**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

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| LINDA MARTINIANO,<br>Next Friend on behalf of Paul Reid,<br><br>Plaintiff,<br><br>v | ) | No ___________<br>Death Penalty Case<br>EXECUTION DATE:<br>JANUARY 3, 2008 at 1:00 a m |
| GEORGE LITTLE, in his official capacity as Tennessee's Commissioner of Corrections; | ) | |
| RICKY BELL, in his official capacity as Warden, Riverbend Maximum Security Institution; | ) | |
| GAYLE RAY, in her official capacity as Assistant Commisioner of Corrections; | ) | |
| ROLAND COLSON, in his official capacity as Assistant Commissioner of Corrections; | ) | |
| JULIAN DAVIS, in his official capacity as Executive Assistant to the Commissioner; | ) | |
| DEBBIE INGLIS, in her official capacity as General Counsel to the Department of Corrections; | ) | |
| JOHN DOE PHYSICIANS 1-100; | ) | |
| JOHN DOE PHARMACISTS 1-100; | ) | |
| JOHN DOE MEDICAL PERSONNEL 1-100; | ) | |
| JOHN DOE EXECUTIONERS 1-100;<br>JOHN DOES 1-100; | ) | |

Defendants )

## C O M P L A I N T

### I.
### Introduction

1 On January 3, 2007, the State of Tennessee ultimately intends to kill Paul Reid by lethal injection under its new lethal injection protocol On April 30, 2007, the State released its new protocol after a 90-day reprieve of all executions In ordering the reprieve, the Governor declared that the current execution protocols, "whether written or otherwise, used by the Department of Correction and related to the administration of death sentences in Tennessee, both by lethal injection and electrocution, [we]re ... revoked," See Governor's Executive Order No 43, and described those prior protocols as having "deficiencies in the written procedures," "sloppy," and "not adequate to preclude mistakes " The Governor directed the Department of Corrections (TDOC) to undertake a "comprehensive review of the manner in which death sentences are administered in Tennessee" including "to utilize all relevant and appropriate resources, including but not limited to scientific and medical experts, legal experts, and Correction professionals, both from within and outside the state of Tennessee " Id. Having concluded its "comprehensive" review, on April 30, 2007, the TDOC released a new lethal injection protocol, which is either similar to, or worse than, protocols used in other states (including, for example, Florida, California, North Carolina, Arkansas, and the federal government) where federal or state courts or other officials have refused to allow executions by lethal injection to proceed because of grave concerns about the constitutionality of such protocols.

2 To kill Mr Reid, the State intends to use the new 2007 protocol whereby he would be injected with a dose of sodium thiopental, then with a dose of pancuronium bromide (Pavulon),

and third with a dose of potassium chloride. As the District Court for the Middle District of Tennessee found in Harbison v. Little, No. 06-1206 (M.D. Tenn. 2007), the use of this protocol is unconstitutional. The sodium thiopental does not, and will not, sufficiently anesthetize Paul Reid. The use of pancuronium bromide is arbitrary, serves no legitimate interest, unreasonably risks the infliction of torture, and, at bottom, offends the dignity of humanity: Indeed, it cannot be used in Tennessee to kill a dog. Its use violates equal protection. The potassium chloride does not stop the heart. The use of this mixture of chemicals causes an unnecessarily painful and prolonged death experienced without total unconsciousness.

3. This Court should declare the 2007 Lethal Injection Protocol unconstitutional and enjoin its use on Paul Reid, as the District Court did in Harbison v. Little.

## II. Nature of Action

4. This action is brought pursuant to 42 U.S.C. §1983[1] for violations and threatened violations of the right of Paul Reid under the Eighth, Ninth, and Fourteenth Amendments, including the right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks equitable and injunctive relief.

## III. Plaintiff

5. Plaintiff Linda Martiniano is the next friend of inmate Paul Reid, who was found incompetent by the Federal District Court in this District. See Martiniano v. Bell, No. 06-00632

[1] The United States Supreme Court decisions in Hill v. McDonough, 547 U.S. ___, 126 S.Ct. 2096 (2006) and Nelson v. Campbell, 541 U.S. 647, 124 S.Ct. 2117 (2004) confirm that a civil rights action pursuant to 42 U.S.C. §1983 is an appropriate vehicle for a claim alleging that the procedures used to carry out a death sentence violate the Eighth Amendment.

(M.D Tenn.) (Docket Entry No 54). Ms Martiniano was subsequently appointed as next friend Mr. Reid is currently a death-sentenced inmate in the custody of Defendants and under the control and supervision of the Tennessee Department of Corrections He is held in the Brushy Mountain Correctional Institute, in Morgan County, Tennessee, but will be brought to Riverbend Maximum Security Institution in Davidson County, Tennessee, for his scheduled execution

## IV.
## Defendants

6. Defendant George Little is the Commissioner of the Tennessee Department of Corrections. Plaintiff sues Commissioner Little in his official capacity Defendant is a state actor acting under color of state law, and his actions in directing and developing the new execution protocol, and then seeking to execute or executing Paul Reid with that new execution protocol, as described *infra,* violate Mr Reid's constitutional rights, as described *infra*

7 Defendant Ricky Bell is the Warden of Riverbend Maximum Security Institution. Bell is directly in charge of executing Paul Reid Plaintiff sues Warden Bell in his official capacity Defendant is a state actor acting under color of state law, and his actions in helping to develop the new execution protocol, and then seeking to execute or executing Mr Reid with that new execution protocol, as described *infra,* violate Mr Reid's constitutional rights, as described *infra*

8 Defendant Gayle Ray is an Assistant Commissioner for the Tennessee Department of Corrections. Plaintiff sues Assistant Commissioner Ray in her official capacity Defendant is a state actor acting under color of state law, and her actions in helping to develop the new execution protocol, and then seeking to execute or executing Paul Reid with that new execution protocol, as described *infra,* violate Mr. Reid's constitutional rights, as described *infra*

9 Defendant Roland Colson is an Assistant Commissioner for the Tennessee Department of Corrections Plaintiff sues Assistant Commissioner Colson in his official capacity Defendant is a state actor acting under color of state law, and his actions in helping to develop the new execution protocol, and then seeking to execute or executing Paul Reid with that new execution protocol, as described *infra,* violate Mr. Reid's constitutional rights, as described *infra*

10. Defendant Julian Davis is the Executive Assistant to the Commissioner for the Tennessee Department of Corrections. Plaintiff sues Executive Assistant Davis in his official capacity. Defendant is a state actor acting under color of state law, and his actions in helping to develop the new execution protocol, and then seeking to execute or executing Paul Reid with that new execution protocol, as described *infra*, violate Mr Reid's constitutional rights, as described *infra*

11. Defendant Debbie Inglis is the General Counsel to the Tennessee Department of Corrections. Plaintiff sues Counsel Inglis in her official capacity Defendant is a state actor acting under color of state law, and her actions in helping to develop the new execution protocol, and then seeking to execute or executing Paul Reid with that new execution protocol, as described *infra*, violate Mr. Reid's constitutional rights, as described *infra*

12. Defendants John Doe Physicians 1-100 are any and all medical doctors involved in the prescription, procurement and/or administration of sodium thiopental, pancuronium bromide, and/or potassium chloride for use upon Paul Reid without the purpose to heal, but to cause Mr. Reid's death Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Paul Reid as described *infra* violate Mr. Reid's constitutional rights, as described *infra*.

13. Defendants John Doe Pharmacists 1-100 are any and all persons involved in procuring, prescribing, dispensing, and/or administering sodium thiopental, pancuronium bromide, and/or potassium chloride for use upon Paul Reid without the purpose to heal, but to cause Mr. Reid's death. Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Paul Reid as described *infra* violate Mr. Reid's constitutional rights, as described *infra*.

14. Defendants John Doe Medical Personnel 1-100 are any and all persons involved in using, preparing, or otherwise handling Paul Reid or sodium thiopental, pancuronium bromide, and/or potassium chloride in any attempt to administer or inject sodium thiopental, pancuronium bromide, and/or potassium chloride upon Mr. Reid without the purpose to heal, but to cause Mrm Reid's death. Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Paul Reid as described *infra* violate Mr. Reid's constitutional rights, as described *infra*.

15. Defendants John Doe Executioners 1-100 are any and all persons involved in using, preparing, or otherwise handling Paul Reid or sodium thiopental, pancuronium bromide, and/or potassium chloride in any attempt to administer or inject sodium thiopental, pancuronium bromide, and/or potassium chloride upon Mr. Reid to cause Mr. Reid's death. Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Paul Reid as described *infra* violate Mr. Reid's constitutional rights, as described *infra*.

16. Defendants John Does 1-100 are any and all other persons who are, or would be, involved in the prescription, procurement, dispensing and/or administration of sodium thiopental, pancuronium bromide, and/or potassium chloride for use upon Paul Reid without the purpose to heal,

but to cause Mr. Reid's death; or otherwise involved in the actual execution of Mr. Reid through the use of sodium thiopental, pancuronium bromide, and/or potassium chloride. Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Paul Reid as described *infra* violate Mr. Reid's constitutional rights, as described *infra*.

## V.
## Jurisdiction/Venue/Timeliness

17. In this action, Plaintiff invokes 28 U.S.C. §§1331 (federal question), 1343 (civil rights violations), 2201 (declaratory relief), and 2202 (further relief). This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. §1983.

18. Just seven days after Tennessee's new lethal injection protocol was promulgated, on May 7, 2007, Plaintiff promptly challenged the new protocol (which is the subject of this current complaint) by filing an administrative grievance with the Tennessee Department Of Corrections (TDOC) pursuant to TDOC Policy 501.01 and Tenn. Code Ann. §§ 4-3-603, 4-3-606, and 41-24-110.

19. Plaintiff's grievance was denied by Commissioner Little on May 21, 2007, and Defendants admit that Plaintiff has exhausted administrative remedies.

20. In an opinion denying relief to Paul Reid on direct appeal, on December 27, 2006, the Tennessee Supreme Court set Paul Reid's current execution date for January 3, 2008. See Reid v. State, 213 S.W.3d 792 (Tenn. 2006).

21. Thus, having properly exhausted administrative remedies, and having filed his complaint within one year of the decision of the Tennessee Supreme Court on direct appeal, Paul Reid's complaint is unquestionably timely. See Cooey v. Strickland, 479 F.3d 412 (6th Cir.

2007)(lawsuit challenging method of execution is filed within the statute of limitations if filed within one year of the decision of the state's highest court on direct appeal)

22. Venue is proper in this district under 28 U.S.C. §1391 and this Court has personal jurisdiction over the Defendants in this matter because the events giving rise to these claims will occur in Nashville, Tennessee, which is within the Middle District of Tennessee.

## VI. FACTS

23. Plaintiff relies on all facts, evidence, and testimony presented in the trial of Harbison v. Little, No. 3:06-cv-1206, 2007 U.S. Dist Lexis 72410 (M.D. Tenn. Sept. 19, 2007). Plaintiff requests this Court to take judicial notice of the record in the Harbison case

24. Paul Reid has been sentenced to death and is currently scheduled to be executed on January 3, 2008.

25. On February 1, 2007, Defendant Phil Bredesen, issued an Executive Order directing the Department of Corrections to "complete a comprehensive review of the manner in which the death penalty is administered in Tennessee," including to "establish and provide to me new protocols and related written procedures for administering death sentences in Tennessee, both by lethal injection and electrocution" by May 2, 2007.

26. The Governor's execution review team conducted their work in complete secrecy.

27. The contents of the 2007 Lethal Injection Protocol were revealed for the first time on April 30, 2007. The review team's Report on Administration of Death Sentences In Tennessee was delivered the following day

28. The State of Tennessee was deliberately indifferent in its development of the 2007 Lethal Injection Protocol.

29 The execution review team contained no members with medical or pharmacological expertise Team members included: Commissioner Little himself, Warden Ricky Bell, Assistant Commissioner Gayle Ray, Assistant Commissioner Roland Colson, General Counsel Debbie Inglis, and Executive Assistant Julian Davis Emails provided by the State of Tennessee, reveal that the "lead" member of the Lethal Injection Review Team was the Commissioner's Executive Assistant.

30. In its Report to the Governor, the Commissioner told the Governor that the Board had consulted with the Bureau Of Prisons in Terre Haute and went on a site visit to participate in their lethal injection training

31 The Commissioner's Report fails to reveal that the lethal injection protocol at the federal facility in Terre Haute has been suspended **by the agreement of the United States Attorney General** while concerns about the constitutionality of the lethal injection protocol are being examined. See Roane v. Gonzales, D.D.C. No 05-2337 (Feb. 16, 2007 Order On Unopposed Motion for Preliminary Injunction).

32 The State of Tennessee, through Defendants, seeks to execute Paul Reid by using the 2007 Lethal Injection Protocol described *infra,* which is also currently the only protocol established by Defendants

## THE NEW 2007 LETHAL INJECTION PROTOCOL

33 According to the written 2007 Lethal Injection Protocol devised and promulgated by Defendants, at Paul Reid's execution, Defendants intend to inject the following drugs into Mr Reid in order to kill him:

a 5 grams of Sodium Thiopental

b. 100 mg (1mg/mL) of Pancuronium bromide

c 100 mL of a 2 mEq/mL concentrate of Potassium Chloride

34. The Defendants' 2007 Lethal Injection Protocol, including the combination of chemicals (sodium thiopental, pancuronium bromide, and potassium chloride); the lack of proper training, qualifications, screening and review of the persons involved in the process; the absence of standardized procedures for administration of the chemicals; the absence of a sufficient anesthetic and any monitoring of anesthetic depth; and the absence of a back-up plan should problems arise during the protocol, creates a grave and substantial risk that Paul Reid will be conscious throughout the execution process and, as a result, will experience an excruciatingly painful and protracted death. In addition, the 2007 Lethal Injection Protocol, devised and promulgated by Defendants, demonstrates a deliberate indifference on the part of Defendants to the excruciatingly painful and horrifying death that will result from its use.

## LETHAL INJECTION CHEMICALS

### Sodium Thiopental

35. Anesthesia is the process of blocking the perception of pain and other sensations, creating insensibility to pain.

36. Sodium Thiopental is an ultra-short acting barbiturate.

37. In the 2007 Lethal Injection Protocol, the alleged purpose of sodium thiopental is to "depress[] the central nervous system, causing sedation or sleep, depending on the dose. It reduces oxygen flow to the brain and causes respiratory depression." See Tennessee's 2007 Lethal Injection Protocol, p.35 (attached as Exhibit 1).

38. Induction of anesthesia using thiopental occurs quickly, but its effect wears off in a matter of minutes. Sodium thiopental is used as an anesthetic in surgery because it enables an

anesthesiologist to quickly awaken a patient should complications arise It is usually used only during the preliminary phase of anesthesia administration Its effects also wear off more quickly when administered through a bolus dose, as Defendants would intend to do here

39. There are differing levels of anesthesia, and thus consciousness.

40. The human body reacts to various stimuli differs depending upon the level of anesthesia.

41 Plaintiff objects to the use of sodium thiopental in the 2007 Protocol for the following reasons:

a The 2007 Protocol fails to educate its readers (the execution team) that thiopental not only has a rapid onset, but also has a rapid withdrawal and that is may cause pain if the drug is infiltrated <u>See</u> Exhibit 1, p. 35.

b. Thiopental is used in surgery for the purpose of temporarily anesthetizing patients for sufficient time to intubate the trachea and institute mechanical support of ventilation and respiration Then, 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) The medical utility of thiopental derives from its ultrashort-acting properties: if unanticipated obstacles hinder or prevent successful intubation, patients will likely quickly regain consciousness and resume ventilation and respiration on their own Thus, if the intended amount of thiopental fails to reach the condemned inmate's brain (as can occur as a result of an infiltration, leakage, mixing error, or other causes), and the condemned inmate receives a near surgical dose of thiopental, the duration of narcosis will be brief and the inmate could reawaken during the execution process Then, a condemned inmate in Tennessee would suffer the same fate

that apparently befell Mr. Angel Diaz in Florida who was intended to receive a 5 gram dose of thiopental just as Paul Reid is intended to receive, but who did not, and then apparently experienced a conscious or semi-conscious response to the execution process.

c Sodium thiopental reacts differently based on a person's weight. The 2007 Protocol fails to address an individual prisoner's weight as related to the dosage of sodium thiopental necessary to effectively anesthetize him, but instead just indicates that a 5 gram dose will be given See Exhibit 1, p 35 In a recent study, Dr Leonardis Koniaris and Dr David Lubarsky found that body weight must be taken into account when using sodium thiopental as the sodium thiopental reacts differently in the body depending on weight. See Leonardis Koniaris et al, *Lethal Injection For Execution Chemical Asphyxiation?*, PLOS Medicine, Vol 4, Issue 4, April 2007 (Exhibit 2).

d The 2007 Protocol also fails to address the individual prisoner's medical condition and history as related to the effectiveness of sodium thiopental See Exhibit 1, p 35. Several regularly prescribed drugs at Riverbend Maximum Security Institution interfere with the ability of sodium thiopental to act properly as an anesthetic

e The thiopental as administered under the 2007 protocol does not induce adequate anesthesia In fact, during the execution of Philip Workman, Workman was talking two minutes after thiopental was administered, and Defendants did not establish that he was, in fact, unconscious when the other chemicals were administered

f. The 2007 Protocol also uses sodium thiopental despite the fact that findings made as a result of the autopsy of Robert Coe, who was executed in Tennessee in 2000, show that his serum thiopental levels were 10 mg/l, which as recent research establishes, is inadequate to establish unconsciousness. See Leonidas Koniaris, *et al*, *Inadequate Anaesthesia In Lethal Injection*

*For Execution*, 365 Lancet 1412-1414 (2005)(Exhibit 3). The 2007 Protocol ignores this medical evidence and instead calls for the same dosage of sodium thiopental (5 grams) that was purportedly given to Robert Coe in 2000. See Exhibit 1, p 35.

g. The 2007 Protocol fails to take into account a new study by Leonard Koniaris and David Lubarsky examining toxicology reports from prisoners executed by California and North Carolina, along with reports from witnesses to executions in other states, that confirms that some prisoners remained conscious during the administration of lethal drugs due to the ineffectiveness of sodium thiopental. See Leonardis Koniaris et al, *Lethal Injection For Execution Chemical Asphyxiation?*, PLOS Medicine, Vol. 4, Issue 4, April 2007 (Exhibit 2).

h The 2007 Protocol fails to provide for any monitoring of anesthetic depth as is necessary when using sodium thiopental See Exhibit 1, p 43 The only monitoring provided for by the 2007 Protocol is monitoring of the IV site via close-circuit camera, which is inadequate. See Exhibit 1, p 43. There is no monitoring of the inmate for anesthetic depth or of the IV lines and tubing during the administration of the drugs.

i. Where, for example, Florida and California now require such monitoring, where Missouri requires physical examination for unconsciousness, where such monitoring has been required by federal court order in North Carolina, and is required in veterinary practice, the 2007 protocol's failure to require anesthetic monitoring violates evolving standards of decency, while establishing deliberate indifference to the serious and substantial risk of torture arising from administration of pancuronium bromide and potassium chloride absent adequate anesthesia

j. This lack of monitoring coupled with the ineffectiveness of sodium thiopental has caused numerous botched executions in the United States.

1) The two most well-known botched executions in the United States related to the failure of sodium thiopental In Florida in December 2006, Mr Angel Diaz did not get an effective amount of sodium thiopental because the IV lines were improperly seated in his veins with through and through punctures As a result, none of the materials injected went to the right place. Instead, the drugs entered his bloodstream first through his flesh and muscle tissue. This process caused foot-long chemical burns on both arms from the sodium thiopental During execution, observers reported that Mr. Diaz moved and tried to mouth words. It took 34 minutes and 14 syringes of chemicals for Mr Diaz to die, during which he was clearly in pain, struggling for breath and grimacing Following the Diaz execution, Governor Bush ordered that all executions be stayed while a committee undertook a review of the Diaz execution and of lethal injection protocols in Florida in general, which were exactly the same as the 2007 Protocol here. Executions remain stayed in Florida under the Governor's order

2) During the May 2006 lethal injection of Joseph Lewis Clark, execution team members took over twenty minutes to insert one IV catheter into Mr Clark's arm According to protocol two catheters were necessary, but the team proceeded with only one After the single IV was inserted and the chemicals began to flow, Mr Clark remained breathing, legs moving, arms strapped down After minutes, he sat up several times and told executioners, "It's not working, it's not working " Minutes later, Mr Clark raised up again and said, "can't you just give me something by mouth to end this?" At that point, the team closed the curtain, and witnesses heard groans and moans from Mr. Clark as if he was in agony. Witnesses reported that the cries of pain lasted for about five or ten minutes and were followed by snores from Mr Clark. Obviously if the sodium thiopental had worked properly then Mr Clark would not have been able to cry out in pain, feel pain,

or sit up during the execution Ohio uses a lethal injection protocol that is similar to the 2007 Protocol here.

42 The danger of improper administration of sodium thiopental is exacerbated by the fact that the 2007 Protocol does not require medically trained personnel to supervise or assist in any way in the medical tasks necessary to prepare for the execution or during the execution. See Exhibit 1, p 32 (stating only that the person who inserts the IV shall have either some unspecified training, or be "authorized by law" to initiate the procedure) These critical, medical tasks include: mixing the sodium thiopental solution; setting up the IV line and associated equipment in order to ensure that fluids do not leak and are not misdirected; finding a usable vein and properly inserting the IV line in the proper direction into the vein; and, verifying that the drugs are flowing into the inmate's vein rather than into surrounding tissue. All of these critical, medical tasks require a high degree of specialized training which the 2007 fails to acknowledge or account for in any way:

43. As is clear from both medical studies and from experiences of other states, sodium thiopental, as used in the 2007 Protocol (without the assistance of an anesthesiologist or certified nurse anesthetist and at such a low dosage that fails to take into account either body weight or drug interaction), does not adequately anesthetize a person prior to the introduction of pancuronium bromide and potassium chloride, resulting in an excruciatingly painful and horrifying death as a result of the conscious asphyxiation by pancuronium bromide followed by the painful intense burn and cardiac arrest of potassium chloride.

**Pancuronium Bromide (Pavulon)**

44. As used in Tennessee's 2007 Lethal Injection Protocol, pancuronium bromide is supposed to "assist in the suppression of breathing and ensure death" See Exhibit 1, p 35

45 Pancuronium bromide, marketed under the name Pavulon, is a neuromuscular blocking agent which causes paralysis of the skeletal muscles of an individual

46 Pancuronium bromide does not affect the brain or nervous system, nor does it block the actual reception of nerve impulses in the brain or the passage of such impulses within the brain

47 Pancuronium bromide does not affect consciousness or the sensation of pain or suffering

48 An individual under the influence of pancuronium bromide, though paralyzed, still has the ability to think, to be oriented to where he is, to experience fear or terror, to feel pain, and to hear.

49 While pancuronium bromide paralyzes the diaphragm to prevent breathing, it does not affect the heart muscle.

50 Pancuronium bromide, administered by itself as a "lethal dose," would not result in a quick death; instead, it would ultimately cause someone to asphyxiate or suffocate to death while still conscious

51. If an individual is not properly anesthetized when injected with pancuronium bromide, he will consciously experience extreme pain while being completely paralyzed

52 Thus, an individual will undergo the terrorizing and excruciating experience of suffocation without the ability to move or to express the pain and suffering which he is experiencing as he is being suffocated

53. Because pancuronium bromide paralyzes all skeletal muscles including facial muscles and those used to speak or communicate through noises, an observer cannot detect, from outward appearance, any expression of pain, horror, or suffering experienced because of the use of

pancuronium bromide

54 Moreover, the paralyzing effect of pancuronium bromide also prevents any expression of the pain, horror, or suffering from any other source, such as potassium chloride which will activate the nerves of the venous system causing an extreme burning pain.

55 The use of pancuronium bromide under the 2007 Lethal Injection Protocol to paralyze Paul Reid greatly and unnecessarily and unreasonably increases the risk that a conscious prisoner will be subjected to a painful and protracted death

56 The use of pancuronium bromide in the 2007 Protocol as a "muscle paralytic" that will "assist in the suppression of breathing and ensure death" is unconstitutional. <u>See</u> Exhibit 1, p 35.

57 The 2007 Protocol fails to educate it readers (the execution team) regarding the true nature of pancuronium – that its paralytic nature blocks the ability to determine if someone is in pain. <u>See</u> Exhibit 1, p 35.

58. Death caused by the use of pancuronium bromide is gruesome, horrible, and painful Pancuronium bromide could not lawfully be used alone as the fatal agent because causing death by suffocation violates the Eighth Amendment's prohibition against cruel and unusual punishment It serves no legitimate penological purpose.

59 The use of pancuronium bromide is arbitrary, unreasonable, degrading to human dignity, and serves no legitimate interest

60 Because pancuronium bromide causes paralysis, suffocation, and the suffering attendant to such paralysis and suffocation, in 2001, Tennessee declared in the "Nonlivestock Humane Death Act" (Tenn. Code Ann. 44-17-301 *et seq.*) that pancuronium bromide cannot be used

to euthanize animals, because its use is not humane.

61 Where the use of pancuronium bromide is not "humane" to use on non-humans, it is arbitrary to claim that its use is "humane" on humans, and its use on humans to cause death violates basic precepts of human dignity

a. The use of pancuronium bromide in execution is unnecessary and arbitrary

b. The use of pancuronium bromide in execution is unreasonable and irrational

c. The use of pancuronium bromide in execution serves no legitimate state interest and is not narrowly tailored to any compelling state interest.

62 As Judge Trauger, found, the inclusion of pavulon in the current Tennessee protocol puts Mr Reid at risk for a "terrifying, excruciating death" Harbison v. Little, supra, Docket Entry No. 147, p. 19

**Potassium Chloride**

63 As used in Tennessee's 2007 Lethal Injection Protocol, potassium chloride is supposed to cause "cardiac arrest and rapid death." See Exhibit 1, p. 35 The 2007 Protocol fails to educate its reader (the execution team) about the true nature of potassium chloride – that it would cause extreme pain in someone who is not properly anesthetized. See Exhibit 1, p. 35.

64. The administration of potassium chloride is extremely painful, because it activates all the nerve fibers inside the venous system. Because veins are replete with nerve fibers, the administration of potassium chloride into the veins creates extreme pain

65 In the absence of adequate anesthesia, the introduction of potassium chloride, like the introduction of pancuronium bromide, creates extreme and excruciating pain

66. Under Tennessee's 2007 Lethal Injection Protocol, 100 mL of a 2 mEq/mL

concentrate of potassium chloride are introduced into the body through a vein. See Exhibit 1, p 35

67. This method of administering this amount of potassium chloride is inadequate to stop the heart.

68. This is confirmed by the autopsy of Robert Coe, which demonstrates that his vitreous potassium was 9 mEq/l (9mmol/l) It actually takes a serum concentration of more than 16 mEq/l (16mmol/l) of potassium to arrest the heart

69. Moreover, an April 2007 study confirms that potassium chloride is not the lethal agent in lethal injection See Leonardis Koniaris et al, *Lethal Injection For Execution: Chemical Asphyxiation?*, PLOS Medicine, Vol. 4, Issue 4, April 2007

70. Indeed, the potassium component of the 2007 Protocol (100 mg/mL of a 2mEq/ml concentrate)(See Exhibit 1, p 35), "is wholly ineffective in causing electrical arrest of the human heart." In fact, it is a pathophysiological impossibility, based upon well-established and accepted mathematical equations, for the heart to succumb to electrical arrest due to the potassium component of the lethal injection protocol Any cardiac arrest that may occur during an execution by lethal injection under the 2007 Protocol, is entirely due to suffocation and lack of oxygen delivery, and not electrical arrest due to potassium injection The suffocation and lack of oxygen delivery is caused by the paralysis induced by the use of pancuronium bromide See Exhibit 4 (Affidavit of James Ramsey).

71. As a result, where the potassium chloride is not sufficient in either the manner of delivery or dosage to cause cardiac arrest, it is clear that under the 2007 Protocol an inmate will die an excruciating painful and horrifying death by asphyxiation because of the paralysis caused by pancuronium bromide, while suffering the severely painful effects of the potassium chloride.

## ADDITIONAL DEFICIENCIES IN TENNESSEE'S 2007 LETHAL INJECTION PROTOCOL

72 The 2007 Lethal Injection Protocol was adopted by the Governor upon a recommendation from the TDOC on April 30, 2007 without any medical research or review to determine that a prisoner would not suffer pain beyond that attendant to the extinguishment of life.

73. Under the 2007 Protocol, an execution by lethal injection requires the participation of the Commissioner, the Warden, the Deputy Warden, the Administrative Assistant, the Death Watch Supervisor and assigned officers, a Chaplain, a Medical Doctor and associate, an "Execution Team," an "IV Team," and an "Extraction Team."

74 The 2007 Protocol contains no description of the "IV Team" or the "Extraction Team."

75 The 2007 Protocol fails to indicate how the members of the IV Team or Extraction Team are qualified to participate, or what screening, if any, has been done to insure that these members do not have a criminal background, mental health issues, personnel and disciplinary issues, drug or alcohol issues.

76. As to each member participating in the lethal injection, including the Execution Team, the IV Team, and the Extraction Team, as well as the Warden, the Deputy Warden, the Administrative Assistant, the Death Watch Supervisor and assigned officers, a Chaplain, a Medical Doctor and associate, the 2007 Protocol fails to indicate how each member is qualified for the duties they have been assigned, what training, if any, each person has had to equip them for their duties, and what screening, if any, has been done to insure that each person is competent to perform their duties and to insure that these persons do not have a criminal background, mental health issues,

personnel and disciplinary issues, drug or alcohol issues. See Exhibit 1, p.32

77. The 2007 Protocol fails to indicate what training, education, or licensing the IV Team and any medical doctor or associate has, if any, and if any training, education, or licensing is required for their selection for those positions See Exhibit 1, pp 20, 21, 32 Moreover, the 2007 Protocol fails to indicate how the medical doctor is qualified to participate, how he or she is chosen, by whom he or she is chosen, or what screening, if any, has been done to insure that the medical doctor does not have a criminal background, mental health issues, personnel and disciplinary issues, drug or alcohol issues

78 The 2007 Protocol fails to indicate how specialized members of the execution team identified as "two (2) EMTs - Paramedic - Certified Emergency Medical Technician"are qualified to participate, how they were chosen to participate, by whom they were chosen, or what screening, if any, has been done to insure that these members do not have a criminal background, mental health issues, personnel and disciplinary issues, drug or alcohol issues. See Exhibit 1, p.32 Moreover, the 2007 Protocol fails to indicate what role these EMTs - Paramedic - Certified Emergency Medical Technician" play on the execution team See Exhibit 1, p 32.

79. The 2007 Protocol fails to indicate how the "three correctional officers" who "received IV training through the Tennessee Correction Academy by qualified medical professionals" are qualified to participate as part of the IV team, how they were chosen to participate on the IV team, by whom were they chosen to participate, what screening, if any has been done to insure that these specific members do not have a criminal background, mental health issues, personnel and disciplinary issues, drug or alcohol issues, and what screening has been done, if any, to insure that they can competently perform their duties as part of the IV team See Exhibit 1, p 32

Moreover, the 2007 Protocol fails to specifically indicate that these "three correctional officers" actually make up the IV team. See Exhibit 1, p 21, 32 In addition, the 2007 Protocol fails to explain or elaborate on the alleged "IV training through the Tennessee Correction Academy by qualified medical professionals " See Exhibit 1, p. 32.

80 The 2007 Protocol fails to indicate what specific training regarding execution by lethal injection is required for members of the execution team. See Exhibit 1, p 33 The 2007 Protocol only indicates that execution team members are required to read the manual and that "the Warden or his designee holds a class during which the manual is reviewed and clearly understood by all participants." See Exhibit 1, p 33 The 2007 Protocol does not explain how the Warden insures that the manual is clearly understood by all participants nor does it explain who teaches the science and medical technique to be utilized in the manual. See Exhibit 1, p. 33.

81 The 2007 Protocol fails to indicate what instruction the Executioner receives, by whom that instruction is given, and what qualifications, education, training, and licensing that individual has to provide any such instruction. The 2007 Protocol only says that "The Executioner receives initial and periodic instruction from a qualified medical professional " See New Protocol, p. 33. Moreover the 2007 Protocol fails to define the role of Executioner, fails to identify the Executioner, how he or she is chosen, by whom he or she is chosen, what qualifications or training he or she has, or what screening, if any, has been done to insure that the Executioner does not have a criminal background, mental health issues, personnel and disciplinary issues, drug or alcohol issues

82. The 2007 Protocol fails to indicate how "the Warden or his designee" chooses one member from the execution team who has access to the Lethal Injection Chemicals during their

procurement and storage See Exhibit 1, p 36 The protocol indicates that "the Warden or his designee" (the designee is not identified) instructs one member of the execution team to "check[] the supply of chemicals and expiration dates," to order additional chemicals, to pick up the additional chemicals and deliver them to RMSI, and to "inventory" the chemicals prior to an execution date. See Exhibit 1, p 36 The 2007 Protocol fails to indicate what qualifications, training, and screening is done to insure that the execution team member who is given this access to the lethal injection chemicals does not have a criminal background, mental health issues, personnel and disciplinary issues, or drug or alcohol issues.

83 The 2007 Protocol fails to indicate who prepares and mixes the "Lethal Injection Chemicals" (other than "one member of the execution team") and what training, education, or licensing any member of the execution team has in the preparation and mixing of chemicals. See Exhibit 1, p 38 Based on the vague descriptions of the execution team, there is no one who has pharmaceutical training or knowledge of drug compounding to mix the drugs Because sodium thiopental is extremely unstable, it must be carefully and properly mixed so that it does not crystallize, a technical task that requires significant training in pharmaceutical calculations.

84 Moreover, the 2007 Protocol provides only that "another member of the execution team observes and verifies that the procedure has been carried out correctly" See Exhibit 1, p 38 Again, the 2007 Protocol fails to indicate what training, education, or licensing, or any other qualifications any execution team member has for observing the mixing of the "Lethal Injection Chemicals" to make sure it is done correctly There is no quality control to assure that the chemicals have actually been mixed correctly and at the proper dosage

85. The 2007 Protocol fails to include the proper instructions for mixing sodium

thiopental by failing to identify what the sodium thiopental should be mixed in, whether it is to be mixed all together (10 boxes in one mixing container) or one box at a time, what instrument is to be used to actually mix the solution, how many syringes should be filled per box of powder, or what precautions are taken to avoid settling or contamination of the sodium thiopental See Exhibit 1, p. 38

86. The 2007 Protocol indicates that a cut-down may be used but does not indicate at what point in the procedure the IV technicians would resort to this option or who would make the determination that a cutdown is necessary.

a. The 2007 Protocol is silent as to the physician's qualifications to perform a cutdown Only 15% of physicians in the United States are qualified to perform a cutdown.

b. Any cutdown procedure is a dangerous and antiquated medical procedure that is rarely performed in the practice of medicine

c. A cutdown procedure involves making a series of sharp incisions through the skin and through several layers of connective tissue, fat, and muscle - all with only local anesthetic -- to expose a suitable vein for IV catheterization.

d. A cutdown is a complicated medical procedure requiring equipment and skill that has a very high probability of not proceeding properly in the absence of adequately trained and experienced personnel, and without the necessary equipment. If done improperly, the cut-down process can result in very serious complications including severe hemorrhage (bleeding), pneumothorax (collapse of a lung which may cause suffocation), and severe pain.

e. Thus, cutdowns are out-dated and are only used in clinical situations that are not pertinent to executions by lethal injection, including emergency scenarios where there has been

extensive blood loss, and in situations involving very small pediatric patients and premature infants

f. Cutdowns have been replaced by the percutaneous technique which is less invasive, less painful, less mutilating, faster, safer, and less expensive than the cut-down technique.

g. The use of a cutdown as a back-up before trying to find percutaneous access is a profound departure from standard medical methods and from the standard of care used in executions in other jurisdictions.

h. To use a cut-down as the backup method of achieving IV access would defy contemporary medical standards and would be a violation of any modern standard of decency

i. The 2007 Protocol is completely silent on the procedures that will be followed by the physician should a cutdown become necessary. See Exhibit 1, pp. 41, 67

87. The 2007 Protocol fails to indicate whose responsibility it is to watch the IV lines for leaks in the tubing, junctions, and valves during the administration of the Lethal Injection Chemicals and what any member of the execution team would do should a leak be found. See Exhibit 1, p. 43.

a. A leak in the tubing, junctions, or valves can result in the failure to properly administer a full dosage of anesthetic to the inmate, resulting in an excruciatingly painful and horrifying death

b. Moreover, the 2007 Protocol fails to indicate how long the IV tubing is, what connections and junctures are used in the tubing, what kind of stopcock is used, or the size of the IV catheter. These IV line extensions, (see 2007 Protocol, Exhibit 1, p. 40), increase the risk that a flaw or kink in the IV line will disrupt the flow of drugs. A reasonable medical standard of care would not permit these unnecessary line extensions

c. Moreover, there is no procedure for testing or verifying the efficacy of the

extended IV tubing. Nor is there a procedure for entering the chamber during the execution should any of the equipment malfunction or the inmate somehow indicate that something has gone awry

88 The only monitoring prescribed by the 2007 Protocol during the administration of the Lethal Injection Chemicals is "by watching the monitor in his room which displays the exact location of the catheter(s) by means of a pan-tilt zoom camera" and allows for the "monitoring the catheter sites for swelling or discoloration." See Exhibit 1, p. 43.

89. Thus, there is no monitoring of the IV tubing or the drip chamber during the administration of Lethal Injection Chemicals. Moreover, the monitoring of an IV site from a remote camera is not medically proper – in order to insure that an IV does not migrate, infiltrate, move, and is working properly, the IV site must be monitored from the bedside. The 2007 Protocol does not provide for anyone to monitor the IV site from the bedside, nor is there any qualified medical personnel in the room to do any personal, medical monitoring of the process. See Exhibit 1, p. 43.

90 The 2007 Protocol fails to indicate what Defendants will do if the inmate has small veins or general venous incompetence and which member of the execution team will make a decision surrounding those issues. Small veins or venous incompetence can result in an inability to properly administer a full dosage of anesthetic to the inmate, resulting in an excruciatingly painful and horrifying death. See Exhibit 1, p. 41. Moreover, the 2007 Protocol fails to identify any execution team member who has medical training in general venous incompetence

91 The 2007 Protocol fails to indicate what any member of the execution team will do if the catheter migrates during the lethal injection. See Exhibit 1, p. 67. The migration of an IV catheter can result in an inability to properly administer a full dosage of anesthetic to the inmate, resulting in an excruciatingly painful and horrifying death

92 The 2007 Protocol fails to indicate what any member of the execution team will do if the inmate has a collapsed vein, perforation or leakage of the vein, or a blown vein from the pressure of the syringe plunger. See Exhibit 1, pp 41-42, 67. A collapsed, torn, or blown vein can result in an inability to properly administer a full dosage of anesthetic to the inmate, resulting in an excruciatingly painful and horrifying death

93. The 2007 Protocol fails to indicate what Defendants will do if a retrograde injection occurs because the stopcock is turned the wrong way nor does it indicate whose job it is to turn the stopcock A retrograde injection can result in the failure to properly administer a full dosage of anesthetic to the inmate, resulting in an excruciatingly painful and horrifying death

94. The 2007 Protocol fails to indicate which member of the execution team, if any, is responsible for loosening the tourniquets or restraining straps. See Exhibit 1, pp 41-42 The failure to properly loosen the tourniquets or restraining straps on an inmate can result in an inability to properly administer a full dosage of anesthetic to the inmate, resulting in an excruciatingly painful and horrifying death

95 The 2007 Protocol fails to indicate the length of time between the administration of each drug. See Exhibit 1, pp. 43-44. This is important to ensure that an inmate is adequately anesthetized by the sodium thiopental prior to the introduction of the pancuronium bromide and potassium chloride.

96. The 2007 Protocol fails to indicate who, if anyone, is monitoring the inmate during the administration of the drugs to assure that the sodium thiopental (anesthesia) is working. See Exhibit 1, pp 43-44. Monitoring the effects of sodium thiopental, like those of other ultrashort-acting anesthetics, requires considerable expertise in anesthesia.

97. The 2007 Protocol fails to indicate the presence of an anesthesiologist or a certified nurse anesthetist who could properly monitor consciousness. See Exhibit 1, pp. 43-44. Indeed, there is no one present on the execution team who is qualified to monitor the anesthetic depth of the inmate. Moreover, the 2007 Protocol fails to indicate the presence of any medical technology that might be used to monitor consciousness. See Exhibit 1, pp. 43-44.

98. The failure to require anyone to monitor anesthetic depth is compounded by the fact that the 2007 Protocol requires that only the Warden, who is not a qualified medical professional, be present in the execution chamber when *any* of the drugs are administered. The protocol thus prevents qualified personnel from obtaining any sort of visual or other verification that the drugs are actually being administered to the inmate, or that the sodium thiopental anesthetic has taken effect. Proper monitoring of the flow of fluids into the vein requires a clear view of the IV site, and also tactile examination of the skin surrounding the IV site to verify skin firmness and temperature.

99. Proper monitoring of the inmate would also necessitate that a person trained specifically in assessing anesthetic depth closely observe the inmate at all times after the sodium thiopental is administered. Only persons trained in anesthesia are able to assess properly whether the inmate has attained the degree of unconsciousness necessary to render him insensitive to pain. Id. at ¶¶ 21-23. For this reason, the American Veterinary Medical Association (AVMA) requires that persons euthanizing animals be "competent in assessing depth [of anesthesia] appropriate for administration of potassium chloride." See 2000 Report of the AVMA Panel on Euthanasia, 218 J. Am. Veterinary Med. Ass'n 669, 681 (2001)(Exhibit 5). Similarly, Tennessee requires extensive training in the use of anesthesia for all technicians authorized to euthanize animals.

100. Thus, despite the foreseeable risks created by the protocol, the 2007 Protocol simply

does not acknowledge, much less provide for, the possibility that the five-gram dose of sodium thiopental will fail to render the inmate unconscious

101. In fact, Philip Workman's continued consciousness during the administration of drugs (See e.g., ¶41e, *supra*) confirms that thiopental either was not administered properly or was not causing anesthesia as Defendants have claimed it would.

102. In light of the fact that sodium thiopental is an ultra-short acting anesthetic, and the 2007 Protocol creates the grave risk that the sodium thiopental will not be properly administered, it is critical that an inmate be able to alert execution personnel should he regain – or never lose – consciousness and that execution personnel have the ability to ascertain whether an inmate is properly anesthetized

103. The use of pancuronium bromide in combination with sodium thiopental effectively prevents an inmate from alerting anyone in any way to the fact that he is conscious and experiencing excruciating pain and prevents anyone, even a trained anesthesiologist, from ascertaining whether the inmate is properly anesthetized.

104. The 2007 Protocol does not indicate what plan is in place if the execution must be stopped because the Governor or the courts have entered a stay or reprieve. See Exhibit 1, p. 67 The 2007 Protocol does not indicate if anyone on the execution team is qualified to resuscitate the inmate or if any of the necessary equipment is present for resuscitation.

105. The 2007 Protocol, including the combination of chemicals (sodium thiopental, pancuronium bromide, and potassium chloride); the lack of proper training, qualifications, screening and review of the persons involved in the process; the absence of standardized procedures for administration of the chemicals; the absence of a sufficient anesthetic and any monitoring of

anesthetic depth; and the absence of a back-up plan should problems arise during the protocol, creates a grave and substantial risk that Paul Reid will be conscious throughout the execution process and, as a result, will experience an excruciatingly painful and protracted death in violation of his constitutional rights and substantive due process under the Eighth, Ninth, and Fourteenth Amendments

106. Thus, there is ample evidence that the 2007 Protocol will cause an inmate to experience unnecessary pain during his or her execution. Both execution records and witnesses' accounts of botched executions in other states provide evidence that is consistent with consciousness following the administration of the sodium thiopental and during the administration of the pancuronium bromide and potassium chloride

a Florida On December 13, 2006, using a protocol essentially identical to Tennessee's 2007 Protocol, Mr. Angel Diaz did not get an effective amount of sodium thiopental because the IV lines were improperly seated in his veins with through and through punctures As a result, none of the materials injected went to the right place Instead, the drugs entered his bloodstream first through his flesh and muscle tissue This process caused foot-long chemical burns on both arms from the sodium thiopental. During the execution, observers reported that Mr Diaz moved and tried to mouth words. It took 34 minutes and 14 syringes of chemicals for Mr. Diaz to die, during which he was clearly in pain, struggling for breath and grimacing See Chris Tisch, *Executed Man Takes 34 Minutes To Die*, www.Tampabay.com, December 13, 2006; Chris Tisch, *Second Dose Needed To Kill Inmate*, www.Tampabay.com, December 14, 2006 Following the Diaz execution, Governor Bush ordered that all executions be stayed while a committee undertook a review of the Diaz execution and of lethal injection protocols in Florida in general. Tennessee's 2007

Protocol does not differ in any material respect from that use in the botched Diaz execution

b. California.[2] Witness accounts of the 2002 execution of Stephen Wayne Anderson in California suggest that Mr. Anderson was not properly anesthetized when he died. The execution took over 30 minutes, and during that time Mr. Anderson's chest and stomach "heaved more than 30 times." According to Dr. Mark Heath, the typical reaction to sodium thiopental is yawning, drawing one or two deep breaths, or visibly exhaling so that the cheeks puff out. Irregular heaving of the chest is not consistent with the depression of the central nervous system caused by sodium thiopental. Rather, chest heaving is indicative of labored respiratory activity, which in turn strongly suggests that Mr. Anderson was conscious, and indeed may have been laboring against the paralyzing effect of the pancuronium bromide

The execution log of Manuel Babbit's 1999 execution also indicates that something went wrong during the process. A minute after the pancuronium bromide was administered, Mr. Babbit had shallow respirations and brief spasms in his upper abdomen -- again suggesting an attempt to fight against the effects of the pancuronium bromide. In addition, Mr. Babbit's heart rate remained constant until the potassium chloride was administered; had the full five grams of sodium thiopental reached Babbit, his heart rate would have changed significantly.

The execution logs of William Bonin's 1996 execution also reflect irregularities that may have caused Bonin to die in excruciating pain. Mr. Bonin was given a second dose of pancuronium bromide for reasons that remain unclear, even though the initial dose would paralyze an inmate for several hours. The redundant dose raises questions about whether Bonin received the initial doses

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[2] The United States District Court for the Northern District of California has stayed executions in California. See Morales v. Hickman, No. 06-00219 (N.D. Cal.)

of sodium pentothal and pancuronium bromide; whether the injection team believed that he was still conscious; and, more broadly, whether such an irregularity is indicative of the lack of training or judgment of injection personnel

Tennessee's 2007 Protocol does not differ in any material respect from that used in the California executions, including 5 grams of thiopental. California, though, has now issued a new protocol requiring monitoring of anesthesia, unlike Tennessee's 2007 protocol

c. North Carolina[3] In Brown v. Beck, No 06-3018, the District Court of the Eastern District of North Carolina, Western Division, had before it toxicology data following four executions in North Carolina showing low post-mortem levels of sodium thiopental North Carolina's protocol calls for a 3 gram dosage of the drug, to be followed by pancuronium bromide and potassium chloride. The toxicology data contradicted the opinion of the State's experts as to the expected concentration that would be present in a man of average size after having been given a dose of 3000 mg of sodium thiopental See Brown v. Beck, 2006 U S Dist. LEXIS 60084 (E.D N C April 7, 2006)(denying preliminary injunction, but conditioning future executions on presence of an anesthesiologist)

Also in Brown, the District Court had before it affidavits from attorneys present at recent executions who had witnessed the condemned inmates writhing, convulsing, and gagging when

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[3]Executions in North Carolina have also been stayed by North Carolina state courts until physicians are permitted to participate in executions by lethal injection. See Robinson and Thomas v. Beck, No 07-CVS-001109 (Wake County, NC)(Ordering that no executions will proceed in North Carolina until physicians agree to participate or a protocol is developed that is satisfactory and does not require doctor participation); North Carolina DOC v. North Carolina Medical Board, 07-CVS-003574 (Wake County, NC) (DOC suing medical board for position statement that "physician participation in capital punishment is a departure from the ethics of the medical profession"and "which adopt[ed] and endorse[d] the provisions of the American Medical Association Code of Medical Ethics Opinion No. 2.06.").

executed Again, such witness accounts were inconsistent with a sufficient dose of sodium thiopental having been successfully delivered to the brain such that the condemned inmate would not feel pain. For instance:

During the lethal injection of Willie Fisher, "Mr. Fisher appeared to lose consciousness around 9:00 p.m. but subsequently began convulsing . . . he looked as though he was trying to catch his breath but could not and his eyes were open as his chest heaved repeatedly." He was not pronounced dead until 9:21 p.m. See Brown, *supra* at *17.

During the lethal injection of Timmy Keel, Mr. Keel's body was "twitching and moving about for approximately ten minutes" after the injection of the chemical cocktail. Id.

During the lethal injection of John Daniels, Mr. Daniels convulsed violently after the administration of the chemical cocktail. "He sat up and gagged." Witnesses "could hear him through the glass." "A short time later, [Mr. Daniels] sat up and gagged and choked again, and struggled with his arms under the sheet. He appeared to [witnesses] to be in pain. He finally lay back down and was still." Id.

During the lethal injection of Eddie Ernest Hartman, Mr. Hartman appeared to suffer for at least five minutes after the lethal injection. "Eddie's throat began thrusting outward and collapsing inward. His neck pulsed, protruded, and shook repeatedly. Eddie's chest at first pulsated frequently, then intermittently, and at least twice I saw Eddie's chest heave violently. . . . Throughout the execution, Eddie's eyes were partly open while his body relentlessly convulsed and contorted." See Brown, *supra* at *16.

As the District Court there found, "evidence of the problems associated with these executions while, perhaps, not clearly indicative of the protocol, does raise some concerns about the effect of

North Carolina's protocol." See Brown, *supra* at *18 (concluding "it would be inappropriate to allow Defendants to proceed with Mr Brown's execution under the current protocol considering the substantial questions raised").

d Ohio. During the May 2006 lethal injection of Joseph Lewis Clark, execution team members took over twenty minutes to insert one IV catheter into Mr. Clark's arm. According to protocol two catheters were necessary, but the team proceeded with only one. After the single IV was inserted and the chemicals began to flow, Mr. Clark remained breathing, legs moving, arms strapped down. After minutes, he sat up several times and told executioners, "It's not working, it's not working." Minutes later, Mr Clark raised up again and said, "can't you just give me something by mouth to end this?" At that point, the team closed the curtain, and witnesses heard groans and moans from Mr Clark as if he was in agony. Witnesses reported that the cries of pain lasted for about five or ten minutes and were followed by snores from Mr. Clark. See Adam Liptak, *Trouble Finding Inmate's Vein Slows Lethal Injection in Ohio*, New York Times, May 3, 2006.

The botched execution of Mr. Clark demonstrates graphically and horrifically how an execution that appeared completely normal and routine at the outset can rapidly go horribly wrong. Ohio's protocol calls for 2 grams of sodium thiopental, following by pancuronium bromide and potassium chloride. The United States District Court for the Southern District of Ohio found that "evidence raises grave concerns about whether a condemned inmate would be sufficiently anesthetized under Ohio's lethal injection protocol prior to and while being executed." See Cooey v. Taft, 430 F.Supp. 2d 702, 707 (S.D. Ohio 2006).

e Arkansas.[4] The Arkansas lethal injection protocol calls for a 2 gram dose of thiopental, followed by pancuronium bromide and potassium chloride. Using this protocol, the Department of Corrections there has presided over several executions where "inmates remained conscious and suffered pain during their executions." See Nooner v. Norris, No. 06-00110 (E.D Ark.), June 26, 2006 Order (granting a preliminary injunction), p. 4

Ronald Gene Simmons was executed in Arkansas by lethal injection on June 25, 1990. The administration of the lethal chemicals began at 9:02 p.m. Between 9:02 and 9:04 p.m., according to an eyewitness, Mr. Simmons appeared to nod off into unconsciousness. However, "at 9:05 p.m. he called out 'Oh! Oh!' and began to cough sporadically as though he might be having difficulty breathing. During the next two minutes, he coughed slightly, approximately 20 times, each cough heaving his stomach slightly and causing the gurney to shake a little." See Bill Simmons, *Stoic Murderer Meets His Fate By Quiet Means*, Arkansas Democrat Gazette, June 26, 1990 at 9A. Simmons became still at 9:07 p.m. after which his face and arm turned first blue and then purple. An ADC employee twice appeared to adjust the IV tube in Mr. Simmons' arm, and not until 9:19 p.m. was Mr. Simmons pronounced dead by the coroner. Id. As Dr. Mark Heath has indicated, the chest heaving is indicative of labored respiratory activity, which in turn strongly suggests that Mr. Simmons was conscious, and indeed may have been laboring against the paralyzing effect of the pancuronium bromide.

Two years later, the execution of Ricky Ray Rector in Arkansas in January of 1992 took 1 hour and 9 minutes. Mr. Rector's hands and arms were punctured no less than 10 separate times

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[4]The United States District Court for the Eastern District of Arkansas, stayed executions to allow further investigation into the constitutionality of the lethal injection protocol. See Nooner, et al., v. Norris, No. 06-00110 (E.D.Ark.).

searching for a suitable vein Ultimately, someone on the execution team did a cut-down into his arm Witnesses could hear his moans as they looked for a vein. See Sonja Clinesmith, *Moans Pierced Silence During Wait*, Arkansas Democrat Gazette, January 26, 1992, at 1B; Ron Fournier, *13 Outsiders View Death Of Rector, Witnesses Listen, Wait Beyond Curtain*, Arkansas Democrat Gazette, January 26, 1992, at 4B Rector talked after 2 minutes and then after 5 minutes his lips were still moving rapidly - as if he was trying to draw shallow breaths. He was not pronounced dead until 10:09 p m. See Joe Farmer, *Rector, 40, Executed for Officer's Slaying*, Arkansas Democrat Gazette, January 25, 1992, at 9A

On May 7, 1992, Steven Douglas Hill was executed in Arkansas His execution began at 9:02 p.m. His eyes closed one minute later, but shortly afterwards he had what witnesses described as "a 'seizure' arching his back with his cheeks popping" See Andy Gotlieb and Linda Satter, *Hill Dies By Injection for '84 Police Killing*, Arkansas Democrat Gazette, May 8, 1992, at 17A He was visibily gasping for air, and even though he was strapped down to the gurney his chest was heaving against the wide belt that covered his chest. The seizure ended at 9:04 p m and Mr Hill was pronounced dead at 9:10 p m

107 Dr. Mark Heath, Assistant Professor of Clinical Anesthesiology at Columbia University has reviewed and/or testified about lethal injection procedures in twenty-seven jurisdictions, has reviewed Tennessee's 2007 Protocol and concluded that Tennessee's new 2007 Protocol "does little to nothing to assure [the TDOC] will reliably achieve humane executions by lethal injection."

108 Dr. David Lubarsky, Chairman of the Department of Anesthesiology at the University of Miami, has testified under oath that the 2007 lethal injection protocol markedly increases the risk

of pain to the inmate.

109 Dr. Michael Higgins, the Chairman of the Department of Anesthesiology at Vanderbilt Medical Center, who was appointed by Judge Trauger as a Court expert, has testified under oath that the 2007 lethal injection protocol poses a known and unjustifiable risk of pain and suffering to the condemned.

**Defendants' Deliberate Indifference**

110 Because Defendants are aware of the risks inherent in Tennessee's 2007 Protocol based on prior lethal injection litigation in this state and ongoing lethal injection litigation in at least fourteen (14) other states – all of which have or have had protocols that are almost identical to Tennessee's 2007 Protocol – the 2007 Protocol was developed, promulgated, and will be used with deliberate indifference to the excruciatingly painful and horrifying death that will result from the use of sodium thiopental, pancuronium bromide, and potassium chloride by untrained, uneducated and unqualified personnel.

111. Defendants are certainly aware of executions in other states where correctional employees have encountered significant problems during lethal injection procedures and orders from state and federal courts and from governors staying executions by lethal injection, including in Arkansas, California, Delaware, Florida, Maryland, Missouri, New Jersey, North Carolina, Ohio, South Dakota, and any federal executions. Defendants are also certainly aware that the lethal injection protocols in each of these states is virtually identical to the 2007 Protocol that Defendants intend to use to execute Paul Reid.

a. Arkansas. On June 26, 2006, the United States District Court for the Eastern

District of Arkansas, granted a stay of execution for Don Davis and a preliminary injunction to allow further investigation into the constitutionality of the lethal injection protocol See Nooner, et al., v. Norris, No 06-00110 (E D Ark )(June 26, 2006 Order granting a preliminary injunction) The lethal injection protocol used in Arkansas is almost identical to the new protocol in Tennessee, using the same three drug cocktail and failing to require the participation of trained medical personnel In its Order granting a preliminary injunction, the Nooner court found 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 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." Id. at p 5 The Court went on to note that "Davis has raised serious questions that call for deliberate investigation " Id.

b California On February 14, 2006, the United States District Court for the Northern District of California in the case of Morales v. Hickman, No 06-00219 (N D Cal ), denied Michael Morales a preliminary injunction conditioned on certain requirements for the manner in which his execution would be carried out See 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 (2006) The old protocol used in California was almost identical to the 2007 Protocol, using the same three drug cocktail and failing to require the participation of trained medical personnel The District Court's conditions dramatically changed California's protocol, including requiring that only sodium thiopental be used in the lethal injection or that someone with training in the field of anesthesiology had to assist in

determining whether the inmate was properly sedated before the administration of the pancuronium bromide or the potassium chloride Id. at 1047-1048 Defendants agreed to comply with the second alternative and enlisted two anesthesiologists, who promptly quit when they realized they were being asked to assist in an execution See Morales v. Tilton, 465 F. Supp 2d 972, 976 (N.D Cal. Dec 15, 2006) As a result, all executions in California are currently stayed while the Governor and correctional officials develop a new lethal injection protocol. California issued a new protocol on May 15, 2007 which incorporates many of the Court's changes, including requiring that a member of the execution team be in the chamber with the inmate to evaluate anesthetic depth before the other drugs are injected

c Delaware. The United States District Court for the District of Delaware on May 9, 2006, granted a preliminary injunction which has stayed all executions since that time See Jackson v. Taylor, et al., 2006 U S. Dist LEXIS 27658 (D Del May 9, 2006) While the stay was for the purpose of awaiting the United States Supreme Court decision in Hill v. McDonough, *supra*, the parties in Delaware are now engaging in discovery for the purpose of a future evidentiary hearing on the issue of the constitutionality of the Delaware lethal injection protocol. The three-drug cocktail used in the Delaware protocol is the same as that used in Tennessee, although the specifics of the Delaware protocol are secretive. On February 23, 2007, the Jackson court certified a state-wide class consisting of all current and future prisoners who are and will be sentenced to death in Delaware See Jackson v. Danberg, 2007 U S Dist. LEXIS 12376 (D Del. 2007)

d Florida. In Florida, the December 2006 execution of Mr Angel Diaz exposed the Florida lethal injection protocol as a deep failure The autopsy of Mr. Diaz showed that the veins in each of his arms had through and through punctures revealing that the IV lines were improperly

seated in his veins. As a result, Mr. Diaz did not get an effective amount of the drug in a vein in either arm – none of the materials injected went to the right place. Instead, the drugs entered his bloodstream first through his flesh and muscle tissue. This process caused foot-long chemical burns on both arms from the sodium thiopental. During execution, observers reported that Mr. Diaz moved and tried to mouth words. It took 34 minutes and 14 syringes of chemicals for Mr. Diaz to die, during which he was clearly in pain, struggling for breath and grimacing.

Following the Diaz execution, Governor Bush ordered that all executions be stayed while a committee undertook a review of the Diaz execution and of lethal injection protocols in Florida in general. After three months, eight hearings, consultations with multiple medical experts and others, the Florida Commission on Administration of Lethal Injection published a Report that contained findings and recommendations for extensive modifications of the lethal injection protocol in Florida. The prior protocol used in Florida for the execution of Angel Diaz used the same three drug cocktail and failed to require the participation of trained medical personnel just like the new protocol in Tennessee. Lethal injection executions in Florida remain stayed by order of the Governor.[5]

The Florida Department of Corrections released a new protocol on May 9, 2007 that requires that anesthetic depth be monitored prior to the injection of pancuronium bromide and potassium chloride.

e. Maryland. On December 16, 2006, the Maryland Court of Appeals ruled in Evans v. State, 396 Md. 256 (Md. App. Ct. 2006), that the state had not complied with the administrative procedures act in adopting its lethal injection procedures. All executions in Maryland

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[5]Although the Commissioner acknowledged reviewing the Florida Report, the protocols adopted by the Commissioner fail to address any of the concerns raised by the Florida Commission.

are on hold until those procedures for reviewing such changes to the law have been followed. Maryland's prior protocol used the same three drug cocktail and did not provide for the assistance of medical personnel just like the new protocol in Tennessee.

f. New Jersey. On February 20, 2004, in In The Matter of Readoption With Amendments of Death Penalty Regulations, 842 A.2d 207 (New Jersey 2004), an appellate court in New Jersey stayed all executions until the state could justify its lethal injection procedures. New Jersey used both sodium thiopental and pancuronium bromide in its lethal injection procedures, just as Tennessee's 2007 Protocol does.

g. North Carolina. Executions in North Carolina have also been stayed by North Carolina state courts until physicians are permitted to participate in executions by lethal injection. See Robinson and Thomas v. Beck, No. 07-CVS-001109 (Wake County, NC)(Ordering that no executions will proceed in North Carolina until physicians agree to participate or a protocol is developed that is satisfactory and does not require doctor participation);[6] State v. Holman, No. 97-49226 (March 6, 2007)(order cancelling execution date). The lethal injection protocol in North Carolina used the same three drug cocktail and did not require the use of trained medical personnel just like the new protocol in Tennessee.

h. Federal Executions. The Attorney General of the United States has agreed to a preliminary injunction for federal capital plaintiffs challenging the federal lethal injection protocols as unconstitutional. See Roane v. Gonzales, No. 05-2337 (D.C. Dist.), February 16, 2007 Order and

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[6]The North Carolina Department of Corrections is currently suing the North Carolina Medical Board for its position statement that "physician participation in capital punishment is a departure from the ethics of the medical profession"and "which adopt[ed] and endorse[d] the provisions of the American Medical Association Code of Medical Ethics Opinion No. 2.06" in North Carolina DOC v. North Carolina Medical Board, 07-CVS-003574 (Wake County, NC).

Unopposed Motion for Preliminary Injunction.[7] In federal executions, the method is determined by the state in which the sentencing took place. Apparently, the federal protocol calls for the same three-drug combination that is called for in the 2007 Protocol.

112. The 2007 Protocol is virtually identical to the protocols which these states are currently forbidden to use, and violates constitutional and statutory provisions enacted to prevent cruelty, pain, and torture and to provide all citizens of the United States with due process and equal protection of law. See Harbison v. Little, No. 3:06-cv-1206, 2007 U.S. Dist. Lexis 72410 (M.D. Tenn. Sept. 19, 2007)(Attached as Exhibit 6).

113. Despite knowledge of the ongoing lethal injection litigation in multiple states and jurisdictions, Defendants failed to consult correctional officials, state officials, or medical experts with experience in lethal injection and lethal injection litigation from any of the listed states or jurisdictions, with the exception of the Federal Prison in Terre Haute, as a part of its review and development of the 2007 Protocol. The committee did consult with Dr. Mark Dershwitz and Dr. Gregory Payne. Both of these anesthesiologists told the committee that a one-drug protocol which utilized only an anesthetic would pose the least risk of pain.

114. Despite knowledge of the ongoing lethal injection litigation in multiple states and jurisdiction, Defendants failed to request documents and information from any correctional officials, state officials, or medical experts with experience in lethal injection and lethal injection litigation from any of the listed states or jurisdictions, with the exception of the Terre Haute facility,[8] as part

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[7] The federal facility in Terre Haute is the facility where the Commissioner and his review committee performed their site visit.

[8] BOP refuses to disclose their protocols to any party and apparently did not provide their documents to the Commissioner, but, did allow a site visit. The Commissioner does not acknowledge that the BOP is currently enjoined from using their lethal injection protocols.

of its review and development of the 2007 Protocol

115. Defendants' analysis was one-sided, unscientific and failed to take into account the serious known and demonstrated risks of the use of the chemicals and procedures selected for the 2007 Protocol

116 Defendants' failure to properly consult, review, and research in promulgating its 2007 Protocol, despite the ready availability of experienced state officials and medical experts, demonstrates a deliberate indifference to the excruciatingly painful and horrifying death that will result from the use of these three drugs by untrained personnel under the new execution protocol.

117 Defendants' analysis of any alternatives for lethal injection methods further demonstrates their deliberate indifference. Defendants' defend their use of the three drug cocktail by simply saying that 29 other jurisdictions use it. This, "everybody else does it" defense fails to acknowledge the number of jurisdictions who are now under judicial and/or executive order not to do it because of concerns that the protocol is unconstitutional.

118. Further, Defendants' discussion of the other methods makes clear the Commissioner and the review committee were concerned with making the lethal injection experience more palatable and acceptable to the witnesses with utter disregard for the risk of pain and suffering to the condemned.

119. The Commissioner told the Governor that the review committee rejected a protocol that eliminates the use of pancuronium bromide because "the administration of potassium chloride without a preceding dose of pancuronium bromide would typically result in involuntary movement which might be misinterpreted as a seizure or **an indication of consciousness** " Nowhere does the report recognize or express a concern that movement might actually indicate consciousness, which

would mean that the sodium thiopental did not work and that the inmate is actually feeling the searing pain of the potassium chloride.

120. In discussing the use of a single drug protocol, the Commissioner acknowledges that a single drug protocol would be simpler, would decrease the risk of error, and would eliminate the drugs which cause pain. The Commissioner rejected this protocol because, he (falsely) claims, the two and three drug protocols will produce a faster death, that the effect and required dosage of the sodium thiopental is less predictable, and nobody else does it that way. Despite recognizing that a single drug would eliminate the serious and substantial risk of gratuitous suffering and harm inflicted through the use of thiopental, pancuronium bromide, and potassium chloride, the Commissioner deliberately rejected this proposal. The Commissioner's actions demonstrate deliberate indifference.

121. Thus, the Commissioner and the review team have admitted that they are fully aware of the unpredictability of sodium thiopental and the fact that pancuronium bromide will mask the failure of the sodium thiopental to work properly. They have further admitted that they could eliminate the risk of pain to the condemned completely, but refuse not to for the sole purposes of making the killing go faster and making it more palatable for the witnesses.

122. This evidences the complete and utter disregard on the part of all of the Defendants to the great risk, and likelihood, of pain and suffering that will be caused by the use of the 2007 Protocol by poorly trained, misinformed, and unqualified members of the execution team, while the only medical doctor on the premises waits in the garage.

123. In addition, the 2007 Protocol, devised and promulgated and approved by Defendants violates evolving standards of decency. See Trop v. Dulles, 356 U.S. 86 (1958).

## VII. CLAIMS FOR RELIEF

## A. Violation of Fourteenth Amendment: Due Process And Equal Protection of Law (Sodium Pentothal)

124 Plaintiff incorporates the preceding paragraphs in their entirety by reference

125. Plaintiff has fundamental life and liberty interests protected by the Fourteenth Amendment to the United States Constitution.

126. Plaintiff's right to equal protection under law is protected by the Fourteenth Amendment to the United States Constitution. Plaintiff has right to a lethal injection procedure which is as humane, or even more humane, as the procedure for euthanizing animals in this country and in Tennessee.

127. The use of sodium pentothal violates Plaintiff's right to due process and equal protection of the law under the Fourteenth Amendment.

128. The use of sodium pentothal, as opposed to a longer-lasting anesthetic, is arbitrary, unreasonable, irrational, and serves no legitimate or compelling state interest As administered under Tennessee's 2007 Protocol, and especially as administered by untrained personnel, the use of sodium pentothal shocks the conscience and is inhumane.

129. Inducing unconsciousness by correctly administering sodium pentothal is indispensable to preventing the wanton infliction of pain.

130. Use of sodium pentothal as administered under Tennessee's 2007 Protocol does not cause sufficient anesthesia for the duration of the lethal injection process.

131 The absence of trained personnel to administer sodium pentothal and insure a prisoner is properly anesthetized before the other chemicals are introduced greatly increases the risk that a prisoner would not receive the necessary amount of anesthetic prior to being paralyzed by the

pancuronium bromide and internally burned by the potassium chloride

132 Sodium pentothal, as administered under the 2007 Protocol, does not adequately anesthetize the prisoner from the pain and horror of asphyxiation or suffocation caused by the pancuronium bromide

133. Sodium pentothal, as administered under the 2007 Protocol, does not adequately anesthetize the prisoner from the extreme pain caused by potassium chloride

134 The AVMA uses a longer-lasting barbiturate when euthanizing animals It also requires personnel be trained and knowledgeable in anesthetic techniques, and competent in assessing anesthetic depth appropriate for the subsequent administration of potassium chloride Tennessee's 2007 Protocol contains no comparable requirements for the personnel who use the same drug in executing prisoners.

**B. Violation Of Eighth And Fourteenth Amendments: Cruel and Unusual Punishment (Sodium Pentothal)**

135. Plaintiff incorporates preceding paragraphs in their entirety by reference.

136. The use of Sodium Pentothal, as administered under the 2007 Protocol, violates Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments

137. Specifically, Plaintiff has a right to be free from arbitrary methods of punishment; from suffering pain beyond that inherent in the course of death; from suffering extreme horror and pain; and from a prolonged death

138. Although it is possible to conduct executions in a constitutionally compliant manner, the TDOC has chosen not to do so The TDOC could choose to use different chemicals that pose

a low risk of administration error yet do not cause extraordinarily grave consequences to a condemned inmate if not properly administered Instead, it has knowingly and recklessly and deliberately chosen to use chemicals that pose a high risk of administration error, like sodium pentothal. Moreover, it has not taken precautions to ensure that the personnel who administer the lethal injection chemicals possess the training, experience, and expertise needed to administer those chemicals properly.

### C. Violation Of Fourteenth Amendment: Due Process Of Law (Pancuronium Bromide)

139 Plaintiff incorporates preceding paragraphs in their entirety by reference

140 Plaintiff has a fundamental life interest protected by the Fourteenth Amendment to the United States Constitution

141 The use of pancuronium bromide is arbitrary, unreasonable, and serves no legitimate or compelling state interest The use of pancuronium bromide shocks the conscience and is inhumane

142 The use of pancuronium bromide violates Plaintiff's right to due process of law under the Fourteenth Amendment.

143 It is well-settled under the due process clause of the Fourteenth Amendment that a state cannot act in a way which fails to serve a legitimate state interest City of Cleburne v. Cleburne Living Center, 473 U S 432, 105 S.Ct 3249 (1985) Likewise, when fundamental interests are involved (such as life) the state must act in a way that is necessary to promote a compelling state interest Troxel v. Granville, 530 U S 57, 120 S.Ct 2054 (2000)

144 Without question, there is no legitimate interest in the use of pancuronium bromide

upon Paul Reid or any other human being As Chancellor Ellen Hobbs Lyle has held:

> [T]he use of Pavulon is . . . unnecessary . . [T]he State [has] failed to demonstrate any reason for its use. The record is devoid of proof that the Pavulon is needed. Thus, the Court concludes that . . . the State's use of Pavulon is . . in legal terms 'arbitrary.'

*Abdur 'Rahman v. Sundquist*, No. 02-2236-III, In The Chancery Court For The State Of Tennessee, Twentieth Judicial District, p. 13 (June 2, 2003).

145 Further, use of pancuronium bromide violates substantive due process for the separate reason that its use shocks the conscience. See Rochin v. California, 342 U.S. 165 (1952). Without question, under Tennessee's "Nonlivestock Animal Humane Death Act," pancuronium bromide cannot be used to euthanize a non-livestock animal in Tennessee. Tenn.Code Ann. §44-17-301 *et seq*, including §44-17-303(c)(any substance which "acts as a neuromuscular blocking agent . . may not be used on any nonlivestock animal for the purpose of euthanasia."). If pancuronium bromide can't be used to kill a dog or a cat because it is not "humane," it shocks the conscience to think that it can be used in an attempt to kill a human being.

146. The use of pancuronium bromide is arbitrary, unreasonable, irrational, and serve no legitimate or compelling state interest. Because Tennessee's 2007 Protocol calls for the potassium chloride to be administered in a lethal dose, the use of pancuronium bromide serve no purpose in the execution process. Pancuronium bromide unnecessary increases the risk that a conscious prisoner will be conscious and paralyzed, yet unable to inform personnel of his condition The use of pancuronium bromide shocks the conscience and is inhumane

**D. Violation Of Eighth And Fourteenth Amendments: Cruel and Unusual Punishment (Pancuronium Bromide)**

147 Plaintiff incorporates preceding paragraphs in their entirety by reference

148. The use of pancuronium bromide is inhumane, violates the dignity of the human person, and is contrary to the evolving standards of decency.

149. The use of pancuronium bromide in the 2007 Protocol violates Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments. Specifically, Plaintiff has a right to be free from arbitrary methods of punishment; from suffering pain beyond that inherent in the course of death; from suffering extreme horror and pain; and, from a prolonged death.

150. The Eighth and Fourteenth Amendments prohibit punishments which do not comport with the evolving standards of decency that mark the progress of a maturing society. Trop v. Dulles, 356 U.S. 86 (1959)

151. In 2001, the State of Tennessee declared as inhumane – and illegal – the use of pancuronium bromide or any other neuromuscular blocking agent on nonlivestock animals. Tenn. Code Ann. §44-17-303(c); 44-17-303(j)(criminal sanctions for violation of Humane Death Act). *A fortiori*, the legislative judgment of Tennessee establishes the fundamental baseline concerning the evolving standards of decency applicable to human beings. Especially where the Tennessee Legislature passed the Nonlivestock Humane Death Act in 2001 – before Defendants' established the 2007 protocol – the very existence of the Act establishes an Eighth Amendment violation of the evolving standards of decency.

152. Further, where Tennessee has already determined that use of pancuronium bromide to kill animals is not "humane," using such a substance to kill a human being is not humane either. It is likewise degrading to humanity itself to allow the Defendants to do what they would intend to do. It sends a message that the State can treat human being with the type of contempt and cruelty that is not befitting an animal.

153. Moreover, pancuronium bromide could not lawfully be used alone as the fatal agent. It would not result in a quick death; instead, it would ultimately cause someone to suffocate or asphyxiate to death. Causing death by suffocation or asphyxiation violates the Eighth Amendment's prohibition against cruel and unusual punishment.

**E. Violation Of Fourteenth Amendment: Equal Protection (Pancuronium Bromide)**

154 Plaintiff incorporates preceding paragraphs in their entirety by reference

155 The use of pancuronium bromide upon Paul Reid while its use is legally prohibited for use on animals because it is not "humane," is inhumane, arbitrary, unreasonable, and serves no legitimate interest, nor is it narrowly tailored to serve a compelling state interest The use of pancuronium bromide violates Plaintiff's right to the equal protection of the laws under the Fourteenth Amendment.

156 By procuring and using pancuronium bromide upon Paul Reid, Defendants would invidiously discriminate against Plaintiff: Under Tenn. Code Ann §44-17-303(h) & §39-14-201(3), the State of Tennessee has protected the following animals against the use of pancuronium bromide: any "pet normally maintained in or near the household or households of its owner or owners, other domesticated animal, previously captured wildlife, an exotic animal, or any other pet, including but not limited to, pet rabbits, a pet chick, duck, or pot bellied pig that is not classified as "livestock" pursuant to this part." Tenn Code Ann §44-17-201(3). There is no legitimate basis -- let alone a compelling state reason – for Tennessee to provide dogs, cats, chicks, ducks, and pot-bellied pigs more protection from cruelty than it would Plaintiff, who is a human being who retains a fundamental right to life. This classification is arbitrary, unreasonable, and serves no legitimate

interest, let alone a compelling state interest. Defendants' procurement and use of pancuronium bromide is therefore unconstitutional.

### F. Violation Of Eighth, Ninth, and Fourteenth Amendments: Cruel And Unusual Punishment

157. Plaintiff incorporates preceding paragraphs in their entirety by reference.

158. Defendants' use of sodium thiopental, pancuronium bromide, and potassium chloride as dictated by the 2007 Protocol causes unreasonable and unnecessary pain and suffering and does not conform with evolving standards of decency and occurs with deliberate indifference and/or reckless disregard of the substantial or significant known risk of pain and suffering, given all the deficiencies identified in this complaint related to the selection, preparation, and manner of administration of such chemicals by persons who are inadequately trained and inexperienced and where there is not adequate monitoring of anesthetic depth and/or the proper administration of such chemicals, individually and cumulatively, and where the process suffers from the various deficiencies identified in the complaint and as yet unknown and/or disclosed to Plaintiff.

159. Defendants' use of the protocol violates the dignity of the human person and Plaintiff's right to be free from cruel and unusual punishment under the Eighth, Ninth, and Fourteenth Amendments.

## VIII. PRAYER FOR RELIEF

WHEREFORE, based on the foregoing complaint, incorporated herein by reference, this Court should do the following:

1. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the 2007 Protocol for all the reasons stated in this complaint, because, *inter alia*, it utilizes

inadequate anesthesia through the use of sodium thiopental, and grant an injunction against the use upon Paul Reid of the 2007 Protocol

2. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the use of pancuronium bromide by Defendants under the circumstances, and prohibiting Defendants from using, seeking to obtain, ordering, writing a prescription, writing a physician's order, prescribing, dispensing, or in any other manner transferring to Defendants Bell or any other Defendants involved in the execution process pancuronium bromide in any form whatsoever.

3. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the use of pancuronium bromide by Defendants under the circumstances, and enjoin Defendants from seeking to execute, or executing, Paul Reid using the above-described protocol which employs pancuronium bromide

4. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the 2007 Protocol and enjoining the administration of the lethal injection procedure by personnel who lack sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure

5 Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the 2007 Protocol, and grant an injunction against the use of the protocol upon Paul Reid

6. Grant further relief that this Court finds necessary and just

Respectfully submitted,

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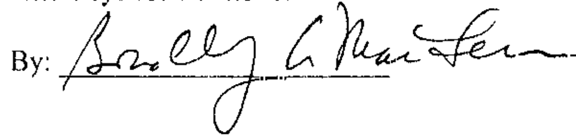
By: 

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COMPLAINT was placed in the United States Mail, postage pre-paid to counsel for the State, Mr. Mark Hudson, Assistant Attorney General, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202-0207 on this the 24th day of October, 2007