IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	**No. M1987-00130-SC-DPE-DD**
	)	
STEPHEN MICHAEL WEST	)	

RESPONSE IN OPPOSITION TO THE ATTORNEY GENERAL'S MOTION TO SET AN EXECUTION DATE FOR STEPHEN WEST AND REQUEST FOR A CERTIFICATE OF COMMUTATION

Comes now Stephen Michael West, through undersigned counsel and opposes the State's motion to set an execution date and respectfully requests that the Court issue a Certificate of Commutation.

I. The State's request for an expedited execution date should be denied because Mr. West has challenged the State's recently released protocol and this Court has previously held that such litigation must be duly considered by the state courts before any execution is carried out.

On September 7, 2017,[1] the State's contractor, a for-profit pharmaceutical supplier, told the State of Tennessee that midazolam "does not elicit strong analgesic effects," and that inmates "may be able to feel pain from the administration of the second and third drugs" in a three-drug protocol. *See* Attachment 2. That is, the State is on notice that if they use midazolam in place of a true anesthetic in a three-drug protocol, a condemned inmate will suffer severe pain during execution.[2]

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[1] *See* Attachment 1, Chronology of Events Relevant to State's Motion to Expedite Execution Dates.

[2] Recently, "botched" executions in Arizona, Oklahoma, and Ohio also put the State of Tennessee on notice that midazolam is not an anesthetic, does not-render inmates insensate to pain, and is grossly inappropriate for use in lethal injection executions.

Despite this warning, on October 18, 2017, the State began the process of procuring midazolam for use in executions, ultimately purchasing midazolam that expires on June 1, 2018. On October 26, 2017, one of the State's drug-suppliers,[3] emailed the Tennessee Department of Correction, and stated, "I will have my pharmacist write up a protocol." Attachment 3. On November 28, 2017, one of the drug-suppliers sent another email that contained, "revisions to the protocol." Attachment 4.

On January 8, 2018, the State promulgated a new lethal injection protocol that retained the one-drug, pentobarbital protocol and added a midazolam-based, three-drug lethal injection protocol: Tennessee's Midazolam Option.[4] Apparently, this is the protocol drafted for the State of Tennessee by the for-profit supplier of drugs that are to be used in the proposed executions.

On January 11, 2018, the State moved this Honorable Court to resume executions. Five-days after requesting such executions, on January 16, 2018, and in response to a public records request, the State disclosed their amendment of the 2015 lethal injection protocol and the adoption of the Midazolam Option.[5] No formal announcement was made alerting the public to the new protocol. However, in the February 15, 2018 Motion to Set Execution Dates, the State, for the first time,

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

[4] That is, the State bought the midazolam first, and created a mechanism to use it, second. With both actions being preceded by a warning from their supplier that midazolam was not effective.

[5] This disclosure came in response to a public records request submitted by counsel for Abdur'Rahman, Johnson, Wright, and Zagorski. This request had been pending since November 6, 2017.

announced its intention to execute inmates using the Midazolam Option, and not via the single-drug pentobarbital protocol.

The State purchased midazolam in October of 2017, that would only be effective until June 1, 2018. This purchase was made while executions were on hold awaiting the United States Supreme Court's resolution of *Abdur'Rahman, et al. v. Parker, et al.*, Case No. 17-6068. The State knew that they would have very little time between a possibly favorable Supreme Court ruling, and the expiration of their midazolam. The State was aware that (1) applications for executive clemency will not be entertained until after execution dates are set, (2) this Court's practice has been to permit at least three months for the Governor to consider such applications, (3) this Court has traditionally scheduled executions many weeks or months apart, and (4) this Court's precedent demands a full and fair constitutional adjudication of substantively new execution protocols. Yet they purposefully kept their plans under wraps.

The State's decision to add the Midazolam Option to its lethal injection protocol (after purchasing it first, and despite being warned of its dangers), and to accept midazolam with a June 1, 2018 expiration date does not create an exigency warranting an unprecedented rush to execution.

The fact that the protocol that would be used to execute West was written, not by State actors, but by the supplier who profits from the sale of the protocol drugs,[6] is yet another reason not to set West's execution.

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[6] In the State's response to public records requests, they have been less than illuminating about the process used to produce the current protocol. However, the emails that were produced are the only

West should be given a full opportunity to litigate the constitutionality of the newly proposed lethal injection protocol without the extraordinary pressure of eight execution dates in a compressed, three-month timeframe. West and all similarly situated inmates, should be given adequate time to present petitions for clemency to the Governor of the State of Tennessee. The State's Motion to Set Execution Dates should be denied.

II. Principles of stare decisis and established precedent require a full and fair adjudication of the merits of the now-pending declaratory judgment action that was filed expeditiously (27 business days) after the Tennessee Midazolam Option was disclosed to counsel for Abdur'Rahman, Johnson, Wright, and Zagorski.

The State's request for relief is foreclosed by binding Tennessee precedent. This Court's precedent establishes that:

> The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

State v. West, No. M1987-000130-SC-DPE-DD, Order p.3 (Tenn. Nov. 29, 2010). This Court has held true to the principles announced in *West*. *See, e.g.*, *State v. Strouth*, No. E1997-00348-SC-DDT-DD, Order, p. 3 (Tenn. Apr. 8, 2014) ("Mr. Strouth is correct that currently, there is no controlling law in Tennessee on the constitutionality of the use of the single drug, Pentobarbital, to execute a death row inmate... Accordingly, the Court will set Mr. Strouth's execution for a future date

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documents provided that detail any part of the drafting procedure. Thus, West relies on them as the best evidence of how the Midazolam Option came to be.

that will allow plenty of time for resolution of the declaratory judgment action in the state courts.").

The State's motion fails to acknowledge the holding in *West*. Further, the State's motion does not provide a single case to give this Court a reason to depart from the principles of *stare decisis*. "The power of this Court to overrule former decisions 'is very sparingly exercised and only when the reason is compelling.'" *In re Estate of McFarland*, 167 S.W.3d 299, 306 (Tenn. 2005) (quoting *Edingbourgh v. Sears, Roebuck & Co.*, 206 Tenn. 660, 337 S.W.2d 13, 14 (1960)). As this Court has held, "The sound principle of stare decisis requires us to uphold our prior precedents to promote consistency in the law and to promote confidence in this Court's decisions." *Cooper v. Logistics Insight Corp.*, 395 S.W.3d 632, 639 (Tenn. 2013). This Court does not deviate from precedent on the basis of speculative "uncertain[ty]." State's Motion To Set Execution Dates, p. 2.

III. The State's professed urgency to schedule executions prior to June 1, 2018, is a manufactured and avoidable crisis that does not justify abridging west's right to fully challenge the Midazolam Option.

A. The State manufactured a crisis to support its request for executions prior to June 1, 2018, to prevent the due process hearing required by court precedent from ever taking place.

Midazolam is the most controversial, dangerous drug ever to be used in a lethal injection protocol in the State of Tennessee. Of the seven states to use midazolam in a lethal injection, three have abandoned its use. The State of Arizona has agreed to never again use any benzodiazepine, including midazolam, or a paralytic in a lethal injection. *First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement,

Docket Entry No. 152 (D. Ariz. Dec. 19, 2016) (Attachment 5) (midazolam); *First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 186 (D. Ariz. June 21, 2017) (Attachment 6) (paralytic).

Midazolam—a sedative with no analgesic properties—is a completely different class of pharmaceutical than the barbiturates sodium thiopental and pentobarbital. Unlike sodium thiopental and pentobarbital, midazolam does not render the inmate unaware or insensate to severe pain. The Supreme Court has held: "It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze v. Rees*, 553 U.S. 35, 53 (2008). The Davidson County Chancery Court agreed with Chief Justice Roberts' opinion in *Baze* in the 2010 *West v. Ray* litigation. *See West v. Ray*, Case No. 10-1675-I, Order (Davidson County Chancery Court November 22, 2010). The Chancellor's opinion in the 2010 *West* litigation remains undisturbed. Similarly undisturbed is the opinion of the Davidson County Chancery Court in the 2005 *Abdur'Rahman v. Bredesen* litigation that pavulon (a paralytic similar to the one used in the new Midazolam Option) serves no purpose in an execution. *Abdur'Rahman v. Bredesen*, 181 S.W. 3d 292, 307 (Tenn. 2005) (noting that "the Chancellor correctly observed that the State failed to show a legitimate reason for the use of Pavulon in the lethal injection protocol[.]")

When Tennessee last used a three-drug protocol, it was found to be unconstitutional unless the State implemented sufficient checks to ensure that the inmate would be unable to experience suffocation and pain. Those necessary checks are absent from Tennessee's Midazolam Option, perhaps because the protocol was drafted by the State's for-profit drug supplier.

The State knew, or reasonably should have known, when it chose to change its lethal injection protocol and add a Midazolam Option, that their new protocol would be challenged in court. It also knew that the challenge would have merit because it was warned by its for-profit drug supplier that midazolam does not work like sodium thiopental or pentobarbital. In a September 7, 2017, email, the supplier wrote "Here is my concern with midazolam, being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium Chloride especially." Attachment 2. The State knew that counsel for Abdur'Rahman, *et al.*, submit requests for public records regarding execution drugs (among other information) on a routine basis. *See* Attachment 7, Chronology of Public Records Requests During Past Six Months. Despite producing public records on November 6, 2017, TDOC did not provide any records regarding a change in the lethal injection protocol to include a Midazolam Option or regarding TDOC's attempts to procure midazolam until January 16, 2018. *See* Attachments 1, 7.

On October 18, 2017, TDOC was told that the midazolam it was purchasing expired on June 1, 2018. Attachment 8, Email. TDOC moved forward with the purchase of midazolam they knew would expire before any challenge to its use could

be litigated in court. Emails, W-9's, invoices and photographs of the drugs purchased demonstrate that the State knew well in advance of January 8, 2018, that it intended to use Tennessee's Midazolam Option to execute West. Yet, despite public records requests made throughout that time, the State failed to notify undersigned counsel of any intent to implement a new lethal injection protocol.

The State's decision to withhold this information from defense counsel appears intentional and calculated to gain a litigation advantage. The State seeks to avoid a trial on the merits of any challenge to Tennessee's Midazolam Option. To do so, they seek to cut off West's access to the courts by executing him before he has a chance to present his proof.

On January 18, 2018, just two days after learning of Tennessee's Midazolam Option, West told this Court that he intended to challenge the new protocol but required time to consult with experts; West additionally stated he would file a challenge on or before February 20, 2018—a deadline West met. The State delayed until February 15, 2018, to tell this Court that its midazolam supply expires on June 1, 2018.

Importantly, and fatal to their request for expedited execution dates, the State does not say that they will be unable to obtain the drugs necessary to carry out executions after June 1, 2018. Rather, the State alleges that their ability to do so is "uncertain." State's Motion to Set Execution Dates, p. 2. Such vague and unsupported allegations are not enough to overturn Tennessee precedent, particularly where the State could have informed West months earlier that it intended to adopt a new lethal injection protocol that adds a Midazolam Option.

Under the circumstances, West has acted with extreme diligence, expediency and transparency. The same cannot be said for the State. *See* Attachment 1.

B. The State's vague and unsupported representation to the Court about its efforts to obtain pentobarbital is inconsistent with the proof in the record, their own representations to the united states supreme court, their representations to the public, and the fact that executions using pentobarbital continue to be carried out.[7]

In its motion, the State tells the Court: "The Department's supply of pentobarbital expired while the *West* proceeding was pending." State's Motion to Set Execution Dates, p. 2. This cannot be true. TDOC's numerous responses to Tennessee Public Records Act requests make clear that TDOC never received any pentobarbital (compounded or otherwise) from its supplier(s) and never had any in its possession, thus there was none to expire. The reason TDOC never had pentobarbital is because the 2015 lethal injection protocol, current Protocol A, uses compounded pentobarbital. According to the USP,[8] high-risk sterile compounds, which compounded pentobarbital is, have a beyond use date of 24 hours at controlled room temperature or three days refrigerated. *See West, et al. v. Schofield, et al.,* Case No. M2015-01952-COA-R3-CV, Technical Record, Trial Exhibits 5, 6. Testimony from State agents during the previous *West* litigation established that the TDOC had a signed contract with a pharmacist who assured that s/he could obtain the active pharmaceutical ingredient necessary to compound pentobarbital

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[7] Although this Court does not resolve factual disputes, and West is not requesting that the Court do so, the following facts are asserted in response to the State's representation regarding pentobarbital. The truth will ultimately be determined in the pending Chancery Court proceedings.

[8] The United States Pharmacopeia sets the world industry standards to "ensure the quality, safety, and benefit of medicines and foods." http://www.usp.org/about (last checked March 1, 2018).

and that the compounder was ready, willing, and able to manufacture and distribute compounded pentobarbital to TDOC upon the setting of an execution date. *See, e.g., West, et al. v. Schofield, et al.,* Case No. M2015-01952-COA-R3-CV, Technical Record, Transcript, Volume III, pp. 823-824; *Id.*, Trial Exhibit 54. On March 2, 2017, Debra Inglis, TDOC legal counsel, told reporters that TDOC was able to obtain the drugs necessary for an execution "as needed." Boucher, *Lethal injections stalled*, The Tennessean, March 3, 2017, p. A3; 2017 WLNR 6714205.

Counsel for Abdur'Rahman, Johnson, Wright and Zagorski have consistently requested public records from TDOC. Attachments 1, 7. TDOC has not produced a document indicating that the compounder has withdrawn from the contract with TDOC. TDOC has not produced a document establishing that they are unable to obtain compounded pentobarbital. On November 13, 2017, the State continued to defend the compounded pentobarbital protocol in the United States Supreme Court. *Abdur'Rahman, et al. v. Parker, et al.*, No. 17-6068, Brief in Opposition. That the State did so indicates that they were confident in their ability to obtain pentobarbital as recently as November 13, 2017.

Public records productions by TDOC, which the State represents are full and accurate as of January 10, 2018, provide no evidence that TDOC is unable to obtain compounded pentobarbital.[9] In fact, documents produced on January 16, 2018, contain a contract signed December 4, 2017, with an individual who agreed to

[9] Despite requests to the contrary, when TDOC finally answers public records requests they only do so as of the date of the letter requesting the records. A February 2, 2018 public records request remains unanswered.

compound drugs for lethal injections in Tennessee. Attachment 9, Pharmacy Services Agreement, Article 1, §1.2.

The State's new protocol, which retained pentobarbital and added a Midazolam Option, is dated January 8, 2018. Texas was prepared to carry out an execution using pentobarbital on February 22, 2018, but the defendant in that case was granted executive clemency hours before the execution was carried out. Georgia is set to carry out an execution using pentobarbital on March 15, 2018. Thus, the State's bald assertion that their ability to obtain pentobarbital is uncertain does not justify their request to schedule West's execution prior to June 1, 2018, and to choose the Midazolam Option, without ever giving West an opportunity for the due process hearing this Court's precedent demands.

C. The State's argument that the pharmaceutical companies are acting at the behest of death penalty opponents is a baseless conspiracy theory.

Multi-billion dollar pharmaceutical companies do not act at the behest of small, non-profit death penalty abolitionist groups. These businesses act at the behest of their stockholders and pursuant to their business model. These private businesses do not have a stake or a position on how or whether West lives or dies. West has no control over these Fortune 500 companies. Nor does West have control over the actions of small, non-profits.

The truth is that the pharmaceutical companies have always objected to their drugs being misused in lethal injections. When states began to use branded drugs in lethal injections, those companies simply enforced their contracts, as any business would.

The fact that the business concerns of multi-billion dollar companies collide with the State's interest in misusing those companies' drugs is not the fault of West. The actions of individuals on either side of the death penalty debate are irrelevant to West's right to due process and the rule of law. Such actions do not provide a reason to cast aside *stare decisis* and set execution dates before West has an opportunity to fully and fairly litigate his case against the new lethal injection protocol.

IV. Tennessee Courts are to be concerned with Due Process and the rule of law.

The February 22, 2018 botched non-execution of Doyle Hamm in Alabama[10] demonstrates why it is essential to fully and fairly litigate challenges to risky protocols such as the Tennessee Midazolam Option in a courtroom environment without the extreme pressure of compressed execution schedules. The constitutionality of the Midazolam Option must be adjudicated in a forum that is free from the immense time pressure the State seeks to impose.

The cases cited by the State in their motion arise in a stay-posture where the defendants faced a higher burden than the one governing West's pending lawsuit in Chancery Court. Moreover, the cases cited by the State do not change the fact that this Court has always held that lethal injection challenges must be fairly adjudicated on their own, unique facts in Tennessee.[11] Fair adjudication means a

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

[11] West's lawsuit cannot be dismissed by reference to cases decided in other jurisdictions in the context of appeals from the preliminary injunction proceedings respecting protocols which are not identical to the Tennessee Midazolam Option. Tennessee courts decide what is constitutional in Tennessee after a full and fair hearing. Further, the State overstates the Supreme Court's holding in

trial with a full record addressing the merits. "The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision." *State v. West*, No. M1987-000130-SC-DPE-DD, Order p.3 (Tenn. Nov. 29, 2010). The State's motion implicitly admits that there is no time to meet the requirement of a fully developed record if eight executions are to be conducted by June 1, 2018. The State's motion fails on the basis of precedent alone.

Indeed, this Court's precedent establishes that West is entitled to sufficient notice and time to challenge the Tennessee Midazolam Option that this State's courts have never reviewed. This Court previously acknowledged that West has a "legitimate. . . right to and need for notice" regarding significant changes in lethal injection protocols. *West v. Schofield*, 468 S.W.3d 482, 494 (Tenn. 2015) (interlocutory appeal holding challenge to electrocution unripe but guaranteeing sufficient notice and time to challenge any change to the protocol).

V. Scheduling execution dates on an expedited basis unduly burdens and/or denies client fair access to meaningful clemency proceedings.

West has a statutory and constitutional right to seek executive clemency. As the United States Supreme Court has observed:

> Executive clemency has provided the "fail safe" in our criminal justice system. K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been

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Glossip v. Gross, 135 S.Ct. 2726 (2015). *Glossip* did not hold that the any lethal injection protocol using midazolam is constitutional. Rather, in the context of an appeal from the denial of a preliminary injunction in a federal court action, it was found that the lower court did not commit clear error. *Id.*, at 2740-41.

> pardoned in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. E. Borchard, Convicting the Innocent (1932). Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made. *See* M. Radelet, H. Bedau, & C. Putnam, *In Spite of Innocence* 282-356 (1992).

Herrera v. Collins, 506 U.S. 390, 415 (1993). The Court reaffirmed the importance of clemency in *Harbison v. Bell*, 556 U.S. 180, 192 (2009) ("As this Court has recognized, however, '[c]lemency is deeply rooted in our Anglo–American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.' *Herrera v. Collins*, 506 U.S. 390, 411–412, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (footnote omitted).").

In the modern era, the State of Tennessee has executed six men.[12] Two men and one woman facing imminent execution have received executive clemency.[13] Thus, in this state, fully one-third of defendants who completed the standard three-tier process and who were facing execution were found to be worthy of a life sentence.

A request for executive clemency in a capital case will not be considered by the executive branch until all litigation is exhausted. An effective case for clemency cannot be cobbled together in a matter of days. Moreover, expediting eight executions before June 1, 2018, prevents a careful, thorough and meaningful

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[12] Robert Coe, Sedley Alley, Philip Workman, Daryl Holton, Stephen Henley, Cecil Johnson.

[13] Michael Boyd, Edward Harbison, Gaile Owens.

consideration of West's clemency request. Forcing West to seek clemency while at the same time litigating the Tennessee Midazolam Option under an extremely compressed timeline alongside seven other inmates is the equivalent of denying all inmates a legitimate opportunity to pursue clemency. Such a compressed timeframe is also extremely disrespectful to Governor Haslam, who would be expected to make eight life or death decisions in mere weeks.[14] This is a separate and untenable injustice that would result if expedited execution dates are set.

VI. This Court should exercise its equitable authority and recommend to the Governor that Mr. West should be granted clemency.

Tennessee's Governor is vested with the authority to commute a death sentence. Tenn. Const. art. III, § 6; Tenn. Code Ann. § 40-27-105 (2017). Complementing the Governor's constitutional clemency power, however, Tennessee law directs this Court, with its unique expertise and familiarity with death penalty cases, to play an important role by certifying that clemency is appropriate when uncontroverted, extenuating circumstances are present in a particular case. Tenn. Code Ann. § 40-27-106; *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000); *id.* at 816-17 (Birch, J., dissenting).

When invoked by a request for a certificate of commutation, Tennessee law assigns this Court the duty to make a *recommendation* whether the Governor ought to commute a condemned inmate's punishment from death to life imprisonment. This act is different from executive clemency *decisions* which are "outside the domain of the courts[.]" *Workman*, 22 S.W.3d at 813 (Drowota, J., concurring). In

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

other words, this Court's certification under Tenn. Code Ann. § 40-27-106, "serves, simply, as a vehicle through which the Court may ethically and on the record communicate with the Governor in aid of his exclusive exercise of the power to commute sentences." *Workman*, 22 S.W.3d at 817 (Birch, J., dissenting).[15]

This Court should issue a certificate of commutation because the death penalty is unreliable in this case. A certificate of commutation should be issued because "there [are] extenuating circumstances attending the case, and that the punishment ought to be commuted." Tenn. Code Ann. § 40-27-106 (2017). The extenuating circumstances in this case include the following:

First, no execution date should be set for a prisoner suffering from mental illness as severe as West's. Second, carrying out the death sentence in this case would be manifestly unfair where the actual killer of the two victims in this case received a life sentence. Third, the jury in this case never got to hear Stephen West's extensive mitigating evidence or learn about the psychological impact that had on him. The combined weight of these extenuating circumstances must persuade this Court to deny the Attorney General's motion.

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[15] Clemency is not "entirely distinct from judicial proceedings." *Harbison v. Bell*, 556 U.S. 180, 192 (2009). It "is deeply rooted in our Anglo-American tradition of law," and "[f]ar from regarding clemency as a matter of mercy alone" it is "the 'fail safe' in our criminal justice system." *Harbison*, 556 U.S. at 192 (quoting *Herrera v. Collins*, 506 U.S. 390, 411-12, 415 (1993) (internal quotation marks omitted)). Clemency operates to address the "unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera*, 506 U.S. at 415.

A. Because the State of Tennessee recognizes that West suffers from severe mental illness, the attorney general's motion to set an execution date should be denied.

Throughout the post-conviction and federal habeas proceedings in West's case, West has sought to show that his history of childhood abuse caused him mental disturbances that affected his actions at the time of the offense. West has presented testimony and affidavits to prove that severe mental illness contributed to his actions in the present case. (*See* Attachment 10, Dr. Kenner Affidavit; Attachment 11, Dr. Coleman Report; Attachment 12, Dr. Dudley Report; Attachment 13, Dr. Stewart Affidavit; Attachment 14, Vestor West Affidavit). This evidence is given additional credence by the State of Tennessee because mental health professionals working for the prison have been treating West for severe mental illness with powerful anti-psychotic drugs for many years now. This ongoing treatment supports West's evidence that mental illness makes him less morally culpable for the crimes he was convicted of committing. Furthermore, executing inmates who are indisputably severely mentally ill violates this state's and this country's evolving standards of decency. Because of this, the execution of Stephen West would violate the Eighth Amendment to the United States Constitution as well as Article I, §16 of the Tennessee constitution.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In deciding whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U. S. 97, 102 (1976) (quoting *Trop v.*

Dulles, 356 U. S. 86, 101 (1958) (plurality opinion) (internal quotation marks omitted)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy* v. *Louisiana*, 554 U. S. 407, 419 (2008) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 382 (1972) (Burger, C. J., dissenting)). Here, this Court must refuse to set an execution date for Stephen West or must recommend a certificate of commutation because he is severely mentally ill and the execution of one so mentally ill offends current standards of decency.

Dr. William Kenner, an expert psychiatrist, examined Stephen West's medical records kept by Tennessee prison officials at Riverbend Maximum Security Institution where he is being held on death row. *See* Dr. Kenner's Affidavit, attached hereto as Attachment 10. Those records show that since 2001, state officials have recognized that West suffers from severe mental illnesses that include psychosis and delusions. (Attachment 10). According to those records, West has been diagnosed with major depressive disorder with psychotic features, chronic paranoid schizophrenia, and schizoaffective disorder. (Attachment 10). According to Dr. Kenner, these diagnoses are severe mental illnesses. (Attachment 10).

In his affidavit, Dr. Kenner traces the history of West's diagnoses by prison doctors:

> Major depressive disorder with psychotic features, as diagnosed by Dr. O'Toole, is characterized by a disturbance of mood and loss of interest or pleasure in everyday activities. Symptoms may also include weight loss or gain, sleep disturbance, fatigue, inability to concentrate, feelings of worthlessness, thoughts or attempts of suicide. This disorder

> is not directly caused by a general medical condition or the use of substances, including prescription medications. The severity of these symptoms can range from mild to severe, with Mr. West experiencing moderate to severe symptoms.

(Attachment 10, pp.2-3 ¶9).

Dr. Kenner also provides a vivid description of what a patient like Stephen West would experience as a result of this severe mental illness:

> Chronic paranoid schizophrenia, as diagnosed by Dr. Sarasti, is diagnosed in individuals who first qualify for the schizophrenic label and then have symptoms that put them into the paranoid subgroup. Schizophrenia is a group of psychotic disorders characterized by disturbances in thought, perception, affect, behavior, and communication that lasts longer than 6 months. Symptoms include delusions, hallucinations, disorganized or incoherent speech, severely disorganized or catatonic behavior. The paranoid type indicates Mr. West is preoccupied with auditory hallucinations; as documented by the prison medical staff.

(Attachment 10, p.3 ¶10).

The inmate the State of Tennessee seeks to execute is also one that the State deems worthy of strong medications:

> To understand Mr. West's latest diagnosis, schizoaffective disorder, it helps to picture someone with the disordered brain and symptoms of schizophrenia, hallucinations and delusions, at the same time he is riding the rollercoaster of bipolar disorder. Dr. O'Connor took a careful history from Mr. West that traced his auditory hallucinations at least to his adolescence. If those symptoms did start at that time, then that timing would fit with the usual onset of this illness, and his severe mental illness would have started years before his capital offense. In my opinion as a practicing psychiatrist, schizoaffective disorder is a severe mental illness.

(Attachment 10, p.4 ¶13).

In accord with these diagnoses, the prison medical staff has been dispensing a number of psychotropic medications.

> Beginning in 2001 and continuing to the present, Mr. West has been prescribed a number of different antidepressant and antipsychotic medications at normally prescribed levels that are used to treat severe mental illnesses. Those agents have included Haldol and Thorazine, both old line, or first generation, antipsychotic drugs, which have been described as "chemical straightjackets[.]" . . . As of September, 2017, he was taking 1200 mg of Thorazine daily. This is a very high dose of Thorazine. The impact and side effects of those two drugs are so unpleasant that less sick individuals and those faking mental illness will refuse to take them. Stephen West's antidepressant medications have included Paxil, Pamelor, Effexor, Trazodone (a sedating antidepressant used as much to induce sleep as to improve mood), and Wellbutrin. After Dr. O'Connor diagnosed West with the combined illness of schizoaffective disorder, she stopped his first generation antipsychotic and started him on a second generation or atypical antipsychotic, Respirdol that has significant mood stabilizing effects as well. Although the exact medication has varied, since 2001, Mr. West has been continually taking some form of medication to treat his severe mental illness, including antipsychotics.

(Attachment 10, p.4-5 ¶15).

There can be no dispute that Stephen West is severely mentally ill. The State of Tennessee clearly thinks so and prescribes strong medication to him because of it. Dr. Kenner's affidavit suggests that West may have been suffering from some form of this mental illness long before prison medical staff arrived at a diagnosis. This is consistent with the fact that the usual onset for schizophrenia is in adolescence. (Attachment 10, p.4 ¶13). At the time of the offense in this case, West's symptoms may well have been covered up by alcohol and drug usage. (Attachment 10, p.4 ¶14). The question now before this Court is what action it should take as a result of this evidence?

The Supreme Court has held that the Eighth Amendment forbids the execution of offenders who committed murder before the age of eighteen. *Roper v. Simmons*, 543 U.S. 551 (2005). The Eighth Amendment also forbids the execution of

those who suffer from mental retardation. *Atkins v. Virginia*, 536 U.S. 304 (2002). These classes of offenders are exempted from the death penalty because, due to their immaturity or their substandard intelligence, they are less morally culpable than other offenders. *Roper*, 543 U.S. at 570-72, *Atkins*, 536 U.S. at 320. They are less in control of their actions. *Roper*, 543 U.S. at 569-70, *Atkins*, 536 U.S. at 320. They are less able to assist their attorneys in their own defense. *Atkins*, 536 U.S. at 320.

These same issues apply to defendants, like Stephen West, who are severely mentally ill. As demonstrated in the expert reports, Stephen West's mental illness affected his actions, and more particularly, his inability to act, at the time of this offense. Furthermore, his masking of his illness and its symptoms contributed to his lack of ability to assist his attorneys in proffering it as a mitigating factor. West could not be expected to understand his own mental illness or to show how it made him less morally culpable. Furthermore, because he had never been treated until the prison officials began to treat him, he could not show that his conditions were amenable to treatment.[16] Through no fault of his own, his mental illness directly contributed to his death sentence.

It simply offends current standards of decency to execute a man as severely mentally ill as Stephen West. This is particularly true in light of his long incarceration and the torturous effect it has had on his mental illness. (Attachment

[16] It is also noteworthy that West has no history of violence or serious infractions within the prison system.

10, p.5 ¶18). *See also Lackey v. Texas*, 514 U.S. 1045 (Mem.) (Stevens, J., respecting the denial of certiorari) (It is arguable that retribution and deterrence don't retain any force for prisoners after 17 years on death row). His severe mental illness is real. It is not something that he brought onto himself and it is not something that he is faking. It almost certainly contributed to his actions at the time of this offense. At the same time, his prison records show that with proper medication, he has not been dangerous to anyone while incarcerated. He has been safely and successfully excluded from society for more than 30 years now. Furthermore, given his mental illness, his long incarceration with the constant threat of execution has been especially torturous. (Attachment 10, p.5 ¶ 18). This Court must deny the State's motion to set an execution date for Stephen West.

B. Where the actual killer of both victims received a life sentence, it is manifestly unfair to execute an accomplice who played a lesser role in the offense.

In the early hours of March 17, 1986, Stephen West and Ronald Martin left their work at a McDonald's in Lake City, Tennessee and, many hours later, arrived at and were admitted into the home of Wanda and Sheila Romines in Union County. Martin was an acquaintance of fifteen-year-old Sheila Romines. He had tried to date her, but was rejected and in fact, was publicly humiliated by her. Sometime between the hours of 6:00 a.m. and 8:30 a.m., Sheila and her mother, Wanda, were stabbed to death. Sheila was raped before she was killed. *State v. West*, 767 S.W.2d 387, 389-90 (1989). Martin and West were arrested the next day. The trials were severed, and the trial against West proceeded first.

Although there is no question that Stephen West was present with co-defendant Ronnie Martin at the time of this crime, the jury in his case never heard a tape recording of Martin admitting to being the actual killer of both victims. While Martin was in custody at the county jail, Martin discussed his involvement in the crimes with cellmate Steve Hunley. This conversation was captured on the tape:

Hunley:	Hey, Ronnie.
Martin:	Yeah?
Hunley:	One more time before I go to bed to ease my mind, Steve do that shit?
Martin:	No.
Hunley:	Huh?
Martin:	No.
Hunley:	O.K. Thank you.
Hunley:	These guys back here don't believe me that you said Steve didn't kill them women. Will you tell them you did?
Unknown:	Who's back there?
Hunley:	All of us.
Martin:	Yeah, I did it.
Hunley:	You killed both them women?
Martin:	Yeah.
Hunley:	Why?
Martin:	I don't know. I don't want to talk about it.

(TT Vol. XIII, p.86, Exhibit 90; R.111-1, PageID# 1173).[17]

Me:	You don't think your [sic] crazy?
Ronnie:	No
Ronnie:	A little goofy at times, but I don't think I'm crazy.
Me:	Yea, but you said Steve didn't kill those women, you did. Don't you think that's crazy?
Me:	Huh
Ronnie:	Huh
Me:	You told me Steve didn't do that but you did, don't you think that's crazy?
Ronnie:	I don't think it's crazy, no.

. . .

[17] Citations to the state court record are indicated by the following abbreviations: trial transcript ("TT"), post-conviction transcript ("PCT"), and post-conviction technical record ("PCTR").

Me: Be honest with me, you going to go in that courtroom and tell them you done that shit?
Ronnie: If its [sic] up to me I will.

(*Id.*; R.111-1, PageID# 1174-75).

"A confession is like no other evidence . . . '[and may] have profound impact on the jury[.]'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 140 (White, J., dissenting)). West's jury never experienced the impact of hearing Martin's own voice confessing to killing both women. Although this Court has upheld the exclusion of that evidence at trial, *see West*, 767 S.W.2d at 396, it is now relevant to the Court's decision on the present motion. *See* Tenn. S. Ct. Rule 12.4(A) ("Any response in opposition to the motion . . . shall assert any and all legal and/or factual grounds why the execution date should be delayed, why no execution date should be set, or why no execution should occur[.]").

Despite the fact that this confession could not technically exonerate West, it is compelling evidence that this Court must consider in determining whether the death sentence should actually be carried out. It is patently disproportionate and unfair to execute West for two murders that Ronnie Martin actually committed, and for which Martin received a life sentence. Where the actual killer is ineligible for the death penalty, it is simply wrong for a secondary actor to be put to death.

Credible psychological evidence also shows that West was not an actual killer, that he was a follower of the younger, but more influential Martin, and that he was susceptible to a period of disassociation once he realized that Martin was

going to kill the Romines women. This evidence demonstrates that Stephen West is submissive and operates at an emotional level of a thirteen to fifteen-year-old, (PCT 9/24/96, p.96, Dr. Engum testimony), that he rates very low on psychological dominance testing, (*id.*, p.97), supporting the theory that he was dominated by his co-defendant and acting under duress at the time of the offense (*id.*, p.155). Testimony about these traits could have been used at trial to provide an explanation for how West could stand by passively as Martin stabbed both victims.[18] While the crimes were being committed, West was "in an extreme situation, and he became essentially dysfunctional during that time." (*Id.*, p.114). West suffered from acute stress disorder which was triggered by the extreme traumatic stressor of Martin's stabbing of the Romines women. He was at high risk of developing acute stress disorder and being influenced by Martin due to problems with anxiety and passive dependence stemming from childhood trauma. (Attachment 11, Dr. Coleman's report, pp.6-7). "[W]hen SW [Stephen West] saw Ronnie Martin holding a knife to Mrs. Romines' neck, he responded with horror and a sense of helplessness, and that scene exacerbated the symptoms of his PTSD and/or precipitated a new PTSD." (Attachment 12, Dr. Dudley's report, p.12).

When confronted with the circumstances at the Romines' house, West, early on, described experiencing intense fear, helplessness and horror. He told Dr. Bursten before his trial, that he felt "dazed" and detached from his body and felt as

[18] This Court identified the need for this explanation in its original opinion: "Defendant offered no explanation as to why he failed to try to get away, call for help, or attempt to overpower or get the drop on Martin...." *West*, 767 S.W.2d at 397.

if the events were unreal. (PCT 9/24/96, pp.115-16, Dr. Engum; PCT 10/22/96, pp.473, 476-77, Dr. Bursten).

> [West's] background of extreme trauma and anxiety during childhood set the stage for West's having an acute stress response and becoming emotionally overwhelmed by the situation, experiencing intense dissociative symptoms of depersonalization and derealization. Mr. Ronnie Martin's psychological history indicates that, although younger than Mr. West, he was an angry individual who had a hostile, aggressive and manipulative personality features. It is my opinion that this more dominating and pathological personality style, in contrast to Mr. West's submissive and fearful personality traits, did serve to reinforce Mr. West's long-standing pattern of becoming passive and compliant when confronted with intense stress. It is my opinion that he had very limited psychological resources for proactive resistance due to the psychological trauma and anxiety reaction he was experiencing at that time. His lack of sleep and his intoxication at the time further depleted his ability to more effectively cope with the traumatic situation.

(Attachment B, Dr. Coleman's report, p.7).

This information explains West's actions (or non-actions) during the crime. According to a legal expert who testified during post-conviction proceedings:

> [T]here is in this case a series of statements that Steve West gives that are reasonably incomprehensible unless you have the psychological background. His statement that a juvenile dominated him sounds on the surface incredible; his actions on that day of being dominated or not participating. Why didn't he run out the door? Why did he act the way he did? I'm sure that runs through jurors' minds. Is this person credible? Would a reasonable person act that way? You can't determine that in the abstract. If you know his psychological profile, his background as Dr. Engum spelled it out, there is a reason why he would have behaved that way.

(PCT 10/22/96, p.413).

The above-cited evidence provides an explanation for why and how West is morally less culpable than co-defendant Martin. Yet, because Martin was a juvenile at the time of the crime, Martin was not eligible for the death penalty. It is

unconscionable to execute Stephen West for murders committed by Ronnie Martin simply because Martin was ineligible for the death penalty. It is manifestly unfair and disproportionate to execute the one who was dominated and who played the lesser role in the offense.

C. Stephen West's jury never got to consider the mitigating impact of his background of horrific abuse. That background presents sufficient mitigation for this Court to recommend a Certificate of Commutation.

Stephen West was sentenced to death despite the fact that the jury in his case was left uninformed about his background and childhood. *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988) (requiring an individualized sentencing determination). Jurors knew that West had no criminal record at the time of his arrest in this case. However, they were never told about his history of extreme childhood abuse. They were also provided none of the psychological evidence described in the foregoing section that would have given them some explanation for the inexplicable: How a 23-year-old man who had no criminal record could have come to be involved in such a horrendous crime. Before this Court decides to set an execution date for Mr. West, it must evaluate this evidence and the impact it would have had on West's jury. This Court must also further reconsider the fairness of imposing the death sentence where no reviewing court has correctly evaluated the mitigating impact of the evidence.

1. West's Childhood

Stephen West's mother gave birth to him in a mental institution; she had been placed there after she tried to commit suicide. (PCT 9/24/96, pp.163-64, Debbie

West). She had a history of mental illness, including auditory hallucinations. (Attachment 11, Dr. Coleman's report, p.3). His father was a lifelong alcoholic and a violent man who openly questioned West's paternity. *West v. State*, No. 03C01-9708-CR-00321, 1998 WL 303030, at *2 (Tenn. Crim. App. June 12, 1998). Under the care of these parents, West's childhood was cruel and traumatizing. Both his mother and his father brutalized him from the time he was a baby. (PCT 10/22/96, pp.370-71). His mother would beat him mercilessly by "[s]winging a belt so long and so hard that it would wear her out." *Id.*, p.371. The beatings left West with "[b]ruises, black eyes, busted lips, pulled hair, pinch marks, bruises." *Id.* They were never predictable and occurred without reason. *Id.*

West's aunt, who lived in an apartment above West's family, witnessed some of this horrible abuse. Specifically, she recalled that West's mother swore at him, beat him, threw him against the wall by his feet, and would leave him in a cold room on a mattress wet with urine. His aunt explained: "She was constantly hitting him. He had bruises on him; pinching him; sling him back in that room if he came out." (PCT 10/22/96, p.383).

She also vividly described one example of the kind of abuse that West regularly suffered:

> I came down. Patty [West's sister] came out to get some food for Steve and she [West's mother] started swearing at them and she ran in there and just slung Steve up against the wall; grabbed him by his feet. There was blood and he started throwing up. And she said, "I feel like killing the little bastard." She walked out. I cleaned them up and took them to the hospital. His nose was bleeding and his mouth was bleeding.

Id., pp.382-83.

West's oldest sister, Debra, remembers him being "slapped in the head and hit with shoes" throughout his childhood. *West*, 1998 WL 309090, at *2. She portrayed him as the family scapegoat: "If my other brother did something wrong, Steve got beat for it. My sister and I would try to get between them, and we would get beat, and then his beating was finished, and this was not just one or two times. This was from the time I can remember Steve coming home from the hospital." (PCT 9/24/96, p.166). Debra described their father as an alcoholic who was violent when sober and even more violent when drinking. (PCT 9/24/96, pp.166-67). Like West's aunt, Debra remembered at least one occasion when West's mother threw him against a wall to punish him. *West*, 1998 WL 309090, at *2.

The abuse was so merciless that neither West nor his sister, Patricia, has any recollection of the first decade of their lives. West's mother eventually told him that during that period his ankles were broken at least seven times and he also suffered broken toes and a fractured elbow. (Attachment 11, Dr. Coleman's report, p.3). In response to this abuse, West never became violent or fought back. Debra explained that West would "duck" when either of his parents raised a hand near him. (PCT 10/22/96, p.167). His aunt said:

> He was very timid. He never said anything. He would just cry. If he saw her coming towards him he'd scream out and start crying and just stand there and let her beat him. A few occasions I asked her, "Please why are you doing this?" She said, "If I could kill him and get away with it I would."

(PCT 10/22/96, p.383).

This evidence of childhood abuse adds up to a compelling mitigation case. However, West's counsel never investigated these issues prior to sentencing, and the jury that sentenced West to death never heard any of this evidence.

West's trial attorneys, McConnell and McAlexander, readily admitted that prior to West's sentencing they did not conduct a probing investigation into West's background or into any issues of abuse within his family. McConnell testified that family members failed to come forward on the issue of abuse. McAlexander was not "entirely sure about [any allegations of] physical abuse, but if they were mentioned, there was nothing that created any kind of red flag in my mind about that being a factor that should have been inquired into." (PCT 9/24/96, p.198). McConnell believed such an investigation "would have been chasing down blind alleys if I checked that out." (PCT 10/22/96, pp.267-68). With respect to conducting separate interviews of siblings and other family members outside the presence of West's parents in order to explore mitigation themes, counsel "certainly wouldn't have wasted time on that." (*Id.*, p.267). Trial counsel also did not obtain West's school, employment, or medical records. (*Id.*, pp.265-66).

Instead of investigating West's background for possible abuse, West's attorneys laid the burden of bringing up this sensitive subject on West and his family: "Mr. West never raised any physical . . . or sexual abuse or anything of this nature." (*Id.*, p.267). But the evidence was readily available if counsel had sought it out. West's sister Patricia testified during the post-conviction proceeding that she did not tell the attorneys about West's background of abuse because "[n]obody asked and I didn't think it would matter." (*Id.*, p.373). And his sister Debra testified

that she informed McConnell about West's history of abuse and that McConnell told her it was not relevant and that because West's parents were paying his fee, he would not raise it. (PCT 9/24/96, p.168).[19] Other potential witnesses, including West's aunt, were simply never contacted. (PCT 10/22/96, p.384).

In the post-conviction proceeding, West presented testimony from Dr. Eric Engum, a clinical psychologist who concluded that West suffered from a severe mixed personality disorder. According to Dr. Engum, West is submissive and operates at the emotional level of a thirteen- to fifteen-year-old. (PCT 9/24/96, p.96). The results of West's testing were consistent with those of an individual who had suffered from severe childhood abuse.

This information would have explained West's actions during the crime. It would have connected West's abusive background and his failure to act against Martin. It would have provided some explanation, other than sheer cowardice,[20] for why West stood by and did nothing during the murders. Mental health experts were able to link the abuse West received as a child with his response to Ronnie Martin's actions. It could have been used as compelling mitigating evidence.

2. No reviewing courts have considered the entirety of West's mitigating evidence under the proper standards of review.

Although this previously undiscovered evidence constituted a compelling case

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[19] McConnell denied the conversation, (PCT 10/22/96, p.301), but West's father corroborates McConnell's conflict of interest. (Attachment 14, Vestor West Affidavit; R.111-1, PageID# 1206).

[20] On direct appeal, this Court represented West's actions as "cowardly" and "cowardice." *West*, 767 S.W.2d at 390, 391.

for a jury to spare West's life, the state post-conviction and federal habeas courts denied relief. The Tennessee courts have recognized counsel's failure to investigate any issues of childhood abuse, explicitly finding that "[n]one [of West's family members] were questioned concerning possible abuse." *West*, 1998 WL 309090, at *8. But the post-conviction trial court denied relief on the ground that West had "fail[ed] to prove *by a preponderance of the evidence* that the result [of his trial] would have been different" had the newly discovered mitigating evidence been presented to the jury. (PCTR, pp.274-75) (emphasis added). That burden of proof is incorrect—indeed, it is the very same burden that the United States Supreme Court would eventually identify as "contrary to" *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) ("If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature' and 'mutually opposed' to our clearly established precedent...."). The Court of Criminal Appeals failed to correct the misstated burden of proof—indeed, that court failed even to apply *Strickland*'s two-part test for evaluating ineffective assistance claims. *West*, 19981998 WL 309090, at *8-9. Neither of these state courts applied the proper constitutional standard when they denied relief. This Court did not intervene to correct these mistakes.

3. Federal habeas courts failed to consider and give mitigating effect to West's evidence of severe childhood abuse.

When the federal district court dismissed West's habeas petition, the court declined to consider the full extent of West's evidence, consisting primarily of additional, corroborating expert opinions describing the psychological impact of West's abusive childhood and its influence on him at the time of the crime in this case, on the ground that West had failed to present that mitigation evidence to the state post-conviction court. *See* 28 U.S.C. §2254(e)(2); R.188, Memorandum & Order, PageID# 87-88. This evidence could not have been presented to the state court due to the very limited funding during state post-conviction proceedings preventing West from being able to hire experts to corroborate and expand upon Dr. Engum's findings. These reports are attached to this Response so that this Court may fully consider West's mental health evidence. (Attachment 10, Dr. Kenner Affidavit; Attachment 11, Dr. Coleman's Report; Attachment 12, Dr. Dudley's Report; Attachment 13, Dr. Stewart's Affidavit).

Without proper consideration of all of the available mitigating evidence, this Court can have no confidence that the death penalty has been justly and fairly applied to Stephen West. The United States Supreme Court has made clear that the presentation of mitigating evidence during a capital sentencing proceeding is absolutely essential to ensure that a defendant's sentence is adequately reliable -- which is of particular concern where the sentence is death. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence

is imposed"). Indeed, the Court has explained that it is because of "the need for reliability in the determination that death is the appropriate punishment" that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Jurek v. Texas*, 428 U.S. 262, 271-74 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189-90 & n.38 (1976).

Mitigating evidence, like that which could have been presented to West's jury is relevant because it explains the defendant and his actions for the jury—it creates a complete picture of a flawed and complicated human being, to which the jury, in all of its complex humanity, can react. Thus, deeply embedded in death penalty jurisprudence is the principle that "punishment should be directly related to the personal culpability of the criminal defendant" and that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime[.]" *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also, e.g.*, *Lockett*, 438 U.S. at 604 (explaining that mitigation evidence is any evidence that might serve "as a basis for a sentence less than death"). Any other process necessarily "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass[.]" *Woodson*, 428 U.S. at 304.

The prejudice analysis mandated by the Supreme Court reflects this understanding of the nature and purpose of mitigation evidence, and gives force to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). The Supreme Court has long held that evidence showing that the defendant was subject to severe abuse as a child is indisputably mitigating, and that counsel's failure to introduce it at sentencing has a prejudicial effect by decreasing the reliability of the sentencing proceeding. *See Strickland*, 466 U.S. at 687 (explaining that counsel's assistance is ineffective where it deprives the defendant of "a trial whose result is reliable"). Such evidence humanizes and gives context—it shows that the person whom the jury already has decided is a killer is less blameworthy for his actions because of what others did to him when he was innocent and vulnerable.

In a series of cases highly relevant to this Court's decision on setting an execution date, the Supreme Court found prejudice under the *Strickland* test where the mitigating evidence not presented was evidence that the defendant was abused as a child. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court vacated the death sentence where trial counsel failed to uncover and present to the sentencing jury the "graphic description of Williams' childhood, filled with abuse and privation" as well as evidence of defendant's borderline mental retardation. *Id.* at 398. Such evidence "might well have influenced the jury's appraisal of his moral culpability." *Id.* In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court also vacated the death

sentence, explaining that "Wiggins experienced severe privation and abuse in the first six years of his life" and "has the kind of troubled history [that the Court has] declared relevant to assessing a defendant's moral culpability"—so that if this evidence had been placed "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 535, 537. In *Rompilla v. Beard*, 545 U.S. 374, 392 (2005)[21], the defendant suffered abuse as a child, was isolated and "lived in terror," and witnessed violence between his parents; the Court found that:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, 'taken as a whole, might well have influenced the jury's appraisal' of [Rompilla's] culpability."

545 U.S. at 393 (quoting *Wiggins*, 539 U.S. at 538). Just as in these cases, West's evidence of severe childhood abuse should have been considered by the jury because it might have influenced its appraisal of West's culpability.

The evidence of the severe depredations West suffered in his abusive and unhappy childhood is the epitome of mitigating evidence under Supreme Court precedent. As in *Williams*, *Wiggins*, and *Rompilla*, its presentation would have allowed the jury to give force to our society's belief that West was "less culpable" for

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[21] In reviewing this case, the Sixth Circuit Court of Appeals inappropriately applied a standard similar to the one rejected in *Rompilla*. The Court found that although West had presented compelling mitigating evidence, the jury may have rejected it because it may have concluded that "violence begets violence ... [and] [t]hey might have despised West and sentenced him to death with greater zeal. *West v. Bell*, 550 F.3d 542, 556 (6th Cir. 2008).

the crimes because his acts were attributable not to some inherent wickedness but rather to his "disadvantaged background" and his resulting "emotional and mental problems." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).

VII. Because multiple errors have infected this case, the cumulative effect of those errors is sufficient cause for this Court to deny the Attorney General's motion.

The above-cited reasons are more than sufficient reason for this Court to deny the Attorney General's motion. However, the Court must further consider the fact that it has already found serious error in West's trial. Although it denied relief, this Court found multiple instances of prosecutorial misconduct in its original review of this case. The prosecuting attorney made improper arguments "that were not supported by any direct evidence," arguments that the defendant was a "liar" who was "trying to throw sand in the eyes of the jury" and "blowing smoke in the face of the jury." *West*, 767 S.W.2d at 394-95. The prosecution also asked improper and inflammatory questions of Mr. West. *Id.* at 397.

In addition to these errors, this Court also recognized that the prosecution improperly attempted to lessen the jury's sense of responsibility for imposing the death sentence. Under *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985), the prosecution may not make "statements [that] minimize the jury's role and allows them to feel that the responsibility for a death sentence rests elsewhere." *West*, 767 S.W.2d at 399. Again, the Court did not reverse, but found that prosecutorial arguments to the jury that the law "provides the punishment, not you," and that "the law is self-executing" violated the principals announced in *Caldwell*. *Id.*

This Court must consider and weigh the fact that it recognized serious error

on its direct review of this case in its present decision about setting an execution date. Tennessee Supreme Court Rule 12.4(A) calls for the Court to consider "all legal and/or factual grounds why the execution date should be delayed, why no execution date should be set, or why no execution should occur." A consideration of the cumulative impact of the errors in this case must lead this Court to conclude that the death sentence here is unreliable.

Stephen West's death sentence was only obtained only after multiple instances of prosecutorial misconduct. It was further imposed without any consideration of West's background of severe childhood abuse. West's mental health issues, including his status as a follower who could be easily dominated by a younger perpetrator, were never put before his jury to consider. Those mental health issues, now documented by the State of Tennessee, demonstrate that he is severely mentally ill and less morally culpable than other defendants. He is certainly less culpable than the man who actually killed the victims in this case and who received two life sentences. This Court cannot have confidence in the reliability of the death sentence imposed in this case. The cumulative import of all of these facts is to demonstrate that an execution of the death sentence is wholly inappropriate in this case. The Attorney General's Motion must be denied.

VIII. If the Court grants the State's motion, the scheduling of an execution date should take into account the realities of the present circumstances.

If this Court decides to schedule West's execution date, then it is respectfully requested that the Court factor in the inordinate burden placed upon West's counsel

as a result of representing multiple clients with execution dates[22] and, consequently, the detrimental effect upon the adequacy of West's legal representation. In addition, when scheduling an execution date for West, the Court should account for West's pending litigation about Tennessee's lethal injection protocol in order to provide an adequate opportunity for such litigation and to minimize the need for additional or last-minute filings with this Court.

A. West will be denied the meaningful assistance of counsel if his legal team is overwhelmed by multiple, overlapping, consecutive execution dates.

Representing clients with overlapping warrant-periods presents extreme challenges. Undoubtedly, representing clients with pending execution dates is part and parcel of undersigned counsel's job.[23] However, the State's act of simultaneously requesting execution dates for 8 death row inmates, 3 of whom are represented by this office adds a considerable weight and stress to this burden.

Along with Stephen West, counsel Ferrell also represents Nicholas Sutton, for whom the State of Tennessee is currently seeking an execution date.

Preparing for the clemency process requires a thorough examination of all prior phases of the case and independent investigation to tailor the clemency presentation to the characteristics of the client, case and jurisdiction. Counsel must

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[22] Undersigned counsel, Stephen Ferrell, also represents Nicholas Sutton, however, Sutton is currently being represented by the Post-Conviction Defender's Office because his post-conviction case has been reopened. *Nicholas Todd Sutton v. State of Tennessee*, Morgan County Criminal Court No. 7555.

[23] Although counsel must prioritize any client who is facing an execution date, the existence of such a date does not dispel deadlines in counsel's other capital cases. The burden of an execution date upon a pre-existing caseload is expected. The undue burden of multiple execution dates coupled with a pre-existing caseload is extremely difficult to manage.

also ensure that consideration of his client's clemency application is substantively and procedurally just. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.2: Duties of Clemency Counsel (Feb. 2003).

With respect to Mr. West, adequate preparation of the case for clemency is especially important because of the circumstances of the crime and the past history that was never presented to the jury in this case. This is, therefore, an exemplary case for the Governor to exercise his clemency powers "to soften the rigour of the general law" in order to exempt West from the punishment of death that he faces while his culpable co-defendant lives in prison. *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (quoting 4 W. Blackstone, Commentaries, at *397 (1769)). Thus, it is imperative that counsel be afforded sufficient time to prepare and present West's case for clemency.

Finally, this Court must consider the torturous effects of imposing multiple dates for the execution of this severely mentally-ill man. This Court set West's execution for November 9, 2010, but then on November 6, just three days before his lethal injection was to begin, this Court reset Mr. West's execution date for November 30, 2010. Then, just one day before West's next execution date, this Court again issued a stay. Given West's severe mental illness, this Court should refrain from setting an execution date for him.

CONCLUSION

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

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

BY: Stephen A. Ferrell
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Knoxville, TN 37929
Office: (865) 637-7979
Fax: (865) 637-7999

Designation of Attorney of Record

Stephen Ferrell is Mr. West's attorney of record upon whom service shall be made. Counsel's contact information is:

Federal Defender Services of
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Phone: (865) 637-7979
Fax: (865) 637-7999

Undersigned attorney of record prefers to be notified of any orders or opinions of the Court by email to the following email addresses: Stephen_Ferrell@fd.org, Susanne_Bales@fd.org and Bridget_Stucky@fd.org.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document is being delivered to the Court via Fed-Ex for delivery on March 1, 2018, and via email and U.S. Mail, first-class to:

Jennifer L. Smith
Deputy Attorney General
500 Charlotte Avenue
Nashville, Tennessee 37243-1401
Phone: (615) 741-3487
Facsimile: (615) 532-7791
Jennifer.Smith@ag.tn.gov

Stephen A. Ferrell

Index to Attachments

Attachment 1

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

Date	Event
9/7/2017	Drug Supplier Emails TDOC stating ""Here is my concern with midazolam, being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium Chloride especially."
9/12/2017	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
10/18/2017	Drug Supplier emails TDOC a list of drugs that they have provided, indicating a June 1, 2018 expiration date, and inquiring about TDOC DEA license.
10/26/2017	Drug Supplier emails first invoice for midazolam.
10/26/2017	Drug Supplier emails TDOC "I will have my pharmacist write up a protocol."
11/1/2017	Drug Supplier emails second invoice for midazolam and signed W-9
11/06/2017	Response to 9/12/2017 TPRA request received. Despite request that response be current as of date of response, TDOC produces documents only up to September 7, 2017. "As has become your practice, you ask for records as of the date of your request, as well as the date of my response. In responding to your request I must request records from multiple sources, and necessarily must include a cut-off date in such requests. Accordingly, I will respond as of the date of your request only. As you are aware, the TPRA does not require that I do more."
11/06/2017	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
11/07/2017	TDOC sends email to drug supplier which asks "Any more product come in?"
11/08/2017	TDOC sends copy of Deberry Special Needs DEA license to Drug Supplier.
11/04/2017	Drug Supplier sends photos of the drugs to TDOC.
11/27/2017	Drug Supplier emails third invoice for midazolam.
11/28/2017	Drug Supplier sends email with attachments "Edited Protocol.pdf" and "TN Agreement –Executed.pdf."
12/4/2017	Pharmacy service agreement signed by Tony Parker; date agreement signed by Drug Supplier is unknown because of redaction.
12/5/2017	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
12/14/2017	Drug Supplier emails fourth invoice for midazolam.
12/21/2017	TDOC legal counsel sends letter to counsel for *Abdur'Rahman, et al.* stating that TDOC will respond to TPRA requests from 11/6/2017 and 12/5/2017 by 01/15/2018.
12/28/2017	Drug Supplier emails fifth invoice for midazolam.
01/08/2018	Petition for Writ of Certiorari in *Abdur'Rahman v. Parker*, No. 17-6068 is denied.

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

Date	Event
01/08/2018	TDOC adopts new lethal injection protocol adding the Midazolam Option
1/10/2018	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
1/11/2018	State Attorney General files Notice with the Tennessee Supreme Court regarding the denial of certiorari in *Abdur'Rahman*. No mention of problems with drug supply; no mention of new protocol. Service is by mail. The motions were filed late in the day Thursday. The following Friday state offices and many businesses in Nashville are closed due to inclement weather. The next business day is Tuesday, January 16, 2018 due to Martin Luther King Day.
1/16/2018	Response to 11/06/2017 and 12/05/2017 TPRA requests is received. Despite request that response be current as of date of response, TDOC produces documents only up to December 4, 2017, plus the new protocol containing the Midazolam Option. This is the first notice to any person working on behalf of Tennessee Death Row Inmates that TN had adopted a new lethal injection protocol.
01/18/2018	Abdur'Rahman, Johnson, Hall, Irick, Miller, Sutton, Wright, West, and Zagorski each file notice with the Tennessee Supreme Court of their intent to challenge the new Midazolam Option in Chancery Court and state that such Complaint will be filed in thirty days.
01/18/2018	Tennessee Supreme Court sets August 9, 2018 execution date for Billy Ray Irick.
02/02/2018	Response to 01/10/2018 TPRA request is received. Despite request that response be current as of date of response, TDOC produces documents only up to January 3, 2018. This heavily redacted response did not provide any additional relevant information.
02/02/2018	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
02/15/2018	State Attorney General files Motion asking Tennessee Supreme Court to set expedited execution dates for Abdur'Rahman, Johnson, Hall, Miller, Sutton, Wright, West, and Zagorski. Motion indicates that the State intends to use the Midazolam Option to execute the named inmates.
02/15/2018	Counsel for Abdur'Rahman, Johnson, Hall, Miller, Sutton, Wright, West, and Zagorski file notice with Tennessee Supreme Court that they intend to respond to State's motion for expedited execution dates within 14 days and that they will file Complaint in Chancery Court on February 20, 2018.
02/20/2018	Abdur'Rahman, Johnson, Hall, Irick, Miller, Sutton, Wright, West, and Zagorski and others file 16 count, 92 page complaint in Davidson County Chancery Court challenging the Midazolam Option.

Attachment 2

The places that it is readily available from do they have disclaimer requirements like what [redacted] hit us with on the Pento?

[redacted]

From: [redacted]
Sent: Thursday, September 07, 2017 12:58 PM
To: [redacted]
Subject: RE: Updtae

Hello [redacted]

That stuff is readily available along with potassium chloride. I reviewed several protocols from states that currently use that method. Most have a 3 drug protocol including a paralytic and potassium chloride. Here is my concern with Midazolam. Being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium chloride especially. It may not be a huge concern but can open the door to some scrutiny on your end. Consider the use of an alternative like Ketamine or use in conjunction with an opioid. Availability of the paralytic agent is spotty. Pancuronium, Rocuronium, and Vecuronium are currently unavailable. Succinylcholine is available in limited quantity. I'm currently checking other sources. I'll let you know shortly.

Regards,

<image004.jpg>

Attachment 3

[redacted]

From: [redacted]
Sent: Thursday, October 26, 2017 4:16 PM
To: [redacted]
Subject: Re: Additonal Info

Can you shoot me a W9 so I can get that to fiscal?

Sent from my iPhone

On Oct 26, 2017, at 3:30 PM, [redacted] wrote:

***** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security. *****

[redacted]

I will have my pharmacist write up a protocol. All drugs are required to be stored in a secured location at room temperature (between 15 and 30 degrees celcius).

Attached is the current invoice along with our Pharmacy Services Agreement. Please review the agreement and let me know if you have any concerns or questions. We will also need the address along with a copy of the current DEA and pharmacy/state license for the facility where we will be shipping the medication to.

There is another shipment arriving tomorrow with 8 Midazolam and 4 Vecuronium sets on board. I will get you the particulars when it arrives. Thanks Kelly. Let me know if I can be of further assistance.

Regards,

[redacted]

From: [redacted]
Sent: Thursday, October 26, 2017 1:43 PM

Attachment 4

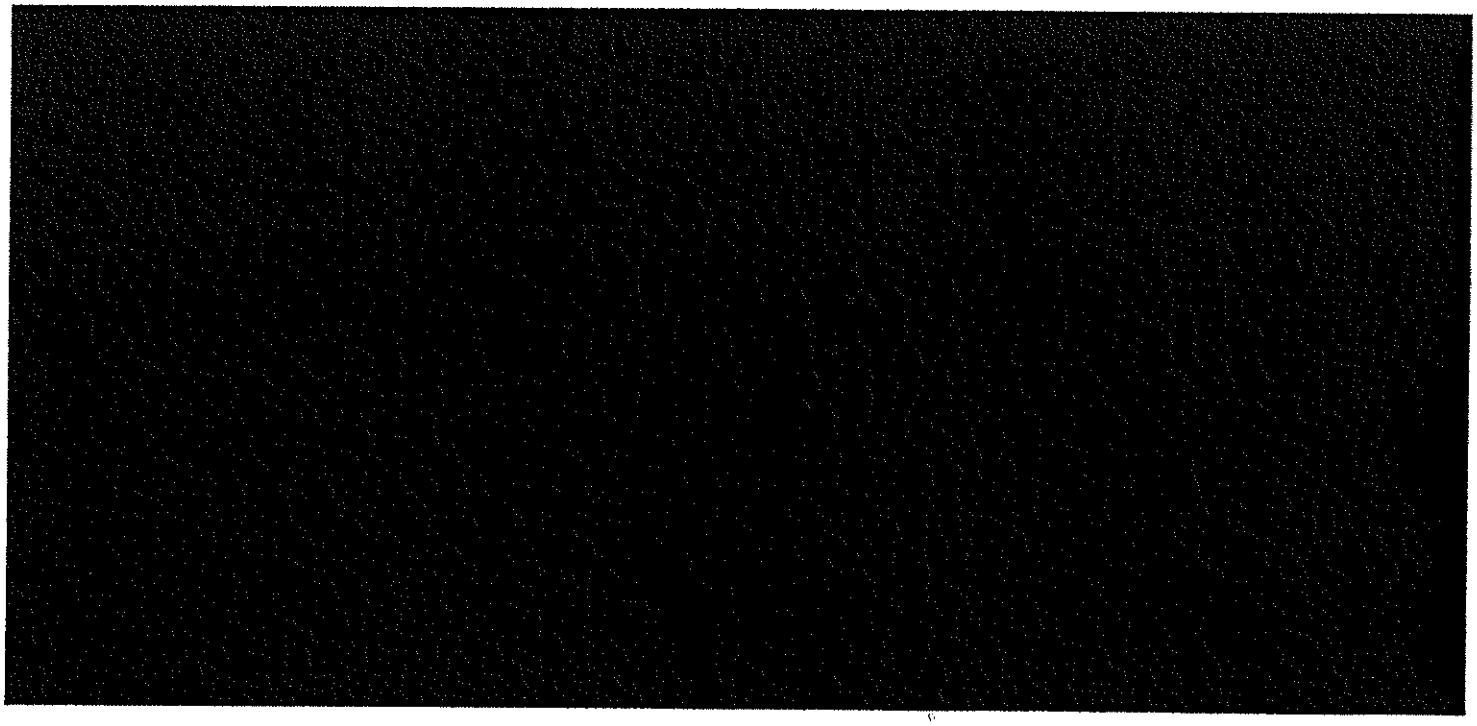
[redacted]

From: [redacted]
Sent: Tuesday, November 28, 2017 12:48 PM
To: [redacted]
Subject: [redacted]
Attachments: Edited Protocol.pdf; TN Agreement - Executed.pdf

*** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security. ***

[redacted]

Attached is the executed agreement and revisions to the protocol. Only one change was noted. Where the potassium chloride is concerned, in order to reach the required dose you need 120ml. Using 50cc syringes would only allow for 100ml necessitating the need for a third syringe with 20ml. You can eliminate the third syringe by using two 60cc syringes in place of the 50cc. One thing to note is that each 10mg Vecuronium vial will need to be reconstituted with 10ml of bacteriostatic water before use, which we will provide. Did you all want us to provide you with the syringes and needles?



Regards,

Attachment 5

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Counsel for Defendants
[additional counsel listed on signature page]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

First Amendment Coalition of Arizona, Inc.; Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz; and Roger Scott,

Plaintiffs,

v.

Charles L. Ryan, Director of ADC; James O'Neil, Warden, ASPC–Eyman; Greg Fizer, Warden, ASPC–Florence; and Does 1-10, Unknown ADC Personnel, in their official capacities as Agents of ADC,

Defendants.

Case No. 2:14-cv-01447-NVW-JFM

STIPULATED SETTLEMENT AGREEMENT AND [PROPOSED] ORDER FOR DISMISSAL OF CLAIM ONE

Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, "Plaintiffs,"), and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections ("ADC"); James O'Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–Florence (collectively, "Defendants"), hereby stipulate and agree as follows:

WHEREAS, Claim One of Plaintiffs' Second Amendment Complaint ("Claim One") challenges ADC's intended use of lethal injection drug Protocol C that consists of midazolam, which belongs to a class of drugs called benzodiazepines, followed by a paralytic (vecuronium bromide, rocuronium bromide, or pancuronium bromide), and potassium chloride under the Eighth Amendment;

WHEREAS, Defendants contend that ADC's previous supplier of midazolam no longer provides the drug for use in lethal injection executions and that ADC's supply of midazolam expired on May 31, 2016;

WHEREAS, ADC has removed Protocol C, the three-drug combination beginning with midazolam that Plaintiffs' challenge in Claim One, from Department Order 710;

WHEREAS, Defendants hereby represent, covenant, and agree, and Plaintiffs and Defendants (collectively, the "parties") intend, that ADC will never again use midazolam, or any other benzodiazepine, as part of a drug protocol in a lethal injection execution;

WHEREAS, Plaintiffs contend that they have incurred in excess of $2,080,000 in attorneys' fees and costs in litigating this action;

WHEREAS, the parties agree that, because of the above-described circumstances, resolution of Claim One—without further litigation, without any admission of liability, and without any final adjudication of any issue of fact or law—is appropriate and will avoid prolonged and complicated litigation between the parties;

WHEREAS, the parties intend this stipulated settlement agreement to be enforceable by, and for the benefit of, not only the Plaintiffs but also all current and future prisoners sentenced to death in the State of Arizona ("Condemned Prisoner Beneficiaries"), who are express and intended third-party beneficiaries of this stipulated settlement agreement and who are entitled to all rights and benefits provided to Plaintiffs herein, and who, upon any showing that ADC intends to use midazolam, or any other benzodiazepine, in an execution or in an execution protocol, may continue this action as substituted plaintiffs pursuant to Rule 25(c) of the Federal Rules of Civil Procedure;

WHEREAS, the parties intend this stipulated settlement agreement to bind Defendants, ADC, and any of Defendants' successors in their official capacities as representatives of ADC, who, in the event that any Plaintiff or Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, will be deemed to have been automatically substituted as defendants in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure;

WHEREAS, the parties intend and agree that, upon any breach of this stipulated settlement agreement, (a) any Plaintiff or Condemned Prisoner Beneficiary has standing and the right to move to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, and (b) an order shall issue permanently enjoining ADC from using midazolam, or any other benzodiazepine, in an execution or in an execution protocol;

WHEREAS, in the event that any Plaintiff or Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, the parties agree that Defendants, ADC, and/or any of Defendants' successors in their official capacities as representatives of ADC waive all objections to this Court's reopening of this proceeding, including on the basis of timing, ripeness, mootness, or the standing of the moving parties;

WHEREAS, in the event that this stipulated settlement agreement is breached through ADC's use or intent to use a benzodiazepine in an execution or in an execution

protocol, and any Plaintiff's or Condemned Prisoner Beneficiary's motion to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure is not granted for reasons related to the moving parties' standing or the Court's jurisdiction, Defendants consent to the entry of an order in a separate action by a Plaintiff or a Condemned Prisoner Beneficiary for breach of this agreement that permanently enjoins ADC from using midazolam, or any other benzodiazepine, in an execution or in an execution protocol.

IT IS THEREFORE STIPULATED AND AGREED that:

(1) Claim One of Plaintiffs' Second Amended Complaint is dismissed, without prejudice.

(2) Upon any showing by any Plaintiff or Condemned Prisoner Beneficiary that ADC intends to use midazolam, or any other benzodiazepine, in an execution or in an execution protocol, Claim One shall be reinstated and reopened pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties granted herein, an injunction shall issue in this action or in a separate action for breach of the parties' stipulated settlement agreement permanently enjoining ADC from using midazolam, or any other benzodiazepine, in an execution or in an execution protocol.

(3) Plaintiffs agree not to seek their attorneys' fees and costs incurred in litigating Claim One unless Defendants or ADC breach this stipulated settlement agreement, in which case Plaintiffs shall be entitled to seek an award of their reasonable attorneys' fees and costs incurred in litigating Claim One, in an amount to be determined by the Court, either in this action or in a separate action for breach of the parties' stipulated settlement agreement. In that circumstance, Plaintiffs shall also be entitled to seek to collect their reasonable attorneys' fees and costs incurred in moving to enforce this stipulated settlement agreement.

Dated: December 19, 2016

Sidley Austin LLP

s/ *Mark E. Haddad*
Mark E. Haddad
Attorneys for Plaintiffs Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz; and Roger Scott

Dated: December 19, 2016

Office of the Arizona Attorney General

s/ *Jeffrey L. Sparks*
Jeffrey L. Sparks
David Weinzweig
Lacey Stover Gard
John Pressley Todd

Attorneys for Defendants

I, Mark Haddad, hereby attest that counsel for Defendants, Jeffrey L. Sparks, authorized the use of his signature on, and concurred in the filing of, this document, on December 19, 2016.

s/ *Mark E. Haddad*
Mark E. Haddad

* * *

ORDER

IT IS SO ORDERED.

DATED this ___ day of _____, 2016.

Neil V. Wake
United States District Judge

Attachment 6

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Counsel for Defendants
[additional counsel listed on signature page]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

First Amendment Coalition of Arizona, Inc.; Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz; and Roger Scott,

Plaintiffs,

v.

Charles L. Ryan, Director of ADC; James O'Neil, Warden, ASPC–Eyman; Greg Fizer, Warden, ASPC–Florence; and Does 1-10, Unknown ADC Personnel, in their official capacities as Agents of ADC,

Defendants.

Case No. 2:14-cv-01447-NVW-JFM

STIPULATED SETTLEMENT AGREEMENT AND [PROPOSED] ORDER FOR DISMISSAL OF CLAIMS SIX AND SEVEN

Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, "Plaintiffs"), and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections ("ADC"); James O'Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–Florence (collectively, "Defendants"), hereby stipulate and agree as follows:

WHEREAS, on December 22, 2016, this Court entered an Order for Dismissal of Claim One (ECF No. 155) based on the December 19, 2016 Stipulated Settlement Agreement (ECF No. 152) between Plaintiffs and Defendants (collectively, the "parties");

WHEREAS, Claim Six and Claim Seven of Plaintiffs' Second Amended Complaint ("SAC") (ECF No. 94) and Plaintiffs' Supplemental Complaint (ECF No. 163) challenge the ADC's reservations of excessive discretion in its execution procedures, and Defendants' past and proposed future exercises of that discretion, including through "last-minute deviations from critical aspects of its announced execution process," May 18, 2016, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss SAC at 13 (ECF No. 117), as violative of the Eighth and Fourteenth Amendments;

WHEREAS, Defendants intend to resolve the deficiencies Plaintiffs allege through their permanent repudiation of certain provisions contained in past versions of the ADC's execution procedures, as set forth herein, and through the adoption of a new set of execution procedures reflecting those changes;

WHEREAS, Defendants' execution procedures have, in the past, stated that "[t]his Department Order outlines internal procedures and does not create any legally enforceable rights or obligations," *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, at p.1 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that Defendants and the ADC will remove from the ADC's current execution procedures the sentence—"[t]his Department Order outlines internal procedures and does not create any legally enforceable rights or obligations"—and that Defendants and the

ADC will never again include such language or substantially similar language in any future version of the ADC's execution procedures (together, "Covenant No. 1");

WHEREAS, Defendants' execution procedures have, in the past, granted the Director of the ADC (the "ADC Director") the discretion to change any of the timeframes set forth in the execution procedures based on the ADC Director's determination that there has been an "unexpected or otherwise unforeseen contingency," *e.g.* Ariz. Dep't of Corr., Dep't Order 710 ¶ 1.1.2.3 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC Director shall henceforth have the authority to change timeframes relating to the execution process only when those timeframes correspond to minor or routine contingencies not central to the execution process; that timeframes that *are* central to the execution process include, but are not limited to, those relating to execution chemicals and dosages, consciousness checks, and access of the press and counsel to the execution itself; and that Defendants and the ADC will never again include provisions in any version of the ADC's execution procedures that purport to expand the ADC Director's discretion to deviate from timeframes set forth in the execution procedures beyond those relating to minor or routine contingencies not central to the execution process (together, "Covenant No. 2");

WHEREAS, Defendants' execution procedures have, in the past, granted the ADC Director the discretion to change the quantities or types of chemicals to be used in an execution at any time that he determines such a change to be necessary, even after a warrant of execution has been sought, *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.6 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC Director shall henceforth have the authority to change the quantities or types of chemicals to be used in an execution after a warrant of execution has been sought only if the Director, the ADC, Defendants, and/or their counsel, (1) notify the

condemned prisoner and his/her counsel of the intended change, (2) withdraw the existing warrant of execution, and (3) apply for a new warrant of execution; and that Defendants and the ADC will never again include provisions in any version of the ADC's execution procedures that permit the ADC Director or the ADC to change the quantities or types of chemicals to be used in an execution after a warrant of execution has been sought without also withdrawing and applying through counsel for a new warrant of execution (together, "Covenant No. 3");

WHEREAS, Defendants' execution procedures, in the past, have not expressly limited the ADC Director's discretion regarding the use of quantities and types of chemicals to only those quantities and types of chemicals set forth in the ADC's execution procedures;

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC Director's discretion to choose the quantities and types of chemicals for an execution shall be limited to the quantities and types of chemicals set forth expressly in the then-current execution procedures; that the quantities or types of chemicals that may be used in an execution may be modified only through the formal publication of an amended set of execution procedures; and that any future version of execution procedures will expressly reflect this limitation of discretion (together, "Covenant No. 4");

WHEREAS, Defendants' execution procedures, in the past, have required that, if any compounded chemical is to be used in an execution, the ADC shall obtain it from only a "certified or licensed" compounding pharmacist or compounding pharmacy, but the ADC's most recent version of its execution procedures has removed that limitation in lieu of a requirement that the ADC provide a "qualitative analysis of any compounded or non-compounded chemical to be used in the execution . . . within ten calendar days after the state seeks a Warrant of Execution," *compare* Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 (Oct. 23, 2015), *with* Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC shall provide, upon request and within ten (10) calendar days after the State of Arizona seeks a warrant of execution, a quantitative analysis of any compounded or non-compounded chemical to be used in an execution that reveals, at a minimum, the identity and concentration of the compounded or non-compounded chemical; that ADC will only use chemicals in an execution that have an expiration or beyond-use date that is after the date that an execution is to be carried out; that, if the chemical's expiration or beyond-use date states only a month and year (*e.g.*, "May 2017"), ADC will not use that chemical after the last day of the month specified; and that all future versions of the ADC's execution procedures shall include these requirements (together, "Covenant No. 5");

WHEREAS, Defendants' execution procedures have, in the past, permitted the use of a three-drug lethal-injection protocol using: (1) a barbiturate or a benzodiazepine as the first drug, (2) a paralytic such as vecuronium bromide, pancuronium bromide, or rocuronium bromide (collectively, "Paralytic") as the second drug, and (3) potassium chloride as the third drug; *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 at Chart C (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that Defendants and the ADC will never again use a Paralytic in an execution; and that Defendants and the ADC consequently will remove their current three-drug lethal-injection protocol from the current and any future version of the ADC's execution procedures (together, "Covenant No. 6");

WHEREAS, Defendants' execution procedures have, in the past, provided for prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own execution, *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.1 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that Defendants and the ADC shall remove from the ADC's execution procedures

any provision that purports to permit prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own execution, and that Defendants and the ADC will never again include any such provision or any substantially similar provision in any future version of the ADC's execution procedures (together, "Covenant No. 7");

WHEREAS, the parties agree that the version of Department Order 710 published on June 13, 2017 fully satisfies Covenant Nos. 1 through 7;

WHEREAS, Plaintiffs contend that they have incurred in excess of $2,350,000 in attorneys' fees and costs in litigating this action since its inception, and have incurred in excess of $280,000 in attorneys' fees and costs in litigating this action since this Court's December 22, 2016, Order dismissing Claim One without prejudice (ECF No. 155);

WHEREAS, the parties agree that, because of the above-described circumstances, resolution of Claim Six and Claim Seven—without further litigation, without any admission of liability, and without any final adjudication of any issue of fact or law—is appropriate and will avoid prolonged and complicated litigation between the parties;

WHEREAS, the parties intend this Stipulated Settlement Agreement to be enforceable by, and for the benefit of, not only the Plaintiffs but also all current and future prisoners sentenced to death in the State of Arizona ("Condemned Prisoner Beneficiaries"), who are express and intended third-party beneficiaries of this Stipulated Settlement Agreement and who are entitled to all rights and benefits provided to Plaintiffs herein, and who, upon any showing that any of the Defendants, any of the Defendants' successors in their official capacities as representatives of the ADC ("Defendants' Successors"), or the ADC has violated or intends to violate any of Covenant Nos. 1 through 7 may continue this action as substituted plaintiffs pursuant to Rule 25(c) of the Federal Rules of Civil Procedure;

WHEREAS, the parties intend this Stipulated Settlement Agreement to bind Defendants, the ADC, and Defendants' Successors, who, in the event that any Plaintiff or Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of

the Federal Rules of Civil Procedure, will be deemed to have been automatically substituted as defendants in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure;

WHEREAS, the parties intend and agree that, upon any breach of this Stipulated Settlement Agreement, (a) any Plaintiff or Condemned Prisoner Beneficiary has standing and the right to move to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, and (b) an order shall immediately issue permanently enjoining the ADC from violating Covenant Nos. 1-7;

WHEREAS, in the event that any Plaintiff or Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, the parties agree that the Defendants, the ADC, and Defendants' Successors waive all objections to this Court's reopening of this proceeding, including on the basis of timing, ripeness, mootness, or the standing of the moving parties;

WHEREAS, in the event that this Stipulated Settlement Agreement is breached through an actual or intended violation of any of Covenant Nos. 1 through 7 by Defendants, Defendants' Successors, or the ADC, and any Plaintiff's or Condemned Prisoner Beneficiary's motion to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure is not granted for reasons related to the moving parties' standing or the Court's jurisdiction, Defendants, Defendants' Successors, and the ADC consent to the entry of an order in a separate action by a Plaintiff or a Condemned Prisoner Beneficiary for breach of this agreement that permanently enjoins Defendants, Defendants' Successors, and the ADC from engaging in any conduct that violates any of Covenant Nos. 1 through 7.

IT IS THEREFORE STIPULATED AND AGREED that:

(1) Claims Six and Seven of Plaintiffs' Second Amended Complaint and Supplemental Complaint are dismissed, without prejudice.

(2) The parties do not hereby intend to settle, and Plaintiffs instead expressly

reserve their right to appeal, other claims that were dismissed by the Court's May 18, 2016, Order, including Claims 3, 4, and 5, which challenge various aspects of the ADC's execution procedures on First Amendment grounds.

(3) Upon any showing by any Plaintiff or Condemned Prisoner Beneficiary that any of the Defendants, any of the Defendants' Successors, or the ADC intend to engage in or have actually engaged in any of the following conduct (together, the "Prohibited Conduct"):

(a) adopt language in any future version of the ADC's execution procedures that purports to disclaim the creation of rights or obligations;

(b) grant the ADC and/or the ADC Director the discretion to deviate from timeframes set forth in the ADC's execution procedures regarding issues that are central to the execution process, which include but are not limited to those relating to execution chemicals and dosages, consciousness checks, and access of the press and counsel to the execution itself;

(c) change the quantities or types of chemicals to be used in an execution after a warrant of execution has been sought without first notifying the condemned prisoner and his/her counsel of the intended change, withdrawing the existing warrant of execution, and applying for a new warrant of execution;

(d) select for use in an execution any quantity or type of chemical that is not expressly permitted by the then-current, published execution procedures;

(e) fail to provide upon request, within ten (10) calendar days after the State of Arizona seeks a warrant of execution, a quantitative analysis of any compounded or non-compounded chemical to be used in an execution that reveals, at a minimum, the identity and concentration of the compounded or non-compounded chemicals;

(f) use or select for use in an execution any chemicals that have an expiration or beyond-use date that is before the date that an execution is to be

carried out; or use or select for use in an execution any chemicals that have an expiration or beyond-use date listed only as a month and year that is before the month in which the execution is to be carried out;

(g) adopt or use any lethal-injection protocol that uses a paralytic (including but not limited to vecuronium bromide, pancuronium bromide, and rocuronium bromide); or

(h) adopt any provision in any future version of the ADC's execution procedures that purports to permit prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own execution; then

Claims Six and Seven shall be reinstated and reopened pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties granted herein, an injunction shall immediately issue in this action or in a separate action for breach of this Stipulated Settlement Agreement permanently enjoining Defendants, Defendants' Successors, and the ADC from engaging in any of the Prohibited Conduct.

(4) Plaintiffs agree not to seek their attorneys' fees and costs incurred in litigating Claims Six and Seven unless Defendants, Defendants' Successors, or the ADC breach this Stipulated Settlement Agreement, in which case Plaintiffs shall be entitled to an award, either in this action or in a separate action for breach of this Stipulated Settlement Agreement, of their reasonable attorneys' fees and costs incurred in litigating this action from its inception through the effective date of this Stipulated Settlement Agreement, as determined by the Court after briefing by the parties. In that circumstance,

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

IT IS SO STIPULATED.

Dated: June 21, 2017

Sidley Austin LLP

s/ *Mark E. Haddad*
Mark E. Haddad

Attorneys for Plaintiffs

Dated: June 21, 2017

Office of the Arizona Attorney General

s/ *Jeffrey L. Sparks*
Jeffrey L. Sparks

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2017, I electronically filed the foregoing **Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claims Six and Seven** by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Barbara Cunningham
Barbara Cunningham
Legal Secretary

Attachment 7

Chronology of Public Records Requests

Request Date	Response Date	Timeframe of Documents Actually Produced
September 12, 2017	November 6, 2017	February 15, 2017- September 7, 2017
November 6, 2017 & December 5, 2017	January 16, 2018	October 17, 2017- December 4, 2018
January 10, 2018	February 2, 2018	October 26, 2017 - January 3, 2018
February 2, 2018	No Response Received	

Attachment 8

[redacted]

From: [redacted]
Sent: [redacted]ober 18, 2017 11:01 AM
To: [redacted]
Subject: Re: Question

I believe we do I will double check on it.

Sent from my iPhone

On Oct 18, 2017, at 10:47 AM, [redacted] wrote:

> Good morning [redacted]
>
> Below is a list of what has been received from our suppliers
>
> Midazolam – 1000mg, Lot: [redacted] EXP: 1June2018
>
> Vecuronium – 200mg, Lot: [redacted] EXP: 12/18
>
> Potassium Chloride – 2000mEq, Lot: [redacted] EXP: 1May2018
>
> I'm working on revising the BAA and agreement. I should have it to you by the end of the day. Do you all have a DEA license?
>
> Regards,
>
> [redacted]
>
>

From: [redacted]
Sent: Wednesday, October 18, 2017 8:33 AM
To: [redacted]
Subject: RE: Question

I got some info re: the test .... Let me know if there is a good time to call and fill you in. thx

Attachment 9

PHARMACY SERVICES AGREEMENT

This PHARMACY SERVICES AGREEMENT ("Agreement") is being made and entered into by and between [redacted] ("Pharmacy") and _____ ("Department") on this 21 day November, 2017, and is being made for the purposes and the consideration herein expressed.

WITNESSETH:

WHEREAS, Pharmacy is [redacted] that provides controlled substance and compounded preparations to practitioners for office use; and

WHEREAS, Department is a State of Tennessee governmental agency that is responsible for carrying out sentences of death by means of lethal injection; and

WHEREAS, Department desires to engage Pharmacy to provide Department with certain controlled substances and/or compounded preparations for lethal injection administration by the Department to those individuals sentenced to death; and

WHEREAS, Pharmacy and Department have agreed to enter into this Agreement setting forth the terms under which Pharmacy will provide certain controlled substances and/or compounded preparations to Department for use in lethal injection.

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein, Pharmacy and Department hereby agree as follows:

Article 1
SERVICES

1.1 Controlled substance. Upon a written request, which may be sent electronically via facsimile or electronic mail, by Department, Pharmacy shall provide Department with the requested controlled substance. Quantities of the controlled substance shall be limited to an amount that does not exceed the amount the Department anticipates may be used in the Department's office or facility before the expiration date of the controlled substance and is reasonable considering the intended use of the controlled substance and the nature of the services offered by the Department. For controlled substance, Pharmacy shall dispense all drugs in accordance with applicable licensing regulations adopted by the [redacted] and the United States Food and Drug Administration that pertain to pharmacies dispensing controlled substance.

1.2 Compounding Preparations. Upon a written request, which may be sent electronically via facsimile or electronic mail, by Department, Pharmacy shall provide Department with the requested compounded preparation. Quantities of the compounded preparation shall be limited to an amount that does not exceed the amount the Department anticipates may be used in the Department's office or facility before the expiration date of the compounded preparation and is reasonable considering the intended use of the compounded preparation and the nature of the services offered by the Department. For compounded preparations, Pharmacy shall compound all drugs in a clean sterile environment in compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments. In addition, Pharmacy shall compound all drugs in accordance with applicable licensing regulations adopted

by the [redacted] that pertain to pharmacies compounding sterile preparations.

1.3 Limitation on Services. Pharmacy shall only provide controlled substance and compounding preparations that it can prepare to ensure compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments. In the event Department requests a controlled substance or compounded preparation which Pharmacy is not able to fill, Pharmacy shall notify Department.

1.4 Recalls. In the event that Pharmacy determines that a recall for any controlled substance or compounded preparation provided hereunder is warranted Pharmacy shall immediately notify Department of the medication and/or preparations subject to the recall. Pharmacy shall instruct Department as how to dispose of the medication or preparation, or may elect to retrieve the medication or preparation from Department. Pharmacy shall further instruct Department of any measures that need to be taken with respect to the recalled medication or preparation.

Article 2
OBLIGATIONS OF DEPARTMENT

2.1 Written Requests. All requests for controlled substances and compounded preparations must be in writing and sent to Pharmacy via electronic mail or facsimile. The following shall appear on all requests:

A. Date of request;
B. FOR COMPOUNDED PREPARATIONS ONLY: Name, address, and phone number of the practitioner requesting the preparation;
C. Name, strength, and quantity of the medication or preparation ordered; and
D. Whether the request needs to be filled on a STAT basis.

2.2 Use of Controlled Substance and Compounded Preparations. Department agrees and acknowledges that all controlled substance and compounded preparations provided by Pharmacy may only be used by Department in carrying out a sentence of death by lethal injection and may not be dispensed or sold to any other person or entity. Department assumes full responsibility for administering any controlled substance or compounded preparations.

2.3 Recordkeeping. Department agrees to maintain records of the lot number and beyond-use date of a controlled substance or compounded preparation to be administered or administered by Department that was prepared by Pharmacy. Department agrees to maintain inventory control and other recordkeeping as may be required by applicable federal and state laws and regulations.

Article 3
TERM AND TERMINATION

3.1 Term. The Effective Date of this Agreement shall be the date first specified above. The term of this Agreement shall be for a period of one (1) year unless sooner terminated by either party pursuant to the terms and provisions hereof. If this Agreement is not terminated by either party prior to the anniversary date of this Agreement or any renewal term, this Agreement shall automatically renew for an additional one (1) year term.

3.2 Termination.

A. Either party to this Agreement may terminate this Agreement, with or without cause, by providing the other party sixty (60) days prior written notice of said termination.

B. Pharmacy may immediately terminate this Agreement in the event of any of the following:

1. Department ceases to provide professional services for any reason.

2. Department's professional license is revoked, terminated, or suspended.

3. Department declares bankruptcy.

4. Department fails to comply the terms of this Agreement and fails to cure such breach within 5 business days of receiving notice of the breach.

C. Department may immediately terminate this Agreement in the event of any of the following:

1. Pharmacy's professional license is revoked, terminated, or suspended.

2. Pharmacy is excluded or debarred from participation in the Medicare and/or Medicaid programs for any reason.

3. Pharmacy declares bankruptcy.

4. Pharmacy fails to comply the terms of this Agreement and fails to cure such breach within 5 business days of receiving notice of the breach.

Article 4
REPRESENTATION

4.1 Representation by TN Attorney General. The Tennessee Attorney General's Office will represent or provide representation to Pharmacy in any civil lawsuit filed against Pharmacy for its acts or omissions arising out of and within the scope and course of this agreement except for willful, malicious or criminal acts or omissions or for acts or omissions done for personal gain. Any civil judgment leveled against Pharmacy arising out it's acts or omissions pursuant to this agreement will be reimbursed by the State in accordance with the terms of T.C.A. § 9-8-112. The Attorney General's Office will advocate before the Board of Claims for full payment of any judgment against Pharmacy arising out of a civil lawsuit in which the Attorney General's Office represents or provides representation to Pharmacy.

Article 5
Miscellaneous

5.1 Amendment. This Agreement may be amended only by mutual agreement and reduced to writing and signed by both parties hereto.

5.2 Payment. Pharmacy agrees to submit invoices within thirty (30) days after rendering services and/or providing controlled substances or compounded preparations to: TDOC Fiscal Director, Rachel Jackson Building, 6th Floor, 320 6th Avenue North, Nashville, Tennessee, 37243. Department agrees to pay an annual fee to Pharmacy in the amount of $5,000.00 (five thousand dollars).

5.3 Captions. Any caption or heading contained in this Agreement is for convenience only and shall not be construed as either broadening or limiting the content of this Agreement.

5.4 Sole Agreement. This Agreement constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter herein.

5.5 Controlling Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee. The parties hereto expressly agree that this Agreement is executed and shall be performed in Davidson County, Tennessee, and venue of all disputes, claims and lawsuits arising hereunder shall lie in Davidson County, Tennessee.

5.6 Severability. The sections, paragraphs and individual provisions contained in this Agreement shall be considered severable from the remainder of this Agreement and in the event that any section, paragraph or other provision should be determined to be unenforceable as written for any reason, such determination shall not adversely affect the remainder of the sections, paragraphs or other provisions of this Agreement. It is agreed further, that in the event any section, paragraph or other provision is determined to be unenforceable, the parties shall use their best efforts to reach agreement on an amendment to the Agreement to supersede such severed section, paragraph or provision.

5.7 Notice. Any notices under this Agreement shall be hand-delivered or mailed by certified mail, return receipt requested to the parties at the addresses set forth on the signature page of this Agreement, or such other addresses as the parties may designate to the other in writing from time to time.

5.8 Agreement Subject to State and Federal Law. The parties recognize that this Agreement, at all times, is subject to applicable state, local and federal laws including, but not limited to, the Social Security Act and the rules, regulations and policies adopted thereunder and adopted by the [redacted] as well as the public health and safety provisions of state laws and regulations. The parties further recognize that this Agreement shall be subject to amendments of such laws and regulations, and to new legislation. Any such provisions of law that invalidate, or otherwise are inconsistent with the terms of this Agreement, or that would cause one or both of the parties to be in violation of the laws, shall be deemed to have superseded the terms of this Agreement; provided, however, that the parties shall exercise their best efforts to accommodate the terms and intent of this Agreement to the greatest extent possible consistent with the requirements of applicable laws and regulations.

5.9 Compliance With All Applicable Laws. The parties hereto hereby acknowledge and agree that each party shall comply with all applicable rules regulations, laws and statutes including, but not limited to, any rules and regulations adopted in accordance with and the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The parties hereby specifically agree to comply with all privacy and security rules, regulations and provisions of HIPAA and to execute any required agreements required by all HIPAA Security Regulations and HIPAA Privacy Regulations whether presently in existence or adopted in the future, and which are mutually agreed upon by the parties. In addition, in the event the legal counsel of either party, in its reasonable opinion, determines that this Agreement or any material provision of this Agreement violates any federal or state law, rule or regulation, the parties shall negotiate in good faith to amend this Agreement or the relevant provision thereof to remedy such violation in a manner that will not be inconsistent with the intent of the parties or such provision. If the parties cannot reach an agreement on such amendment, however, then either party may terminate this Agreement immediately. This section shall survive the termination of this Agreement.

5.10 Referral Policy. Nothing contained in this Agreement shall require, directly or indirectly, explicitly or implicitly, either party to refer or direct any patients to the other party.

5.11 Assignment. This Agreement is not assignable without the other party's prior written consent.

5.12 Independent Contractor Status. In performing their responsibilities pursuant to this Agreement, it is understood and agreed that Pharmacy and its pharmacists and other professionals are at all times acting as independent contractors and that the parties to this Agreement are not partners, joint-venturers, or employees of one another.

5.13 Non-Waiver. No waiver by one of the parties hereto of any failure by the other party to keep or perform any provision, covenant or condition of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same, or any other provision, covenant or condition.

5.14 Counterparts/Execution. This document may be executed in multiple counterparts, each of which when taken together shall constitute but one and the same instrument. In addition, this Agreement may be executed by facsimile or electronic signature, which shall constitute an original signature.

5.15 No Third-Party Beneficiaries. No provision of this Agreement is intended to benefit any third party, nor shall any person or entity not a party to this Agreement have any right to seek to enforce or recover any right or remedy with respect hereto.

5.16 Confidentiality. Both parties agree to keep this Agreement and its contents confidential and not disclose this Agreement or its contents to any third party, other than its attorneys, accountants, or other engaged third parties, unless required by law, without the written consent of the other party.

IN WITNESS WHEREOF, the parties have hereunto caused their authorized representatives to execute this Agreement as of the date first set forth above.

[redacted]

By: [redacted]

Name: [redacted]

Title: [redacted]

Date: [redacted]

Address: [redacted]

By:

Name: Tony Parker

Title: TDOC Commissioner

Date: 12/4/17

Address: 320 6th Ave. North, 6th Floor
Nashville, TN 37243

Attachment 10

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

Before me, the undersigned authority, personally appeared WILLIAM D. KENNER, M.D., who upon oath deposes and says:

1. My name is William D. Kenner, M.D. I am a physician licensed to practice in the State of Tennessee with specialty training in psychiatry, child psychiatry, and psychoanalysis. I maintain an office and private practice in Nashville, Tennessee, specializing in Child and Adult Psychiatry/Psychoanalysis. I have been qualified as an expert in psychiatry in State and Federal courts in Tennessee and many other states. My Curriculum Vitae has been previously provided to this Court and is attached to this Affidavit.

2. At the request of Attorney Stephen Ferrell, I have reviewed medical records compiled by medical personnel working on behalf of the Tennessee Department of Corrections. These records pertain to the treatment of Stephen Michael West, an inmate at Riverbend Correctional Institution in Nashville, Tennessee and are as recent as 2017. Although not the focus of this Affidavit, I have also reviewed mental health reports prepared by mental health experts and presented at various stages of post-trial litigation.

3. In April of 2010, after having reviewed Mr. West's medical records to that date, I provided an Affidavit to this Court in which I opined that Stephen West suffered from severe mental illness. In this current affidavit, I renew that assessment based on more recent medical records that have been provided to me by Mr. West's attorneys.

4. Doctors, working on behalf of the prison, have examined Mr. West and diagnosed him as suffering from a variety of mental illnesses. In March, 2001, prison staff expressed concerns about the state of Mr. West's mental health. Molly O' Toole, M.D. initially diagnosed him with major depressive disorder with psychotic features, and over the next five years his modifiers have ranged from moderate to severe. On September 12, 2001, Mr. West was experiencing auditory hallucinations, and Nurse Gilchrist wrote that Mr. West thinks "people are whispering about me ... mumbling and whispering in his 'head only when I'm around others.'" His affective diagnosis of major depressive disorder with psychotic features remained from 2001 to 2006. Around that time, Dr. Koch started his patient on a combination of an antidepressant, Effexor and an antipsychotic, Haldol. Two weeks later, on October 8, West described a marked

improvement that must have pleased his psychiatrist: "I feel better. It's like I'm a different person."

5. Since a strictly affective illness, major depressive disorder, can present with psychotic features, the presence of West's hallucinations at a time when his mood was "real good" helps to confirm the later diagnosis of schizoaffective disorder.

6. One curious fact is that during the middle of his 2001 to 2006 period of elevated mood, West apparently attempted suicide. While it may seem counter intuitive that an individual enjoying a manic high would consider suicide, Dr. Rhimer found that manics do commit suicide at a higher rate than expected for the general population.[1] If a patient with depressive symptoms also has some manic symptoms, then traditional antidepressants can push him over into full blown mania or a mixed state, both mania and depression at the same time is a dangerous combination for self-harm.[2]

7. In 2006, Ana Maria Sarasti, M.D. changed Mr. West's diagnosis to "chronic paranoid schizophrenia." Dr. Sarasti described that Mr. West presented with "anxiety, depression and auditory hallucinations," and several months later, Dr. Renee L. Glenn, described that her patient "feels sad 'all the time'" in addition to "feeling paranoid."

8. In 2008, after a careful chart review, Susan O'Connor, M.D. changed Mr. West's diagnosis once again to schizoaffective disorder. In reviewing West's progress notes and evaluations, Dr. O'Connor saw that her patient has had both symptoms of schizophrenia, delusions and hallucinations, and those of a bipolar type 1 disorder, mania and depression. In other words, West and his TDOC healthcare providers had only previously recognized his depressive symptoms. When he was manic or hypomanic, they considered that to be his "normal" even though their patient was not sleeping.

9. Major depressive disorder with psychotic features, as diagnosed by Dr. O' Toole, is characterized by a disturbance of mood and loss of interest or pleasure in everyday activities. Symptoms may also include weight loss or gain, sleep disturbance, fatigue, inability to concentrate, feelings of worthlessness, thoughts or attempts of suicide. This disorder is not directly caused by a general medical

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[1] Rhimer, Z. (2007). Suicide Risk in Mood Disorders. *Current Opinion in Psychiatry*, 20(1), 17-22, p. 18.

[2] Goldberg, J.F., Perlis, R. H., Bowden, C. L., Thase, M.E., Mikowitz, D.J., Margell, L. B., & Sachs, G. S. (2009). Manic Symptoms During Depressive Episodes in 1,380 Patients with Bipolar Disorder: Findings from the STEP-BD. *American Journal of Psychiatry*, 166(2), 173-81.

condition or the use of substances, including prescription medications. The severity of these symptoms can range from mild to severe, with Mr. West experiencing moderate to severe symptoms.

10. Chronic paranoid schizophrenia, as diagnosed by Dr. Sarasti, is diagnosed in individuals who first qualify for the schizophrenic label and then have symptoms that put them into the paranoid subgroup. Schizophrenia is a group of psychotic disorders characterized by disturbances in thought, perception, affect, behavior, and communication that last longer than 6 months. Symptoms include delusions, hallucinations, disorganized or incoherent speech, severely disorganized or catatonic behavior. The paranoid type indicates Mr. West was preoccupied with auditory hallucinations, as was documented by the prison medical staff.

11. Current findings in schizophrenia research suggest that some prenatal or obstetrical insult damages the brain that then develops normally until the neuronal pruning process of adolescence occurs.[3] When that happens, particularly to genetically vulnerable individuals, normal brain development goes off its rails in adolescent such that by the end of adolescence, schizophrenic brains have decreased volume compared to healthy brains. As Paul J. Harrison wrote in *New Oxford Textbook of Psychiatry* (2003) about the structural changes in the brains of schizophrenic patients:

> *Despite the many uncertainties, there are now established facts about the neurobiology of schizophrenia. There is ventricular enlargement and decreased brain volume. Although the cellular correlates remain poorly understood, they involve the size, density, and organization of neurons and their synaptic connection. In vivo studies show differences in cerebral metabolism and other parameters of cerebral function, with a pattern indicative of aberrant connectivity between brain areas. (p 610)*

12. To shed light on how the brain disorder is experienced by someone suffering with this severe mental illness, we can turn to a noted legal scholar, who has struggled with schizophrenia since her late adolescence. Professor Elyn R. Saks (University of Southern California Gould School of Law, San Diego) in her autobiography *The Center Cannot Hold, My Journey Through Madness* (2007) described how her paranoia began, as her thoughts became frightening and disjointed:

> *Once, there'd been a time in my life when thoughts were something to be welcomed, and pored over, like pages in a favorite book. Just to idly think about things—the weather, the future, the subject of a paper I needed to write for a*

[3] Bloom, FE. Advancing a neurodevelopmental basis for schizophrenia. *Archives of General Psychiatry*. 1993;50(3):224-227.

class, the friend I was going to meet for a cup of coffee—these things felt so simple, so taken-for-granted. But now thoughts crashed into my mind like a fusillade of rocks someone (or something) was hurtling at me—fierce, angry, jagged around the edges, and uncontrollable. I could not bear them, I did not know how to defend myself against them, and I could not bear to be near anyone when I was experiencing them. "You are a piece of shit. You don't deserve to be around people. You are nothing. Other people will see this. They will hate you. They will hate you and try to hurt you. They can hurt you. They are powerful. You are weak. You are nothing." (p. 83)

13. To understand Mr. West's latest diagnosis, schizoaffective disorder, it helps to picture someone with the disordered brain and symptoms of schizophrenia, hallucinations and delusions, at the same time he is riding the rollercoaster of bipolar disorder. Dr. O'Connor took a careful history from Mr. West that traced his auditory hallucinations at least to his adolescence. If those symptoms did start at that time, then that timing would fit with the usual onset of his illness, and his severe mental illness would have started years before his capital offense. In my opinion as a practicing psychiatrist, schizoaffective disorder is a severe mental illness.

14. In his years between adolescence and his incarceration, Stephen West's schizophrenic process had been hidden behind his self-medication with alcohol and marijuana. The confusion in his diagnosis and delay in recognition of his schizoaffective illness is also typical for both schizoaffective and bipolar disorders. Even in the free world, a decade often passes before an individual's manic symptoms will be recognized. If Dr. O'Connor had not done a careful chart review, Mr. West might still not be on mood stabilizing drugs.

15. To control his severe mental illness, doctors working on behalf of the prison, have prescribed Mr. West several psychotropic medications. Beginning in 2001 and continuing to the present, Mr. West has been prescribed different antidepressant and antipsychotic medications at normally prescribed levels that are used to treat severe mental illnesses. Those agents have included Haldol and Thorazine, both old line, or first generation, antipsychotic drugs, which have been described as "chemical straightjackets," not drugs to take for the fun of it.[4] As of September 2017, he was taking 1200 mg of Thorazine daily. This is a very high dose of Thorazine. The impact and side effects of those two drugs are so unpleasant that less sick individuals and those faking mental illness will refuse to take them. Stephen West's antidepressant medications have included Paxil, Pamelor,

[4] Lahti AC, Weiler MA, Medoff DR, Tamminga CA, Holcomb HH. Functional effects of single dose first- and second-generation antipsychotic administration in subjects with schizophrenia. *Psychiatry Research: Neuroimaging.* 2005;139(1):19-30.

Effexor, Trazodone (a sedating antidepressant used as much to induce sleep as to improve mood), and Wellbutrin. After Dr. O'Connor diagnosed him with the combined illness of schizoaffective disorder, she stopped his first generation antipsychotic and started him on a second generation or atypical antipsychotic, Respirdol that has significant mood stabilizing effects as well. Although the exact medication has varied, since 2001, Mr. West has been continually taking some form of medication to treat his severe mental illness, including antipsychotics.

16. Under the prevailing standard of care and the black box warnings in the *Physician's Desk Reference* or *PDR*, no psychiatrist should prescribe these antipsychotic medications unless the treating physician sincerely believes that the patient is indeed suffering from a severe mental illness.

17. The records show no indications that prison doctors believe that Mr. West is, in any way, malingering or "faking" the severity of his mental illness. If a doctor were to suspect malingering, the doctor typically indicates that in the patient's medical records. Mr. West has seen many mental health professionals in the prison, and if he were thought to be faking, then observations to that effect would appear in his medical records.

18. Although I have never examined Mr. West, but from my review of his medical records, I can understand the impact of his mental illness on his inner life: his periods of paranoia and delusions. Despite treatment for his severe mental illness, Mr. West's long incarceration with the ever-present threat of execution has added a chilling note of reality to the threatening, waking nightmare that is his life.

FURTHER AFFIANT SAYETH NOT.

William D. Kenner, M.D.

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me this 21 day of February, 2018.

SHERRIE STONE SOLOMON
STATE OF TENNESSEE
NOTARY PUBLIC
RUTHERFORD COUNTY
MY COMMISSION EXPIRES 7-9-2018

Notary Public

My Commission Expires: _____

Attachment 11

Claudia R. Coleman, Ph.D.
220 West Millbrook Road Suite A
Raleigh, North Carolina 27609
(919) 846 6442

Forensic Psychology • Neuropsychology • Psychological Assessment

PSYCHOLOGICAL EVALUATION

Name:	WEST, Stephen
Date of Birth:	09-16-62
Age:	39
Date of Evaluation:	11-07-01
Referral Source:	Dana C. Hansen, Assistant Federal Community Defender

Identifying Information and Reason for Referral: Mr. Stephen West is a thirty-nine-year-old divorced white male who was found guilty in 1987 in Union County, Tennessee of two counts of First Degree Murder; two counts of Aggravated Kidnapping; and one count of Aggravated Rape relative to the deaths of Wanda and Sheila Romines on March 17, 1986. Mr. West's post-conviction counsel, Dana C. Hansen, Assistant Federal Community Defender, requested that an evaluation be conducted to assess any psychological factors that might have influenced Mr. West's thinking and behavior at the time of the offenses, and thereby might have had some bearing on possible defenses and/or mitigation issues at the time of his trial in 1987.

Date of Contact and Procedures Administered: A clinical interview was conducted with Mr. West on November 7, 2001 at the Riverbend Maximum Security Institution in Nashville, Tennessee. Psychological assessment conducted at that time consisted of the administration of the Millon Clinical Multiaxial Inventory, Third Edition (MCMI-III) and the Beck Depression Inventory-Second Edition (BDI-II). In addition to the MCMI-III and BDI-II test results, the results from extensive neuropsychological and psychological testing performed in 1995 by Eric S. Engum, Ph.D., J.D. was available through Dr. Engum's report of 09-22-96 and also through his testimony at a post-conviction hearing on September 24, 1996. All of the findings were considered in the current evaluation.

Extensive collateral records were made available for review. These records included the following:

Supreme Court case opinion of 02-06-89;
Three statements of Ronnie Martin (co-defendant);
TBI memo regarding Mr. Martin's statements dated 05-28-87;
Arrest warrant for Ronnie Martin;
Interview of John F. Allen;
Five statements of Stephen West;
Transcription of Steve Hunley tape;
Clinical notes of Dr. Ben Bursten (1986);
Competency Evaluation notes from February, 1989 (unsigned);
Neuropsychological Evaluation Report of Eric S. Engum, 09-22-96;

Affidavit of Dr. Engum dated 01-31-96;
Affidavits of Daniel Matthews, Joseph Ingle, Elisabeth Donnovin, William Harris, Jerry Welborn, Karin Elsea, and Darlene Foote (February, 2001);
Letter from Glenn Fuller dated 02-28-01;
Affidavit of Vestor West (father), dated 12-31-98;
Affidavit of Debra Harless (sister), dated 12-31-98;
Medical Records from Riverbend dated 02-01-01 to 05-30-01;
Trial testimony, Vol. 3, pp. 2-17;
Letter from Stephen West to Judge Asbury;
Trial testimony, Vol. 10, pp. 31-142;
Trial testimony, Vol. 11, pp. 6-35
Trial testimony, Vol. 11, pp. 76-129;
Trial testimony, Vol. 13, pp. 93-137;
Post-conviction testimony of Dr. Engum, pp. 56-168 (1996);
Post-conviction testimony of sister, Debra West, pp.158-192 (1996);
Post-conviction testimony of aunt, Ruby West, pp. 380-391 (1996);
Post-conviction testimony of Dr. Bursten, pp. 421-483 (1996);
School records;
Military discharge record;
Affidavit of Dr. Keith Caruso dated 02-23-01;
Medical records of birth from Community Hospital;
Post-conviction testimony of sister, Patricia DePew, pp.369-380 (1996);
Trial testimony of Patty Rutherford, pp. 45-61.
Affidavit of Karen West Bryant dated 12-18-01;
Mental Health Records of Ronnie Martin from the Regional Mental Health Center of Oak Ridge for services in 1983

Additional information was obtained by telephone interviews with Mr. West's ex-wife and his older sisters.

Background Information: Mr. West was born in Anderson, Indiana. His father is still living, but his mother died several months after his conviction. He has two older sisters and one older brother. Mr. West reported essentially no memory of his childhood. The collateral records indicated that Mr. West was severely abused by his parents. There has been family testimony that he was born after his mother was psychiatrically hospitalized due to a suicide attempt by gas inhalation. Further, the records reflected that Mr. West received recurrent beatings by his mother with belts, shoes, and her hands, frequently leaving bruises and marks. The mother was noted to grab Mr. West by his feet and sling him into a wall, at one point apparently injuring his eyes such that he later needed several surgeries. An aunt reported that she once took Mr. West to the hospital after his mother threw him against the wall. The aunt also reported that Mr. West's mother would make him stay in a very cold room on a urine-soaked mattress. One of Mr. West's sisters stated that he became so fearful of his mother that he would tense if she simply walked near him, and that he would flinch, become immobilized, and start crying if she raised her arm toward him in any manner. His sister also described the mother as pinching the children until they bled, simply "for fun".

Mr. West's father was described as an alcoholic who also was physically and verbally abusive toward him. The father frequently called Mr. West a "bastard", specifically because he (the father) thought Mr. West was not his own child. Family members report that it was an open secret among many that Mr. West was actually the child of the father's brother. Mr. West's sisters described him as a timid, shy, and fearful child because of the parental abuse. They reported that he did not act out; he was a passive child not an aggressive one. He apparently sustained multiple ankle and foot fractures, along with the eye problems, as a result of the abuse.

Despite the severe abuse, Mr. West did attend school and was not in special classes. He began drinking alcohol while he was still in junior high school because it made him "feel better". He dropped out of school in the eleventh grade, and, to escape the violent home situation, joined the United States Army. Mr. West obtained his GED while in the Army. He served approximately three years in the military, and received a discharge under honorable conditions in 1982.

Mr. West noted that his drinking increased significantly while he was in the service. Often he would began drinking early in the morning and drink a case of beer by noon. He also drank hard liquor and began smoking marijuana daily. After discharge from the military, his alcohol and marijuana use decreased for a period of time, but he slowly began drinking more and was again drinking around a case of beer a day when he met his wife, Karen, in 1983. The couple met in Cleveland, Ohio where Mr. West was working in construction.

In discussing his use of alcohol, Mr. West admitted that he had blackouts at times from alcohol, but denied that he became aggressive or abusive when drinking. This information was confirmed by his ex-wife. She denied that he was ever threatening or abusive to her, even when drinking. Mr. West's ex-wife described Mr. West as a friendly individual who was very well-liked by others. Both Mr. West and his ex-wife discussed his chronic use of marijuana. He reported that smoking marijuana, just as using alcohol, "calmed his nerves" and decreased the tension he "always" felt.

Mr. West and his wife moved to Tennessee only a few months prior to Mr. West's arrest on the instant offenses. His wife was several months pregnant at the time of his arrest. Mr. West and his wife were eventually divorced in 1992.

Medical history is positive for the eye surgeries and multiple bone fractures in childhood as noted previously. Mr. West also reported hearing loss in his left ear that has been present as long as he can remember. There is a family history of mental illness. An older sister has been diagnosed with Bipolar Disorder and continues to remain on medication for this illness. The sister stated that her adult daughter also has Bipolar Disorder and that at least two of Mr. West's maternal aunts have suffered from this illness. The sister further reported that the mother had symptoms consistent with Bipolar Disorder, but that the family did not know if she was actually diagnosed with the illness when she was psychiatrically treated. The mother was described as having psychotic symptoms. She experienced auditory hallucinations and believed there was a little man in her head that spoke to her. The mother also was very paranoid at times, thinking that others were talking about her and plotting against her. As mentioned previously, the mother made at least one suicide attempt by gas inhalation when she was pregnant with Mr. West. The family is aware that the mother was treated with ECT after Mr. West was born.

Mr. West had no history of psychiatric/psychological treatment prior to his incarceration. He was evaluated after his arrest by Dr. Ben Bursten on July 26, 1986. Dr. Bursten's notes from this interview were available as was a transcript of his testimony from the 1996 post-conviction hearing. There were indications in the notes of various factors that are typically associated with a stress response. For example, Mr. West reported suddenly seeing the co-defendant holding a knife to Wanda Romines' throat and afterward making threats. Mr. West described feeling dazed, crying and shaking, and feeling unable to do anything to resist. He also reported feeling as though the events were not happening. Mr. West testified to these factors at trial. Nevertheless, the testimony of Dr. Bursten at the post-conviction hearing in 1996 indicated that he found no evidence of mental state issues as a result of his interviewing Mr. West in 1986 that could have had bearing on defense or sentencing issues. Dr. Bursten noted in his records and his testimony that Mr. West denied having been abused during his childhood. The only testing performed by Dr. Bursten in 1986 was administration of the Shipley Scale, a brief screening measure for verbal intelligence. No personality or other psychological testing was given. Dr. Bursten did conduct an interview with Mr. West's parents.

The collateral records contained notes from an interview conducted in 1989 reflecting psychological problems, but there was no signature accompanying the notes. Nevertheless, there was indication in that record that Mr. West was abused during childhood and that he had no substantial memory for events in childhood. The interview notes also indicated that Mr. West had on-going problems with dizziness and blurred vision as well as chronic problems with anxiety and racing thoughts.

In 1995, Dr. Eric Engum performed a comprehensive neuropsychological evaluation including standard personality and psychological assessment. Although he did not find evidence of neuropsychological deficit associated with either pre-natal maternal exposure to gas or to head injury related to the pattern of abuse Mr. West experienced in childhood, Dr. Engum did find that Mr. West had long-standing personality features that have characterized his psychological functioning during adulthood. Dr. Engum described these features in both his report and during his post-conviction testimony in 1996. Specifically, Dr. Engum reported that the test results showed schizoid, avoidant, self-defeating and dependent personality traits. Dr. Engum noted that individuals with such personality features tend to be overly compliant in order to avoid rejection and abandonment, thereby being, "...exceedingly passive, submissive, dependent...". Dr. Engum's opinion was that, based upon Mr. West's statements to law enforcement and to Dr. Bursten after his arrest, Mr. West was in "extreme emotional distress" at the time of the offenses" and that "...he was emotionally overwhelmed by the events initiated by and sustained by the co-defendant, Ronnie Martin". Dr. Engum also found Mr. West to be suffering from depression at the time of the evaluation in late 1995. Dr. Engum's diagnoses were Depressive Disorder, NOS, and Mixed Personality Disorder with Schizoid, Avoidant, Self-defeating, and Dependent Characteristics. Dr. Engum further noted that the test findings, coupled with Mr. West's amnesia for childhood, were consistent with significant abuse during childhood. In testimony, Dr. Engum stated that he viewed Mr. West as functioning at an emotional level consistent with early adolescence.

More recently, medical records from the Tennessee Department of Correction showed that Mr. West was diagnosed with Major Depression on April 5, 2001 and was started on the antidepressant medication, Paxil. At the time of the current evaluation in November of 2001, Mr. West reported that he was then taking the antidepressant, Effexor, and a low dose of Haldol at bedtime.

There were some mental health records obtained regarding Mr. West's co-defendant, Ronnie Martin. This information was considered in an effort to assess how Mr. Martin's personality and behavioral factors might have interacted with and thereby affected Mr. West's behavior at the time of the offenses.

Mr. Martin's records were from two contacts at the Regional Mental Health Center in Oak Ridge in 1983. At that time, he was fourteen and was seen for assessment regarding possible treatment in the center's in-patient program. Mr. Martin had been arrested for stealing $7000 worth of equipment from TVA and had also threatened to harm himself with a knife in the school cafeteria. The records indicated that Mr. Martin reported being "bored and unhappy" and noted much conflict with his mother. The record also reflected that he believed he had committed the theft of property "for the excitement", and he reported that he liked to be "scared". A history of occasional outbursts of temper and mild destructiveness was noted. Mr. Martin was described as expressing "considerable anger toward others who are in occasional conflict with him, teachers, neighbors, relatives, peers." The progress notes further reflected that Mr. Martin "...does seem to be an angry young man who fantasizes violence toward those who frustrate his desires". The notes showed that he was viewed as "skillfully manipulative" and that his mother was tired of his "playing games" with other people. The mother was noted to not take Mr. Martin's provocative behavior seriously. She apparently was concerned that he did not have insight into the difficulties that could stem from breaking the law and from "...fabricating stories about possibly hurting himself or others". The examiner noted that Mr. Martin's veiled threats of harming himself or others appeared "...to be related to boredom and a desire for excitement and challenge". The examiner also stated that Mr. Martin's anger could be due to feelings of abandonment by his father. Mr. Martin was diagnosed as having a Conduct Disorder, Undersocialized, and non-aggressive at that time. The possibility of out-patient and/or in-patient treatment was discussed with Mr. Martin and his mother after the evaluation, but treatment was declined.

Behavioral Observations: Mr. West presented as a medium-statured man who appeared his stated age. He was somewhat reserved initially and appeared mildly anxious. Over the course of the interview, he became less tense and was very cooperative with the procedures. He was alert and fully oriented. There was no evidence of a formal thought disorder and Mr. West denied psychotic symptoms. He expressed no clearly delusional thinking, but did describe having "racing thoughts" for as long as he could remember. He denied other symptoms associated with mania or hypomania, other than on-going sleep disturbance. Affect was tearful at times and mood was viewed as mildly depressed and moderately anxious. Mr. West denied suicidal thinking. He reported that his mood had improved over the months preceding the evaluation and it was his belief that the improvement was a direct result from the antidepressant medication he was taking. Nevertheless, he reported continued difficulties with chronic worry and with disturbed sleep and appetite. As noted previously by others, Mr. West denied memory for his childhood. He did report significant parental abuse during early adolescence and stated that he joined the military to escape the home environment. Mr. West also noted that, after his arrest, he finally became somewhat closer to his mother and father.

In discussing the events surrounding the offenses, Mr. West reported some fragmentation of memory. He admitted that, over the course of time, it was increasingly more difficult to recall some of the events of that morning and reported that when he actively tries to recall them he becomes very anxious. He does, however, have a clear, recurring and intrusive memory of sitting on the sofa with Sheila Romines, hearing

her gasp, and looking up to see Ronnie Martin with a knife to Wanda Romines' throat. He also remembers at one point sitting on the floor crying. He still feels as though he is remembering most of the events as though they did not really happen and he was not actually there. Mr. West described that for months after his arrest, he had recurrent intrusive thoughts of the events, particularly of first seeing Ronnie Martin with the knife. He also experienced nightmares and would frequently wake up in a near-panic from the dreams of the events. He reported that he had the "shakes" for months, along with increased heart rate and sweating, and that he experienced frequent uncontrollable crying spells. When asked if these symptoms were simply associated with his legal circumstance, Mr. West stated that they were related to what happened at the time of the offenses because he could not get those images from his mind. Over many months, these symptoms diminished considerably, but he continues to have them on occasion. His sister and ex-wife confirmed that Mr. West was extremely nervous, tense, and "shaking" during the months after his arrest.

When asked about his passivity and non-intervention at the time of the offenses, Mr. West described having been very frightened of Ronnie Martin since Martin had the knives and the gun. He stated that, after he first saw Martin with the knife, he felt as though things were unreal, as though they were not happening although he knew they actually were. He described feeling unable to resist and as having no control of the situation.

Test Findings: As described above, previous psychological testing by Dr. Engum in 1996 revealed that Mr. West has long-standing personality traits characterized by schizoid, avoidant, self-defeating and dependent features. The current psychological testing indicated highly similar personality factors. The findings showed that Mr. West is an individual who did not develop cohesive, mature emotional coping mechanisms during his formative years. His self-image is that he is weak and ineffectual and he has marked feelings of social inadequacy. He typically relates to others in a dependent manner, seeking acceptance and approval through passivity. He is prone to become confused and to regress emotionally during episodes of stress by psychological withdrawal. He is susceptible to disabling anxiety with depersonalization at such times and may experience confusion to such a degree that there is some breakdown in reality-testing.

The current test results further showed that Mr. West suffers from a prominent anxiety disorder characterized by social anxiety, chronic apprehension, restlessness, sleep disturbance, fatigue and poor concentration. Additionally, the findings reflected that he was previously confronted by a traumatic event that precipitated intense fear and horror and that he continues to have some persistent residual symptoms associated with this event. Specifically, he has recurrent and distressing recollections of the event, he seeks to avoid cues associated with event, he has nightmares and sleep difficulties, and he is prone to having a subjective sense of numbing of his emotions. A chronic pattern of dysthymic mood was also indicated by the testing.

Impressions: Given the overall findings from review of the collateral material, information obtained from family members, and results of psychological evaluation, it is clear that Mr. West suffered from intense psychological trauma and anxiety as a child directly due to the severe physical and emotional abuse of his parents. His was described as hypersensitive to stimuli associated with abuse, such as his mother simply walking close to him or even innocuously throwing her hand out, and as having intense

psychological stress reactions to such cues. He was also observed to be a passive, essentially immobilized, recipient of the harsh abuse. Given that memory of these events has been blocked and Mr. West cannot now personally recall his childhood does indicate the severity of the distress he suffered during that period. Due to his amnesia for that period of time, it is difficult to assess the full range and exact nature of all the symptoms he experienced at an early age, but the pattern of responses that is known strongly supports the development of Posttraumatic Stress Disorder.

It is also clear that Mr. West's passive, dependent, and avoidant personality traits as an adult stem from his traumatic childhood experiences. While unable to exert any change over his unpredictable and threatening environment, he obviously remained passive and compliant in attempts to avoid acute conflict and fear-provoking situations. This strategy became quite entrenched as Mr. West's coping response to stress, later forming a basis of his personality integration. When he became a teenager, he found another way to temper and avoid his pervasive fears and anxieties when he began drinking and using marijuana. His continued use of these substances over time appears to have been an attempt to self-medicate his chronic anxiety. The history supports diagnoses of Alcohol and Cannabis Dependence.

Mr. West has reported that, at the time of the offenses, he experienced intense fear for his life and for the lives of others due to Mr. Martin's actions. Mr. West described feelings of derealization, depersonalization, and numbing associated with the events of that morning. He described being psychologically immobilized and unable to resist or obtain assistance. He subsequently experienced persistent recollections of the events in the form of flashbacks, recurrent intrusive thoughts, and nightmares, along with chronic generalized anxiety and difficulty with memory. While his symptoms diminished over the course of some months, many of the symptoms still persist. The available history indicated that Mr. West experienced an overwhelming Acute Stress Disorder at the time of the offenses and subsequently had Posttraumatic Stress Disorder from the experience. He continues to have residual symptoms of this disorder.

The current evaluation also showed evidence of chronically depressed mood. The records reflect that Mr. West has been depressed over the last several years and that he was diagnosed with Major Depression, Moderate, last year. He has since been treated with antidepressant medication and his mood has improved. He remains on medication

Conclusions: There are several factors that appear to have influenced Mr. West's' psychological response and therefore his behavior at the time of the offenses. His background of extreme trauma and anxiety during childhood set the stage for Mr. West's having an acute stress response and becoming emotionally overwhelmed by the situation, experiencing intense dissociative symptoms of depersonalization and derealization. Mr. Ronnie Martin's psychological history indicates that, although younger than Mr. West, he was an angry individual who had a hostile, aggressive and manipulative personality features. It is my opinion that this more dominating and pathological personality style, in contrast to Mr. West's submissive and fearful personality traits, did serve to reinforce Mr. West's long-standing pattern of becoming passive and compliant when confronted with intense stress. It is my opinion that he had very limited psychological resources for proactive resistance due to the psychological trauma and anxiety reaction he was experiencing at that time. His lack of sleep and his intoxication at the time further depleted his ability to more effectively cope with the traumatic situation.

Based upon the evaluation findings, it is my opinion that Mr. West was suffering from a mental disorder at the time of the offenses and that this mental disorder might have had relevance as a defense and/or mitigation issue at trial. The acute anxiety disorder, along with sleep deprivation and intoxication, appear to have significantly compromised Mr. West's judgment, reasoning, decision-making and problem-solving abilities at the time of the offenses. It is also my opinion that a complete forensic evaluation prior to trial, consisting of repeated observation and clinical interviews over time, psychological testing, in-depth assessment of psychosocial history, and review of all investigative records, would have been able to determine the presence and possible legal relevance of Mr. West's significant problems with anxiety.

Claudia R. Coleman

Claudia R. Coleman, Ph.D.

Attachment 12

RICHARD G. DUDLEY, JR., M.D.
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212-926-0122

21 February 2002
PSYCHIATRIC EVALUATION

IN RE: STEPHEN M. WEST

Presenting Problem:

Stephen M. West (SW) is a 39 year old (DOB 16 September 1962) white male, who is currently under sentence of death in Tennessee for the 17 March 1986 murders of Wanda and Sheila Romines.

It is the understanding of this psychiatrist that in 1987, in connection with this matter, SW was found guilty of two counts of first degree murder, two counts of aggravated kidnapping, and one count of aggravated rape, and then sentenced to death for the murders and also given sentences of 40 years for each of the other three counts. SW had no prior record of any involvement with the law. SW's codefendant in this matter was Ronnie Martin, and although Ronnie Martin was only 17 years old at the time of the murders, he had a prior record of involvement with the law.

In connection with SW's petition for post-conviction relief, his attorney referred him to this psychiatrist for an evaluation, focused on whether or not he was suffering from any psychiatric disorder or difficulties at the time of the crime that might have constituted either a defense to his involvement in this matter and/or mitigation against the penalty of death. The following is the report of that evaluation.

Sources of Information:

- Supreme Court opinion on SW's appeal, dated 6 February 1989
- SW's 18 March 1986 sworn statement, and a later 18 March 1986 addendum to that statement
- SW's first oral statement transcribed on 17 April 1986, and then his second oral statement also transcribed on 17 April 1986
- Bruton statement of SW, transcribed on 11 April 1986
- Ronnie Martin's arrest warrant
- Ronnie Martin's statements, dictated on 2 April, 16 April, and 17 April 1986
- Interview of John F. Allen, transcribed on 11 April 1986
- Transcription of Steve Hunley tape
- Dr. Bursten's notes, CCRC notes regarding competency evaluation
- Trial testimony, Volume 3 pp 2-17, Volume 10 pp 31-142, Volume 11 pp 6-35 and pp 76-129, and Volume 13 pp 93-137
- SW's letter to Judge Asbury
- Dr. Engum's evaluation of SW and affidavit
- Post-conviction testimony pp 56-192, pp 380-391, and pp 421-483
- Affidavits of Daniel Matthews, Joseph Ingle, Elisabeth Donnovin, William Harris III, Jerry Welborn, Karin Elsea, Glenn Fuller, Darlene Foote, Vestor West, Debra Harless, Patty Rutherford, and Kathy West Bryant
- Dr. Caruso's affidavit
- Riverbend records from 1 February 2001 to 30 May 2001
- SW's Anderson County school records
- SW's military records
- Report of the psychological evaluation of SW performed by Claudia Coleman, Ph.D.
- Psychiatric examination of SW performed by this psychiatrist on 11 January 2002

Summary of Information:

When SW met with this psychiatrist, he reported that he only has 'regular memories' starting from about the time he was about 17 years old and about to enter the army. Prior to that point, his memory is extremely spotty. Upon further exploration, SW explained that he only remembers a few scenes from prior to that point in his life; these are just isolated scenes, and he doesn't remember when they occurred, what happened prior to those scenes, or what happened after those scenes; and he really doesn't remember anything else about his childhood or early adolescent years.

Upon further exploration, SW reported, for example, that he remembers a couple scenes wherein his parents are beating him. He remembers being a young child and being kept in a room; when the door opened he hid under the bed; and he hid there hoping that it would be little feet coming into the room, which would mean that he wasn't going to be beaten. He also has a memory of being at the beach with his mother and some man other than his father.

SW reported that recently, 2 guys who said that they had attended junior high school with him heard about his case, contacted him, and started trying to remind him of their time together in junior high school. On his own he couldn't remember anything about junior high school, including any classes, teachers, or other students. However, when they kept trying to remind him of things, he thought that maybe he could remember some of those things, but he doesn't really know if his memory was stimulated by what they told him or if it was simply that he bought into the things that they told them.

SW reported that in contrast, although the information contained in affidavits from his family members about his childhood years is also new to him (and not a part of his independent memory), he still can't remember any of the events that family members described in those affidavits. SW noted that for all of these years, he just thought that it was strange that others could remember their childhood, instead of thinking that his inability to do so was a major problem. He explained, for example, that when he met his wife, she told him about her childhood; but when she tried to question him about his childhood, he couldn't remember very much; and then after she questioned him a couple more times and he still couldn't remember very much, she just stopped asking him about his childhood. Therefore, he really didn't make anything of the fact that he just couldn't remember things about his childhood.

SW reported that he remembers leaving school while in junior high school, but he doesn't really remember why he left school or if there really even was a particular reason why he left school. He thinks that he was doing OK in school; but he remembers feeling that nothing mattered and feeling like he didn't have any direction; and in retrospect (i.e., now that he has learned more about his childhood and early adolescent years), he suspects that he probably just wanted to get away from home. SW noted that he does remember that he was drinking a lot of beer and other alcohol – by the time that he was 17 he was drinking a pint of alcohol and a couple 6-pacs of beer each day. He was also constantly smoking marijuana all day – by the time that he was 17 he was smoking about 20 joints each day. In addition, he was using a little acid whenever he could get it, which was about twice a month.

Upon further exploration, SW reported that he doesn't really remember when he started drinking. However, he remembers being about 16 or 17 years old and drinking until he would blackout; he remembers that it got to the point where he was drinking that heavily most nights; and he remembers repeatedly waking up at home and not knowing how he got home. He noted that he really can't remember any days when he didn't drink, and he noted that essentially, if he was awake he was drinking.

SW reported that he used to get a good high from the marijuana; he really enjoyed marijuana; and he denied ever having any bad experiences with the drug. SW reported that he also had good trips with acid; he doesn't remember any bad experiences with acid either; and although the acid made everything more intense, he doesn't remember ever having any hallucinations or anything like that while on acid.

Upon further exploration, SW reported that although he often drank alcohol and smoked marijuana by himself, he lived in a small town where drinking and smoking marijuana was quite popular, even during the school day. Eventually he also started drinking and smoking with some friends, but he really can't remember anything about those friends. What he does remember however is that he used to roll marijuana joints the size of cigars, and that that (as opposed to anything else about him) made him quite popular with some of the other kids.

SW then noted that in retrospect, he guesses that he was a pretty depressed teenager who spent most of his teenage years in an alcohol/drug-induced stupor. He doesn't remember having any home life; his parents just argued with each other all the time; and he just came and went from the house, feeling that his parents didn't care what he did or didn't do. Although he remembers that his brother was still in the house, he and his brother really didn't have much of a relationship either.

Upon further exploration about his family, SW reported that his father was an alcoholic, but he noted that he never really knew that until after he was locked up in connection with this matter. After he was locked up, he also learned that his mother had mental problems.

SW reported that he had a brother and 3 sisters, but one of his sisters died at an early age and so he never met her. His surviving sisters are now about 43 and 45 years old, and his brother is a year older than he is. SW reported that he doesn't remember his sisters ever being in the home with him or even being around him; actually, he doesn't remember his sisters at all; but he does remember his brother being around. He noted that he remembers meeting his sisters at his trial and then later talking to them during the post-conviction process; when he met them, they were like strangers to him, and he couldn't remember anything that they told him about his childhood years; and if he hadn't been told that they were his sisters, he wouldn't have known that they were his sisters.

SW reported that he entered the Army in about 1980, and spent 3 years in the Army. After basic training, he trained as a combat engineer, and then he served in that capacity in West Germany. After serving those 3 years in the Army, he was given an honorable discharge.

SW reported that he continued to drink alcohol in the Army, but he graduated from marijuana to hash. The Army was conducive to both alcohol and hash use/abuse; they couldn't drink while on duty, but they smoked hash while on duty; and then as soon as they were off duty, they went right to the bars to drink. He noted that although while he was in the Army he wasn't drinking all day anymore, he thinks he actually drank more than he did before he entered the Army; he still always drank until he blacked out; and his Army buddies used to carry him home.

SW reported that reportedly (according to his Army buddies), he was always a more 'goofy/stupid' drunk. He really never got that crazy when he was drinking; over the years, he only got into a few fights; and he was really a 'mild tempered' drunk. He remembers a few guys from the Army (he remembers their faces more than their names), and he remembers having some friends in the Army and getting along pretty well there. SW noted that aside from the alcohol-related blackouts, his memory is much better for the period of his life starting after he left home and entered the Army.

SW noted that when he was in the Army, he felt he had something to do (his job)/felt that something was expected of him; he could do his job and that felt good to him; and it also felt good to have a focus. He even got his GED while he was training to become a combat engineer; he really didn't have to prepare for the GED that much, and for the most part he just took the test and passed it (which is why he presumes that he must have done OK when he was in school); and he was actually encouraged by getting his GED. SW noted that he thinks that he had a good time in the Army, and he believes that he was less depressed during that period in his life as compared with his childhood and early adolescent years.

SW reported however that when he was discharged from the Army, he had no idea what he was going to do. He returned home to Lake City; he found that nothing had changed there; and so after a couple days there, he decided that that wasn't the life for him. Then, he went to Ohio where he got some 'odds and ends jobs'; eventually, he met and became involved with his wife, Karen; and then his wife got pregnant. When his wife got pregnant, he brought her back to Lake City. The murders occurred about 6 months after he returned to Lake City.

Upon further exploration, SW reported that when he first got home from the Army, he saw the same old family problems; his parents were still arguing; and his parents still treated him like he wasn't there. He concluded that both of his parents were nuts, and that he just needed to find something to do and get on with his life. Therefore, he went to Ohio because he thought that with the mills there and all, he might be able to find a job.

SW reported that once he got to Ohio he worked here-and-there, and otherwise drifted, partied, and continued to get high on alcohol and marijuana. Then in 1984, he met and became involved with Karen, at which point he cut back on his drinking. SW explained that Karen didn't drink; she grounded him for a while/gave him a foothold; and he really

enjoyed being with her. She was different than the other girls he had met; he and Karen were friends first, and they didn't start having sex until much later; and from the start, he knew that there was something different about her.

When asked if he had had any serious relationships prior to meeting and becoming involved with Karen, SW reported that he was involved with a German woman while he was in the Army and stationed in Germany; she was a couple years younger than he was; and he met her in a train station one night. He was involved with her during most of the time that he was stationed in Germany, and she wanted to get married; he loved her, but it was too hard to work out the details involved in marrying her and bringing her back to the United States; and then after he returned to the United States, they just quickly drifted apart. Upon further exploration, SW noted that the German woman was his first and only other serious relationship, and his first sexual experience was with her.

Upon further exploration about Karen, SW reported that Karen is 3 years younger than him. She is sweet; she cares about everyone and everything; and she is just one of those positive people that one meets along the way. She was still living with her parents when they met; then about 6 months later, they got a place together; and then about 6 months after that, they got married. He was working at a paper company and he had learned to run all of the machines; she was working at a candy factory; and so between them they made enough money to support themselves.

SW reported that once he started living with Karen, they primarily hung out at home or with a few friends. He cut back even further on his drinking; he wasn't really getting drunk and having blackouts anymore; and so Karen thought that he was OK. He did however continue to smoke marijuana pretty heavily, but Karen didn't really seem to mind that as long as he didn't become a nut while high on the marijuana. SW explained that he and Karen were in love; he treated her well, and nothing else but her really mattered to him; and he noted that he was extremely happy with Karen, and noted that it was the best time of his life.

SW reported that he and Karen didn't exactly plan to have a child; but they both wanted children and they were not using any birth control; and although they were not making a lot of money, they could afford to have a child. He reported that therefore, they were really happy when they discovered that Karen was pregnant. SW then noted that actually, he hadn't thought about having a child until he met Karen; he hadn't even seriously thought about getting married until he met Karen; but he noted that all of that just clicked in for him when they met.

SW reported that once he and Karen discovered that she was pregnant, they decided to return to Lake City so that they could raise their child in a small town environment. He explained that that was what Karen wanted; plus she wanted to meet his parents; and so he decided 'why not'. Upon further exploration, he explained that although he wasn't interested in being around his parents, he just concluded that he would be with Karen now; she would be his family now; and his parents and their behavior really wouldn't matter. When he agreed to move back to Lack City, he really didn't focus on work; he

had been working steadily in Ohio; and he just felt that therefore, he could find another job back in Lack City.

SW reported that when he and Karen moved to Lake City, they both got a job at the McDonald's. He met his codefendant, Ronnie Martin, at work about 2 weeks before the incident, which was just after Ronnie Martin started working at the McDonald's too. SW then explained that when he and Karen were still working in Ohio, they had put a little money aside; so they were able to pay for the move and rent a house once they got to Lake City; and then they got the jobs. He and Karen also started making some friends; he noted that everyone liked Karen; and he noted that Karen even managed to have some positive interactions with his mother, and that was despite the fact that he limited their contacts with his parents.

SW reported that Karen's pregnancy went well. He reported that he cut his drinking and his use of marijuana to a minimum, because he wanted to do the right thing. Upon further exploration, SW explained that he made the decision that he would stop drinking and stop smoking marijuana before the baby was born; he didn't want any of that going on around the baby; and the idea of having a baby/becoming a father gave him even more of a sense of purpose and direction, so much so that he wanted to and felt that he could stop drinking and smoking marijuana. Therefore, he started cutting down his use of both substances, and it got to the point where he was hardly using either substance at all.

SW reported that he really didn't know Ronnie Martin, and noted that he had only met him a couple times. Then one night, Ronnie Martin asked him to go out for a few beers; by then, he hadn't done that for quite a while and he had almost completely stopped drinking and smoking marijuana; and so he thought 'why not', he told Ronnie Martin OK, and he told Karen that he was just going out for a few beers.

SW reported however that it ended up that he and Ronnie Martin just kept riding around drinking beers and smoking marijuana; he noted that Ronnie Martin had a lot of marijuana and just kept buying more and more beer; and he doesn't even know how much they drank and smoked that night. Since he really hadn't been drinking in a while, he quickly became drunk from the alcohol. He noted that he was also probably high on the marijuana, but he doesn't really have much of a sense/memory about that. Upon further exploration, SW noted that he had really thought that he could just have a couple beers and then go home, but he guesses that he just got caught up in it. The riding, drinking and smoking went on for most of the night/early morning (they had gotten off work at midnight); after a while, he really wasn't paying attention to the time; and he noted that when one is drunk like that, one really doesn't pay attention to the time. Upon further exploration, SW reported that he hadn't done anything like that since he had met Karen; he hadn't even been out without Karen since they met; and so neither he nor she had any reason to suspect that he would do anything else other than just have a few beers and come home.

SW reported that then at some point, Ronnie Martin stopped at one of his friend's house, but he/SW didn't know the guy. He later learned that Ronnie Martin got a knife from that friend's house, but he didn't realize that at the time.

SW reported that then Ronnie Martin ran out of money, and then said that he wanted to go to his aunt's and borrow some money. When they got to the house (which ended up being the Romines House), a lady and a girl opened the door; the girl said 'it's Ronnie', and so he thought that they really were all family; and then he and Ronnie Martin went into the house.

SW reported that he sat on the couch with the girl, who appeared to him to be about 15 years old, while Ronnie Martin went to talk to the lady. Then suddenly, the girl looked over his shoulder and gasped; he turned around and saw Ronnie Martin holding a knife at the lady's throat; and that is the last thing he clearly remembers. SW noted that to this day he sees that scene over and over again, and it is just as clear to him today as it was that morning.

SW noted that now it is hard to separate any other independent memories that he might have about the incident from all the things that he has been told about the incident. The things that he is certain about are seeing the above noted scene, and feeling helpless. He reported that he also remembers being in the driveway of his home, feeling tired, and going right to sleep. He knows that he went to work that next evening, but he doesn't actually remember going to or being at work that evening. He also knows that he was arrested the morning after that; reportedly, he was questioned several times; but he only remembers one attempt to question him that was stopped by an attorney.

SW noted that he really doesn't think that he was involved in the murders. He explained that there was no blood on him; he believes that Karen would have noticed something like blood on him; and he noted that besides, murdering someone is not at all something he would do. SW reported that he remembers being in jail and waiting for his trial, and remembers everyone (the police and his attorney) feeding him information about what must have happened at the Romines house.

Upon further exploration about Ronnie Martin, SW noted that before the incident, it seemed to him like Ronnie Martin was just an every day guy. He/SW had thought that he and Ronnie Martin were about the same age; he had a car and wasn't going to school or anything; and it wasn't until after the incident that he learned that he was only 17 years old.

SW reported that he doesn't remember much about the guilt phase of his trial, and he doesn't remember the penalty phase at all. Upon further exploration, he noted that some years after he got on death row, one of the psychiatrists here pointed out to him that he looses things when emotionally stressed, and he noted that he knows that he has seen some things while in jail (for example, a murder) that he doesn't actually remember. He noted that he had never really realized how that happens to him until that discussion with that psychiatrist, and he noted that he had just always thought that he had a bad memory.

Upon further exploration, SW reported that he only sleeps a couple hours each night; he was sleeping a little better for a while when the psychiatrist was giving him Trazadone at night; but once the Trazadone was discontinued, he went right back to sleeping only a couple hours each night.

When asked about his obvious physical agitation (observed by this psychiatrist during the examination), SW reported that he stays 'wired up' all the time; he is constantly moving/fidgety; but although he feels fearful, there is no real focus for his fears. Upon further exploration, he noted that he was always like that (i.e., fearful and fidgety); the marijuana slowed him down and gave him a more 'mellow' feeling; and he noted that that was why he liked smoking marijuana so much. He started really feeling fidgety again when he tried to stop drinking and smoking marijuana (during Karen's pregnancy); but he was determined to stop drinking and smoking marijuana; but then some nights he had to walk for miles/burn some of that energy off before he could get to sleep at all. At the time, he just told himself that he was over excited and a little hyper. SW reported that although he is still constantly moving, if he focuses on it, he can control it, but as soon as he stops focusing on it, it starts up again.

SW reported that at night he spends hours trying to fall asleep, because his mind keeps going and will not turn off. He noted that it is not just that he is thinking about his case or his current situation – he is mostly thinking about his own life or anything and everything else that is going on in the world. SW noted that he has always had a problem getting to sleep; he thinks his best period in this regard was when he was with Karen; but before he got involved with Karen he would black out from being drunk, and he never really just fell asleep.

Upon further exploration about his relationships with his friends, SW noted that although he had some friends, there was no one who he ever felt close to until he met the woman in Germany. The only person he ever really felt especially close to was Karen. Upon further exploration, SW noted that it wasn't that he didn't want to have close friends, it is just that he never felt really that comfortable with and close to anyone until he met Karen.

When asked about his physical health, SW reported that he knows that his ankles were broken several times when he was a child; but he doesn't have any memory of any of that; and he doesn't have any current problems resulting from any of that. He also knows that he had some surgeries on his eye when he was a child, but he doesn't have any memory of those surgeries either. However, he has had to wear glasses; his vision has even further deteriorated as he has gotten older; but he was never able to see very much without his glasses. When asked about his weight, SW reported that he has been about 175 pounds (he stands about 6'2") for all of his adult life; at various times he has tried to put on weight, but nothing he tried ever worked; and he noted that he is the only thin one in his family.

Returning to his memories about the morning of the murders, SW again reported that he only remembers Ronnie Martin holding the knife at the lady's throat and feeling helpless. He explained that he felt that if he jumped up Ronnie Martin would cut the lady, and if he didn't do anything Ronnie Martin would still cut the lady. He still thinks about that memory even when he is trying to keep his mind on something else, and when he thinks about it, he still feels helpless. Upon further exploration, SW denied currently having any nightmares containing that memory, and noted that he can't honestly recall if he ever had any such nightmares during the months after the murders.

When asked about any history of psychiatric treatment, SW reported that the only mental health treatment that he has received has been here on death row. For the last several months, he has been taking Effexor (an antidepressant medication) 150mg each day (in a time-released form) and Haldol (an antipsychotic medication) 5 mg each night. He explained that he was really despondent before being started on the medication, and he noted that before being started on the medication, he was so depressed that he would not have been able to tolerate his session with this psychiatrist (i.e., would not have been able to talk about all of the things he had talked about with this psychiatrist without breaking down).

Upon further exploration, SW explained that he has really deteriorated since being on death row; over the years he became increasingly depressed; and in about March 2001, he was so depressed that he was ready to drop his appeals and he just wanted to die. Then, within about 12 hours of his execution, his friends pulled him back/talked him out of it. SW reported that then he was started on Paxil (an antidepressant), which was the first time he was ever treated by a psychiatrist, but the Paxil didn't help him. Then he was switched to another antidepressant medication, but that medication didn't help him either. Then he was switched to the Effexor and the Haldol; he was also given the Trazadone then, but that was stopped after 2 weeks; and although he told the psychiatrist that he couldn't sleep after the Trazadone was stopped, the psychiatrist wouldn't put him back on the Trazadone.

A mental status examination of SW revealed that he was a 39 year old (DOB 16 September 1962) white male, who was tall and thin, and who appeared to be about his stated age. He grossly appeared to be physically healthy. As noted above, although he was on medication, there was still considerable physical agitation/almost constant movement. His speech was clear, coherent, and goal-directed. He appeared to be open and cooperative with the examination process.

- He was oriented to person, place, and time
- He denied having any independent memory of his childhood or early adolescent years except for a few scenes (screen memories), and reported that there had also been incidences in his adult life that he was unable to remember

- He appeared to be moderately depressed, despite the fact that he was taking antidepressant medication, but noted that he was not as depressed as he had been back in 2001 or at other even earlier periods in his life
- His affect was appropriate to his depressed mood, there was also the above noted agitation, and there was little-to-no range of affect evidenced in response to the various topics discussed
- There was no gross evidence of a thought process disorder or an organic brain syndrome
- His intellectual capacity grossly appeared to be within the average range
- His insight was fair
- His judgement was fair

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In the interest of time, the various records and documents reviewed by this psychiatrist will not be summarized here. Most of these records and documents are available to reviewers of this report and/or already summarized in Dr. Coleman's report, and the particularly relevant information contained in these records and documents will be noted in the 'summary & discussion' below.

Summary & Discussion:

Although SW has little-to-no independent memory of his childhood or early adolescent years, information contained in the documents reviewed by this psychiatrist indicate that he was a victim of extremely severe child abuse and neglect. More specifically, he was repeatedly brutally beaten by his parents, especially his mother, and he was repeatedly seriously injured during the course of those beatings. He was also regularly confined to a dirty room with hardly any contact with other family members. In addition, he was deprived of the love, attention, and guidance usually offered by reasonably adequate parents.

The few 'scenes' (or screen memories) that SW remembers from his childhood years indicate that he responded to the abuse and neglect that he experienced with extreme fear/horror and a sense that he was helpless/totally unable to protect himself.

Based on the information currently available to this psychiatrist, it is the opinion of this psychiatrist that as a result of the extremely severe abuse and neglect that SW was exposed to during his childhood and early adolescent years, he developed a Posttraumatic Stress Disorder (PTSD). SW's inability to remember his childhood and early adolescent years is part of the persistent avoidance and numbing of general responsiveness that is characteristic of PTSD, as was his intense desire to escape from his home/parents and his inability to emotionally connect with friends (i.e., a restricted range of affect). SW's persistent sleep difficulties, fearfulness, and fidgetiness are examples of the persistent symptoms of increased arousal associated with his PTSD. Given SW's inability to remember his childhood and early adolescent years, it is difficult to explore for indications that he persistently reexperienced the traumas (the other group of symptoms characteristic of PTSD). However, SW reports that he is unable to remember other violent events that occurred later in his life; this would suggest that he responds to reminders of his original traumas with intense psychological distress; and such a response would be an indication that he persistently reexperiences the original traumas.

Based on the information currently available to this psychiatrist, it appears that at least by the time that SW was an adolescent, he had learned to use alcohol and marijuana as 'self-medication' for the symptoms of his PTSD. As he reported to this psychiatrist, the substances helped him to feel 'more mellow', feel less fearful, and be less fidgety. However, it is the opinion of this psychiatrist that as a result of such heavy use of alcohol and marijuana (and, given his family history, probably also a genetic predisposition for the development of alcoholism), SW developed substance abuse difficulties. More specifically, he developed Alcohol Dependence, as characterized by, for example, the use of increasing amounts of alcohol over time, the development of tolerance to alcohol, and the continued use/abuse of alcohol despite blackouts and other negative effects on his ability to function. He also developed Cannabis (marijuana) Dependence, as characterized by, for example, the use of increasing amounts of marijuana over time, the development of tolerance to marijuana, and the continued use/abuse of marijuana despite negative effects on his ability to function.

SW reported that when he met and became involved with Karen, he began to cut back on his use/abuse of alcohol. He reported that then when he discovered that Karen was pregnant, he made the decision to stop using/abusing alcohol and marijuana, and by the time of the murders, he had virtually stopped using/abusing alcohol and marijuana. However then, he spent the hours before the murders constantly drinking and smoking marijuana; he remembers quickly becoming drunk from the alcohol; and he noted that he suspects that he had more than enough marijuana to also become high on the marijuana. As SW noted when he met with this psychiatrist, given that he had virtually stopped using both substances before that night, the heavy alcohol and marijuana use had a far greater impact on him then it had had in the past.

Based on the information currently available to this psychiatrist, it is the opinion of this psychiatrist that as a result of his PTSD, when SW saw Ronnie Martin holding a knife to Mrs. Romines' neck, he responded with horror and a sense of helplessness, and that scene exacerbated the symptoms of his PTSD and/or precipitated a new PTSD. It is also the

opinion of this psychiatrist that that night's/early morning's heavy use of alcohol and marijuana only increased SW's vulnerability to respond to a violent/threatening situation with horror, helplessness, and an exacerbation of the symptoms of his PTSD and/or a new PTSD.

Therefore, it is the opinion of this psychiatrist that on 17 March 1986, at the time of the murders for which SW is currently under sentence of death, SW was suffering from a mental disorder. It is also the opinion of this psychiatrist that SW's mental disorder was of the type that would have been relevant to his defense during the guilt phase of his trial and also relevant as mitigation during the penalty phase of his trial.

Richard G. Dudley, Jr., M.D.
Psychiatrist
Diplomate, American Board of Psychiatry & Neurology

RGD:dw

Attachment 13

AFFIDAVIT OF PABLO STEWART, M.D.

I, Pablo Stewart, M.D., declare as follows:

1. I am a physician licensed to practice in California, with a specialty in clinical and forensic psychiatry. I have extensive clinical, research, and academic experience in the diagnosis, treatment, and prevention of substance abuse and related disorders, including the management of patients with dual diagnoses and the use of psychotropic medication and diagnostic, treatment, and community care programs for persons with Posttraumatic Stress Disorder. I have written and published numerous articles in peer review journals on topics that include dual diagnoses, psychopharmacology and the treatment of psychotic disorders and substance abuse. I have designed and taught courses on protocols for identifying and treating psychiatric patients with substance abuse histories and have supervised psychiatric residents in teaching hospitals. I have worked closely with local and state governmental bodies in designing and presenting educational programs about psychiatry, substance abuse, and preventative medicine.

2. I received my Bachelor of Science from the United States Naval Academy, Annapolis, Maryland, in 1973, with a major in chemistry. I received my Doctor of Medicine Degree from the University of California, San Francisco, School of Medicine in 1982.

3. I have served as Medical Director of the Comprehensive Homeless Center, Department of Veterans Affairs Medical Center in San Francisco where I had overall responsibility for the medical and psychiatric services at the Homeless Center; Chief of the Intensive Psychiatric Community Care Program, Department of Veterans Affairs Medical Center in San Francisco, a community based case management program that is social work managed; Chief of the Substance Abuse Inpatient Unit, Department of Veterans Affairs Medical Center in San Francisco, where I

had overall clinical and administrative responsibilities for the unit; and Psychiatrist, Substance Abuse Inpatient Unit, where I provided consultation to the Medical/Surgical Units regarding patients with substance abuse issues. I am currently the Chief of Psychiatric Services at Haight Ashbury Free Clinic, a position I have held since 1991. I served as a Physician Specialist to the Westside Crisis Center, San Francisco from 1984 to 1987 and the Mission Mental Health Crisis Center from 1983 to 1984.

4. In addition to my clinical and teaching responsibilities, I have experience in forensic psychiatry. From 1988 to 1989, I was Director, Forensic Psychiatric Services for the City and County of San Francisco where I had administrative and clinical responsibilities for psychiatric services provided to the inmate population of San Francisco. My duties included direct clinical and administrative responsibility for the Jail Psychiatric Services and the Forensic Unit at San Francisco General Hospital. From 1986 to 1990, I was Senior Attending Psychiatrist, Forensic Unit, University of California, San Francisco General Hospital, where I was responsible for a 12-bed maximum-security psychiatric ward. One of my duties was advising the San Francisco City Attorney on issues pertaining to forensic psychiatry.

5. I am also serving as medical and psychiatric consultant to the monitors of the agreement between the United States and Georgia to improve the quality of juvenile justice facilities, critical mental health, medical and educational services, and treatment programs. The monitor is the Institute of Crime, Justice and Corrections at George Washington University. I have qualified and testified as a Psychiatric Expert witness in federal court cases regarding the implementation of constitutionally mandated psychiatric care to California's inmate population at different maximum security and psychiatric care facilities. I serve as a Technical Assistance

Consultant to the Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, Department of Health and Human Services; and Psychiatric Consultant to the San Francisco Drug Court.

6. In 1985, I received the Mead-Johnson American Psychiatric Association Fellowship for demonstrated commitment to public sector psychiatry and was selected as the Outstanding Psychiatric Resident by the graduating class of the University of California, San Francisco, School of Medicine. In 1985 - 1986, I was the Chief Resident, Department of Psychiatry, University of California San Francisco General Hospital and had direct clinical supervision of seven psychiatric residents and three to six medical students.

7. I have served as an Examiner for the American Board of Psychiatry and Neurology and am a Diplomate of the same Board. I am active in several professional associations and have served as the President, Secretary-Treasurer and Councilor-at-large of the Alumni-Faculty Association, University of California, San Francisco, School of Medicine; Vice President of the Northern California Area, Alumni-Faculty Association, University of California, San Francisco; and Associate Clinical Member of the American Group Psychotherapy Association.

8. I have held academic appointments as Associate Clinical Professor, Assistant Clinical Professor, and Clinical Instructor in the Department of Psychiatry, University of California, San Francisco, School of Medicine, since 1989. I received the Henry J. Kaiser Award for Excellence in Teaching in 1987 and was selected by the graduating class of the University of California, San Francisco, School of Medicine as one of the top ten faculty members for the academic year 1994 - 1995, 1990 - 1992, and 1988 - 1989. I designed, planned and taught "Drug Alcohol Abuse" and "Alcoholism," one unit courses covering major aspects of drug and alcohol abuse;

supervised fourth year medical students in the care of dual diagnostic patients at the Psychiatric Continuity Clinic, Haight Ashbury Free Clinic; facilitated a weekly psychiatric intern seminar on "Psychiatric Aspects of Medicine;" and lectured on addictionology and substance abuse to the School of Pharmacy, UCSF.

Referral Questions

9. At the request of counsel for Stephen West[1], I conducted a psychiatric assessment of Mr. West to determine what factors contributed to his actions surrounding the offenses for which he has been sentenced to death, the presence and effect of any mental disease from which he may suffer, and the role of alcohol and substance abuse in his and his family's life.

Materials Reviewed

10. In order to answer the questions asked of me, I conducted a clinical interview of Mr. West and reviewed extensive material relating to the legal proceedings against him and his social and medical history, including birth records, academic records, military records, affidavits and testimony of family members, prison medical and psychiatric records, Stephen's statements to law enforcement and testimony, his codefendant's statements to law enforcement, and excerpts of legal proceedings. I also reviewed the exhaustive reports of Richard Dudley, M.D., and Claudia R. Coleman, Ph.D., and consulted with them by telephone conference. These are the kinds of materials routinely relied upon by members of my profession in providing expert opinions.

Social and Medical History

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[1] In the interest of clarity, Mr. West and his family members will be referred to by their first names.

11. Mr. West was born September 16, 1962, while his mother was a patient in a psychiatric hospital in Anderson, Indiana. Stephen was the youngest of five children born to Wanda West, a mentally ill woman who was ill equipped to parent any of her children. The child's grandmother reared her first child, Debra, born when Wanda was only a teenager. Wanda's second child died in infancy, apparently from complications of hemolytic disease, which developed when Wanda's Rh-negative blood was incompatible with the infant's Rh-positive blood. Wanda and her husband, Vestor West, reared her last three children (Patty, Teddy, and Stephen) as a family, although Vestor denied paternity of Stephen. Stephen's biological father, according to family reports, was Vestor's brother, Vaughn. By all accounts Vestor shared Wanda's limited abilities to parent. An alcoholic who could not read or write, Vestor worked in menial jobs. Wanda worked occasionally as a house cleaner in a hotel. The family was impoverished and lived in public housing.

12. Stephen's family has a significant history of major mental illness that significantly interfered with the family's functioning and derailed Stephen's developmental trajectory. His mother, Wanda demonstrated psychotic symptoms that included auditory hallucinations, delusions, and paranoia. She believed that others plotted against her and talked about her and that a little man in her head spoke to her. When she was pregnant with Stephen, she attempted suicide by gas inhalation. Her symptoms were severe enough that she required psychiatric hospitalization and treatment with medication and electroconvulsive therapy (ECT). Stephen's older sister, his niece, and two of his maternal aunts have Bipolar Disorder, a major psychiatric disease recognized to have a strong genetic component. His biological daughter is taking medication for Attention Deficit Hyperactivity Disorder (ADHD).

13. Stephen survived prolonged, life threatening maltreatment at the hands of his mother and her husband. The abuse began in early childhood and continued until Stephen left home to join the military in an attempt to find safety from the relentless abuse he survived. His mother and stepfather physically assaulted Stephen without provocation or fear of reprisals. They beat, kicked, punched, and threw him, causing injuries that left him deformed and disabled. His mother beat him with belts, shoes and her hands, often pinching him until he bled. She grabbed him by his feet and slung him into a wall. During one episode of being slung into a wall Stephen was knocked "cross eyed. Stephen had multiple surgeries to correct his vision. At another point, she broke Stephen's ankles. The physical assaults caused bruising, bleeding, and scarring. Stephen's alcoholic stepfather, described as having a temper and being unpredictable as well as retarded, regularly beat Stephen and his siblings. Stephen's stepfather hit him with a belt, the buckle of the belt, a cord, sticks, a broom handle and his fists on all part of his body.

14. Extreme acts of cruelty accompanied the constant battering Stephen survived. The acts of cruelty formed an effective strategy of coercive control by both parents that included public humiliation, degradation, threats to maim, control over basic bodily functions, captivity, and isolation. In an act of humiliation and degradation, Wanda forced Stephen to sit outside on the porch clad only in his underwear while the neighborhood children ridiculed him. .Wanda exiled Stephen as a child to an unheated, cold room where he had to sleep on a urine soaked mattress. She withheld food from him as a form of punishment. Wanda singled Stephen out for the harshest punishment while favoring her other son, Teddy, whom she did not physically abuse. Wanda offered words of encouragement for Stephen's siblings, but withheld support for

Stephen. His stepfather cursed Stephen, calling him a bastard because Stephen's biological father was the stepfather's brother.

15. Stephen developed a characteristic set of responses to surviving chronic and severe abuse. He became so fearful of his mother that he tensed when she came near him. An aunt described him as "shivering up" when she approached him. If his mother raised her arm toward him in any manner, he became immobilized and cried. Stephen became a fearful, timid, shy child who did not act out. He was passive and not aggressive, accepting the blows without fighting back. Stephen was undernourished as a child. His sister Patricia Depew, described a picture of neglect and abuse:

> I always picture Steve with long, blond, curly hair, never combed, a diaper dragging down to his knees, always needing changed, bruises, very, very, very thin. You could always see his ribs; all of his bones always. . . .[M]ost of the time he was crying.

His academic records show that, like other abused children, his responses to chronic danger at the hands of his caretakers interfered with his academic performance. He began drinking alcohol and smoking marijuana in junior high school in an effort to quell the overwhelming emotions he experienced. Although he was promoted from one grade to the next, his academic marks fell far below his potential. He withdrew from school in the eleventh grade and joined the army, where he served three years before being discharged under honorable conditions in 1982.

16. Stephen developed clear symptoms of psychiatric disease as he matured that prevented him from functioning in the community in the manner he desired. After discharge from the military, Stephen moved to Cleveland, Ohio, where he spent several years growing up, and

worked on maintenance crews and in construction. It was in Ohio where he met and married his wife Karen, with whom he has three daughters: Krystal Marie, Stephanie Michelle and Tiffany Kay. He deeply wanted his marriage to be successful and wanted to meet his responsibilities as a father. In an effort to be a responsible husband and father, he reduced his drinking greatly, but he continued to experience symptoms of anxiety and depression that interfered with his ability to maintain employment. He and Karen returned to Tennessee and he took a job at McDonald's in Lake City, Tennessee, where he met his codefendant.

17. Prior psychiatric evaluations and psychological assessments provide a uniform picture of the distressing symptoms that affected Stephen over the course of his life. He experienced social anxiety, chronic apprehension, restlessness, sleep disturbance, fatigue, and poor concentration. He showed signs of obvious physical agitation and felt "wired up" all the time. He moved and fidgeted constantly. He walked for miles to "burn some of that energy off" so he could sleep. He described forgetfulness, racing thoughts, blackouts, dizziness, blurred vision, and insomnia. He demonstrated sudden autonomic changes commonly seen in survivors of life threatening trauma, including increased pulse rate, tremors and shaking, and sweating. He reported losing his vision, having spots in his vision, and episodes of syncope as often as three or four times a week. He self medicated by using marijuana and drinking alcohol. His symptoms and the course of his illness are consistent with Posttraumatic Stress Disorder as a result of childhood abuse and exposure to the murder for which he has been convicted, Polysubstance Abuse/Dependence (alcohol and marijuana), Attention Deficit Hyperactivity Disorder, and Mood Disorder with Psychotic Features (resolved).

Clinical Interview

18. I interviewed Stephen West on August 26, 2002, at the Riverbend Maximum Security Institute, where he is a death-sentenced prisoner. Stephen is a Caucasian male who appears his stated age. He was somewhat tense and mildly anxious but was cooperative throughout the interview. He is euthymic. He was alert and oriented. He described past episodes of severe depression with psychotic features of hearing whispers.

19. At the time of the interview with me, Stephen was medicated with Effexor 75 mg BID, an antidepressant; Haldol, an antipsychotic; and trazodone, an antidepressant. Psychiatric staff at the prison started Stephen on these medications for chronic depression characterized by anhedonia, mood lability, and sadness. Paxil and Elavil were not effective for Stephen's condition. Paxil made him very drowsy and he slept too much. Paxil had similar effects on Stephen's intense anxiety as marijuana and drinking, but was even stronger. Paxil addressed Stephen's symptoms of anxiety but his depression was not responsive. Elavil did not have any positive effects but caused him difficulty urinating. Stephen reported that the medications are effective and that he feels the "best I've felt in my life. I feel like a human." It is unclear what the exact effects of his medication regimen are because Haldol was begun at the time same time he started Effexor. Of note, the Effexor dealt with symptoms of depression but Stephen remained anxious (i.e., foot twitching, racing thoughts, tapping his feet). It was due to these symptoms that Trazodone 100 mg was started. After the trazodone was started, all of these symptoms subsided. Haldol was begun while he was still depressed and the Paxil and Elavil were not addressing these symptoms. Stephen admitted to hearing whispers while he was severely depressed. The Haldol did address this symptom. Of note, he had ADHD-like symptoms for a while after starting Effexor and Haldol.

20. Since being medicated, Stephen was able to recognize that he has suffered a life-long depressive syndrome. His "style" of depression was the "withdrawn" variety. This is consistent with prior mental health evaluations and lay witness reports describing him as passive and complacent. Due to his depression being treated effectively, he was able to be friendly and enjoy activities with others. He was relieved to be getting along with people. He felt that the custody staff would report how well he has been doing since he began receiving proper medication. He described himself at the time of the interview as being happy.

21. Stephen had significant memory impairments, most likely associated with the acute trauma he experienced during his formative years. His recall memory began when he was 17 or 18 years of age and corresponded to his joining the U.S. Army where he was stationed in the U.S. and in West Germany as a combat engineer. He has a few non-specific memories before the age of 13. He has no direct memories of the well-documented abuse inflicted upon him and appears to be sincere in this denial. He does not have much of a memory for events since age 17. He described his memory as being "fragmented." For example, he could not recall the previous mental health expert who evaluated him. The relative immediacy of the offense made it easier for him to access traumatic memories of the offense at the time he was questioned by law enforcement and testified. This coupled with his being under the extremely stressful situation of police interrogation increased his vulnerability to reexperiencing the actual trauma and relating its details. This unfortunate situation was also recreated in the courtroom where he appeared detached and cold in telling the details of the crime, when in fact, he was displaying classic symptoms of posttraumatic stress disorder.

22. Stephen is unclear about the exact onset of his drinking, but believes it began when he was young and in junior high school. He consumed up to a case of beer and a pint of liquor or more daily. By the time he was 17, he drank daily until he passed out each night. When he awakened, he was unable to remember how he got home. He described his teen years as ones spent in an alcohol-drug induced stupor. He continued drinking until a few weeks before the offense, secondary to his wife's pregnancy. In an effort to prepare for parenting and to keep his marriage intact, Steve had greatly reduced his drinking. As he reduced his drinking, he confirmed the fact of increased ADHD-like symptoms as his drinking decreased.

23. Stephen began using marijuana at the same time he began drinking in junior high school. Marijuana "calmed him down." He smoked up to 20 marijuana cigarettes a day. He smoked hashish while in the military. By the time of his arrest, his drinking and use of marijuana had substantially decreased to a few beers now and then and an occasional marijuana cigarette.

Mental Status at the Time of the Offense

24. Stephen reported that on the day of the offense he and his codefendant left work and purchased two six packs of beer and stopped at his house for three more beers. Stephen and the codefendant drove around drinking until early morning hours. By the time they arrived at the house where the offenses occurred, Stephen was drowsy and drunk. According to Stephen, his codefendant did not make known his plans to harm the two women in the house until after they entered the house. Instead, the codefendant told Stephen he wanted to go into the house to borrow money from one of the occupants who was a friend of his. After they entered the house, the codefendant revealed he was armed with a gun and knives, sexually assaulted both women, and forced Stephen to participate in sexual acts with one of the women. Stephen was passive

throughout the offenses and followed orders to move from one room to the next or to have one of the victims perform sexual acts on him. Stephen, however, refused to participate in stabbing either victim, both of whom were stabbed to death by the codefendant. The codefendant threatened to have Stephen's family killed if Stephen went to the police. At the time of the offenses, Stephen believed he was helpless to take any action against his codefendant and was overwhelmed and frozen by the sheer terror at his codefendant's actions. He did not plan or intend for his codefendant to harm anyone and he was repulsed and horrified by the codefendant's actions.

Conclusions

25. A constellation of psychiatric symptoms and disorders affected Stephen West's behavior at the time of the offenses. The kind of prolonged abuse that Stephen survived constitutes extreme duress and breaks the bonds that children need to develop into healthy adults. It caused Stephen to relinquish his autonomy, moral principles and relationships with others for the sake of his survival. He developed an insidious progressive form of posttraumatic stress disorder that controlled and constricted his entire life. Stephen, like other chronically traumatized people, became hypervigilant and lived in a state of constant arousal, acutely tuned to following the coercive demands of others in positions of perceived power. His severe memory loss is avoidance of memories of abuse and inability to tolerate re-experiencing acts of abuse that he survived. He displays classic physiological responses to abuse such as increased heart and pulse rate, trembling, sweating, and dizziness. This disorder is long-standing and chronic.

26. The long term consequence of surviving terror at the hands of his father and mother resulted in numerous alterations in Stephen's behavior and functioning that are recognized in psychiatry as the sequellae to trauma, but he also has been plagued with other major mental disorders, including Major Depressive Disorder with Psychotic Features, Attention Deficit Hyperactivity Disorder, and Polysubstance Abuse/Dependence. He has experienced persistent depression and chronic anxiety, auditory hallucinations, sleeplessness, hopelessness, and agitation. As a child and young adult, he ingested copious amounts of alcohol to suppress the terror and anxiety associated with the abuse. Prolonged ingestion of alcoholism, especially during critical developmental periods, can result in deleterious changes to brain structure and function, as well as other body organs. Brain changes associated with alcoholism include lower white-matter volume, enlarged ventricles and sulci, and lower brain weight. It can also cause abnormalities in brain function including lowered brain metabolism, impaired memory and other cognitive deficits.

27. It is my professional opinion, which I hold to a reasonable degree of medical certainty, that Stephen West was under unusual and substantial duress when he participated in the events that led to the deaths of Wanda and Sheila Romines. His capacity to conform his conduct to the requirements of the law at the time of his offense and to appreciate the wrongfulness of his conduct was substantially impaired. The extreme duress he experienced is the direct result of the psychiatric disease from which he suffers. Stephen had a present, imminent and pending fear of death or serious bodily harm at the hands of his co defendant and a reasonable belief that he could not escape his codefendant's control. The codefendant was described as a bizarre, belligerent, and dominant person, while Stephen was uniformly described as passive and

submissive. Stephen's history of subjection to totalitarian control, combined with the codefendant's threats to kill Stephen's family, deprived him of the sense of autonomy that allows independent action and the ability to choose a course of action . The events of the crime shattered Stephen's already fragile mental state to the point that he responded to the violent and threatening situation with complete submission and dissociation resulting in loss of contact with reality. At the time of the killings, Stephen responded to his codefendant's commands without plan, thought, or recognition of the consequences of his actions. He harbored no intent to kill or malice for the victims, and his actions were taken without premeditation or understanding, knowledge about the difference between right and wrong, or awareness of the risks to others of his behavior.

28. I have been asked to offer my opinion about Stephen's intoxication at the time of the offense. Stephen was intoxicated at the time of the offense, secondary to the chronic symptoms of posttraumatic stress disorder, depression, and ADHD he experienced. Because Stephen had greatly decreased his alcoholic intake for months prior to the evening of the offense, he was especially susceptible to the effects of alcohol and its exacerbating effects on Stephen's underlying mental impairments. Alcohol causes impaired judgment, reasoning, and insight. In sufficient quantities, such as the amount Stephen consumed over a relatively short period of time, it causes mental confusion and altered states of consciousness. It is my professional opinion, which I hold to a reasonable degree of medical certainty, that Stephen's intoxication at the time of the offense exacerbated Stephen's underlying mental impairments and further eroded his ability to understand and conform his conduct to that required by the law.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed on December 13, 2002.

PABLO STEWART, M.D.

Attachment 14

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

COPY

STEPHEN MICHAEL WEST, Petitioner

vs.

STATE OF TENNESSEE, Respondent

Case No. 03 C01-9708-CR-00321

AFFIDAVIT OF VESTOR WEST

STATE OF TENNESSEE)
COUNTY OF HAMILTON)

Personally appeared before me, Vestor West, who after first being duly sworn, deposes and says:

1. I am more than eighteen years of age, under no legal disability, and make this affidavit based upon my personal knowledge.

2. I raised Stephen as his father and I very familiar with his case, his capital murder trial in which a jury found him guilty and sentenced him to death, and his attorneys, Mr. Richard McConnell and Mr. Thomas McAlexander.

3. I admit that both his mother and I severely abused Stephen from the time he was born in a mental institution in Indiana until he left home to join the army.

4. We physically abused him by hitting him with our hands, sticks, bottles or anything else we had. This abuse was extreme and always very violent. For instance, Stephen was slammed against a wall so hard when he was baby that he was knocked cross-eyed and required surgery.

5. I was present for the first meeting with Mr. McConnell when we discussed Stephen's case. At this meeting, I tried to tell Mr. McConnell about this physical abuse and Stephen's drug problems but my wife told me to "shut up" and then told Mr. McConnell that he was not to mention any word about abuse or she would fire him on the spot.

6. After that, Mr. McConnell refused to meet with me and refused to speak with me when I asked him on the telephone if he knew about Stephen's history.

7. I would have testified at Stephen's trial about this abuse if Mr. McConnell had asked me to but he refused to let me testify.

FURTHER THE AFFIANT SAITH NOT.

one of the people who

Vestor West
VESTOR WEST

Sworn to and subscribed
before me this 1st day
of December, 1998.

Rebecca Hamm
Notary Public

My commission expires: 3-23-02

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served upon the parties listed below by placing the same in the U.S. Mail with sufficient postage to reach its destination:

John Knox Walkup
Office of the Attorney General
425 Fifth Avenue North
Nashville, TN 37243-0485

This _____ day of _____, 1998.

_____