. Mitchell*, "[a] hypothetical threat [to the plaintiff] is not enough" to create federal jurisdiction. *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). For a claim to be ripe, and hence cognizable under Article III of the Constitution, the harm facing the plaintiff must be immediate or imminent. Until the Supreme Court denied plaintiff's petition for writ of *certiorari* in connection with his federal habeas corpus challenge to the legality of his conviction and sentence, the threat presented to plaintiff by the chemical combination that the State uses to carry out lethal injections was entirely "hypothetical." *See also Caprock Plains Federal Bank Ass'n v. Farm Credit Admin.*, 843 F.2d 840, 844-45 (5th Cir. 1988).

In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, the Supreme Court was confronted with a lawsuit by an environmental group regarding a land and resource management plan that the National Forest Service had developed for the Wayne National Forest which, the environmental

groups maintained, improperly favored "clearcutting." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 731-32 (1998). The Court held that the case was not yet ripe for review due to the fact that there were ample steps and obstacles that had to be taken and overcome before the plan could actually pose a real threat to the plaintiffs' interests:

> Nor have we found that the Plan now inflicts significant practical harm upon the interests that the Sierra Club advances–an important consideration in light of this Court's modern ripeness cases. As we have pointed out, before the Forest Service can permit logging, it must focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court. *The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain. Any such later challenge might also include a challenge to the lawfulness of the present Plan if* ***(but only if)*** *the present Plan then matters, i.e.,* ***if the Plan plays a causal role with respect to the future, then-imminent, harm from logging.***

Id. at 733-34 (emphasis added). In all material respects, plaintiff's case is analogous to the case the Supreme Court confronted in *Sierra Club*. Because defendants are free to alter their execution protocol at any time and for any reason, harm from any given execution protocol can *only* be ascertained as the date for the execution nears and the protocol to be used can be more certainly identified, which is generally only after state and federal post-conviction litigation ends. Indeed, until the completion of federal habeas corpus proceedings, in the course of which the petitioner argues that the State has no lawful authority to execute him, the defendant's lethal injection protocol does not "matter," within the meaning of *Sierra Club* and a challenge to that protocol is therefore not ripe.

2. Imminence of execution is a prerequisite for entitlement to prospective injunctive relief.

Had plaintiff brought this lawsuit any earlier than he did, he would not be entitled to the ultimate relief—a prospective permanent injunction—he seeks, because case-or-controversy

considerations "obviously shade into those determining whether the complainant states a sound basis for relief." *Lyons*, 461 U.S. at 103 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)). The "basic requirement" for the issuance of prospective equitable relief is the "likelihood of substantial and ***immediate*** irreparable injury." *Id.* (emphasis added). In other words, even if Article III courts were to have the constitutional power to hear a case such as this if it were brought years earlier as Harris would require, *plaintiff would not have been entitled to the equitable relief he seeks until now.*

In *Lyons*, the Supreme Court stated:

> Lyons fares no better if it be assumed that his pending damages suit affords him Article III standing to seek an injunction as a remedy for the claim arising out of the October 1976 events. The equitable remedy is unavailable absent a showing of irreparable injury, *a requirement that cannot be met where there is no showing of any real or immediate threat* that the plaintiff will be wronged again--a "likelihood of substantial and immediate irreparable injury." *O'Shea v. Littleton*, 414 U.S., at 502, 94 S.Ct., at 679. The speculative nature of Lyons' claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled.

Lyons, 461 U.S. at 111 (emphasis added). Plaintiff's situation is no different. Because defendants are free under Texas law to unilaterally alter their confidential lethal injection protocol at any time, the threat of being executed in this manner when plaintiff first arrived on death row was entirely speculative. According to defendants' website, the average length of time an inmate spends on death row before being executed is 10.43 years. *See* "Death Row Facts," available at http://www.tdcj.state.tx.us/stat/drowfacts.htm. Requesting injunctive relief from a federal court with respect to State action ten years down the road which *may or may not even occur* does not meet the "real and immediate" threat prerequisites for entitlement to equitable relief.

D. If plaintiff's Complaint is dismissed, he will have been denied his rights to access to the courts, to equal treatment under the law, and to due process in violation of the First, Fifth and Fourteenth Amendments.

"It is clear that ready access to the courts is one of, perhaps the, fundamental constitutional right." *Cruz v. Hauck*, 475 F.2d 475, 476 (5th Cir. 1973). Inmate access to the courts must be adequate, effective, and meaningful. *Bounds v. Smith*, 430 U.S. 817, 822 (1977). In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court extended the right of access to include "civil rights actions"–i.e., actions under 42 U.S.C. § 1983 to vindicate "basic constitutional rights." 418 U.S. at 579. The Supreme Court has generalized this right as such:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. *Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.*

Procunier v. Martinez, 416 U.S. 396, 419 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989) (emphasis added); *see also Cruz v. Hauck*, 515 F.2d 322, 332 (5th Cir. 1975).

The First Amendment likewise confers a right of access to the courts on prisoners and non-prisoners alike. Access to the courts is a constitutionally protected fundamental right and one of the privileges and immunities awarded citizens under Article IV and the Fourteenth Amendment. *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001). The First Amendment right to petition the government has as one aspect the right of access to the courts. *Id.* Accordingly, "[a] mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be 'adequate, effective, and meaningful.'" *Id.* at 858. *See generally Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir.

1983) (discussing the three constitutional bases upon which the fundamental right of access to the courts is premised).

If plaintiff is deemed not to be equitably entitled to the injunctive relief he requests *because* his execution is imminent, yet, as shown above, plaintiff is also not entitled to the injunctive relief he requests *unless* his execution is imminent, he will have been deprived his constitutional right of access to the courts. With respect to challenging the administration of his lethal injection by defendants, plaintiff would have no means for courts to ever decide the issue, because federal courts would be unable to address his claim either before his execution was imminent or after it became imminent. In short, plaintiff will be completely locked out of the federal courts.

Plaintiff has brought this suit within mere days after the completion of his federal post-conviction proceedings. If dismissal is appropriate in this case, then there remains no judicial avenue by which *any* person can challenge the administration of lethal injection. Such a result is inconsistent with the Constitution and the fundamental right of all persons to petition the courts for adjudication of their federal rights.

Similarly, dismissal on these grounds will violate plaintiff's rights to due process and equal protection, because the courts will be applying one standard to death row inmates seeking to challenge state action regarding the administration of lethal injection and another standard for everybody else without any rational basis for doing so. The general rule requiring imminence of injury for entitlement to injunctive relief simply cannot be squared with a rule in which imminence of injury *disentitles* a death-sentenced inmate from injunctive relief. There is no rational basis for deviation in the present case from the general rule that imminence of injury is a prerequisite for entitlement to prospective injunctive relief.

III. DEFENDANTS ARE ACTING WITH DELIBERATE INDIFFERENCE TO PLAINTIFF'S MEDICAL NEEDS IN WITHHOLDING THEIR PROTOCOL FOR OBTAINING VENOUS ACCESS AND IN POTENTIALLY PERFORMING MEDICALLY INVASIVE PROCEDURES ON PLAINITIFF WITHOUT THE PROPER SAFEGUARDS IN PLACE.

Plaintiff has a history of difficulty giving blood. Specifically, medical personnel have had difficulty locating veins in his arms from which they can draw blood. As a result, plaintiff has typically had blood drawn not from his arm, as is usual, but from the back of his hand, where the veins are smaller. *See* Exhibit 7 (Declaration of Melvin White). Drawing blood in this manner is not preferred, is more painful, and takes longer than from the arm.

In order to inject plaintiff with the drugs that will execute him, Defendants must obtain IV access by inserting two needles in his veins. IV access can typically be obtained through a peripheral vein—veins that are located in the arms, legs, hands, or feet. Peripheral access cannot always be obtained, however. It is more difficult to insert needles for an IV than to draw blood because of their size. It is also more difficult to find suitable veins to insert two needles than to insert only one. It is for this reason that plaintiff's ability to give blood through the back of his hand does not ensure that defendants will be able to locate a suitable peripheral vein from which to gain IV access. Additionally, the veins utilized for lethal injection should be larger than those required to draw blood, because the injection may cause smaller veins to collapse.

When access to suitable peripheral veins cannot be obtained, resort to a medically invasive procedure must be utilized to gain access to a central vein, such as the internal jugular (neck), subclavian, or femoral (groin) veins. There are two primary types of procedures to gain access to central veins for IV placement: the cut-down procedure and percutaneous techniques. Both are medically invasive procedures requiring appropriate safeguards, but the cut-down

procedure is more intrusive and should not be used unless less invasive methods of access have been ruled out as inappropriate for the circumstances.

The cut-down procedure is a potentially dangerous surgical procedure requiring deep incisions into the arm, leg, or chest to locate large, uncompromised veins. It is medically acceptable only "when conducted in the correct setting, by a properly trained physician, and where less intrusive procedures are unavailing." Brief of Laurie Dill, M.D., et. al., as Amici Curiae in Support of Petitioner at 4, *Nelson v. Campbell*, 541 U.S. 637, 2004 WL 234123 (2004). The procedure causes considerable pain and distress, and risks include severe hemorrhage from the rupturing of large blood vessels, among others. *Id.* For these reasons, cut-down procedures should only be undertaken in an appropriate medical setting[12] by specialized physicians who have appropriate expertise.[13] *Id.* at 5-6.

Percutaneous techniques are less intrusive than the cut-down procedure and are the preferred means when necessary to access central veins. The most common technique is percutaneous central line placement, which utilizes a hollow needle and wire to secure access. *Id.* at 7. Percutaneous methods, although less invasive than the cut-down procedure, still require physician involvement and a suitable environment in which to perform them.

In light of the potential problems in obtaining peripheral venous access in plaintiff, counsel for plaintiff attempted to determine how defendants intended to act in the event they could not utilize the vein in plaintiff's arm to gain IV access. On October 19, 2005, counsel

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[12] "All of the complications that can arise require ready access to equipment found only in the hospital setting, and to trained staff who can competently assist the physician." *Id.* at 6.

[13] "Emergency medicine, surgery, anesthesiology and cardiology are the four areas of medicine most likely to provide doctors with experience in cut-down procedure. Doctors outside of these specialties may well have never performed a cut-down." *Id.* at 6 n. 5.

placed a telephone call to the Warden's office of the Huntsville Unit[14] and was referred to the Office of the General Counsel for the Texas Department of Criminal Justice (TDCJ). Plaintiff's counsel was contacted on October 20 by a representative from that office and was told that in the event plaintiff's arm was insufficient to gain IV access, a suitable vein would be found. Counsel requested more information, such as what constitutes a suitable vein and how access to such a vein would be obtained. Counsel was contacted later in the day and was told that that a cut-down procedure was not an option.

Although plaintiff was assured that a cut-down procedure was not an option, plaintiff does not know how defendants intend to gain IV access should they be unable to locate a suitable peripheral vein. In that case, the only option to initiate the lethal injection is to utilize a medically invasive procedure to gain access to a central vein. Because defendants keep their protocol a secret, because there are no witnesses to defendants' insertion of the IV, and because no autopsy or other medical review of the body is conducted other than pronouncement of death following the injection, plaintiff cannot be satisfactorily assured that defendants will not resort to a cut-down to obtain a suitable vein. Nor does plaintiff know whether defendants intend to resort to some other means of central venous access besides a cut-down procedure, such as percutaneous techniques, should it be unable to obtain peripheral venous access.

Plaintiff has been kept in the dark about how defendants will attempt to gain IV access and about what safeguards they have in place to ensure his medical needs are met and he is not subjected to cruel and unusual punishment prior to his lethal injection. Plaintiff believes defendants may resort to an invasive procedure if necessary to locate a suitable vein and, further, that defendants do not have adequate safeguards and standards in place for these types of

[14] The Huntsville Unit is where plaintiff will be executed.

procedures should they turn to them. If defendants were to resort to invasive procedures, plaintiff does not know if there would be any physician involvement at all or, if so, what the experience and qualifications of that physician are. In light of these circumstances, this Court should step in to protect plaintiff from defendants' deliberate indifference to his medical needs and ensure his right to remain free from cruel and unusual punishment is protected.

CONCLUSION

Plaintiff, through this action, does not seek to overturn his conviction or sentence of death by lethal injection. He asks only for protection of his civil rights under the law. As Chief Justice Marshall asserted so long ago, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection...." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). The enforcement and punishment of criminal acts is undisputedly an important and legitimate public concern. These goals, however, must be achieved in a manner consistent with the protections and procedures derived from the Constitution. Because of defendants' deliberate indifference to the constitutionally intolerable risk that their planning and administration of lethal injection will result in needless suffering and pain to plaintiff and because defendant's actions do not comport with evolving standards of decency, plaintiff is entitled to the redress he seeks through 42 U.S.C. § 1983 and any other relief to which he is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Plaintiff's Memorandum of Law in Support of Complaint has been served on the following by Federal Express on this 21 day of October, 2005.

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EXHIBIT

1

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Gary Johnson
Executive Director

Carl Reynolds
General Counsel

January 2, 2004

Ms. Alberta Phillips
Austin American-Statesman
Editorial Department
305 South Congress Ave.
Austin, Texas 78704

Re: Request for Information Dated December 12, 2003

Dear Ms. Phillips:

This responds to your requests dated December 9, 2003 and December 12, 2003 (except the second part of item # 1 of your December 12, 2003 request) for information relating to the execution procedures for persons sentenced to death in Texas. That part of item #1 will be addressed via separate correspondence.

Information about execution procedures is held in the strictest of confidence, is generally not reduced to writing, and is known to only a few people within the Department. That confidentiality is maintained to assure that security procedures established for executions are not compromised. Thus, to the extent that we have written policies and procedures responsive to your request, that information has been found to be confidential and not available to the public. See OR 2001-2850 dated July 2, 2001 and OR 2003-1091 dated February 19, 2003. Because the information found to be excepted from release by the above noted opinions is exactly the same information responsive to much of your requests, we decline to make it available to you pursuant to Govt. Code §552.301(a). The Attorney General has made it quite clear that a governmental body need not request a decision if there has been a previous determination that the requested material falls within one of the exceptions to disclosure. See ORD 673 (2001); ORD 665 (2000).

Responding to other items of your requests not covered above, it is my understanding that the TDCJ Public Information Officer has already provided to you information regarding the dosages of the three chemicals used in lethal injections. Also, with regard to drugs used in the execution process and policies about handling those substances, the Department holds a DEA controlled substances registration certificate. See the applicable federal regulations with regard to policies about handling those controlled substances. (Title 21, Code of Federal Regulations 1300 *et seq.)*. We have no information to indicate missing, misplaced or stolen drugs used in the execution

process. Neither autopsies nor toxicology tests are performed on executed inmates since execution is carried out pursuant to order of the court. We have no information on "botched" executions.

With regard to your questions about policies for handling of controlled substances and missing, misplaced or stolen drugs, assuming your questions relate to drugs used in the execution process, we have no responsive written policies, but are vigilant in ensuring proper and secure storage and replacement prior to expiration date as set out in the above noted federal regulations.

Finally, we have no written information responsive to your request other than that noted above. I would point out that the only other responsive information of which we are aware is found in the Code of Criminal Procedure, Article 43.14, *et seq.*

Sincerely,

James L. Hall
Assistant General Counsel
OFFICE OF THE GENERAL COUNSEL

c: Carl Reynolds
General Counsel

JLH/kjb
020104006JH/OR/Phillips