IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, Maryland 21215

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND;
3600 Clipper Mill Road, Suite 350
Baltimore, Maryland 21211

MARYLAND CITIZENS AGAINST STATE EXECUTIONS;
PO Box 39205
Baltimore, Maryland 21212

and

VERNON EVANS, JR.;
Division of Corrections No. 172357
Maryland Correctional Adjustment Center
410 East Madison Street
Baltimore, Maryland 21202

Plaintiffs,

vs.

Civil Action No. ____

MARY ANN SAAR, Secretary,
Department of Public Safety and Correctional Services
300 East Joppa Road
Suite 2000
Towson, Maryland 21286;

FRANK C. SIZER, JR., Commissioner,
Maryland Division of Correction;
6776 Reisterstown Road
Baltimore, Maryland 21215;

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' URGENT APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, National Association for the Advancement of Colored People ("NAACP"), American Civil Liberties Union Foundation of Maryland ("ACLU"), Maryland Citizens Against State Executions ("CASE"), and Vernon Evans, Jr., urgently seek a temporary restraining order and preliminary injunction enjoining Defendants from performing any executions in the State of Maryland until they have complied with Maryland State law in adopting its execution protocols. Because the execution of Plaintiff Evans is scheduled for the week of February 6, 2006, this application and motion is urgent.

This application and motion are based upon the allegations made in the Complaint filed on this day in the present matter.

Currently, executions in Maryland are performed by lethal injection, and the Department of Public Safety and Correctional Services (DPSCS), Division of Corrections (DOC) has been solely responsible for adopting regulations that set forth the proper procedures for carrying out death sentences. Those regulations are set forth in the DOC's Execution Operations Manual. Department of Public Safety and Correctional Services, Division of Correction, Execution Operations Manual (June 14, 2004) (sometimes hereinafter "Manual"), Exhibit A.

Plaintiffs challenge the validity of the regulations set forth in the Execution Operations Manual on three distinct grounds: (1) several of them conflict with the statutory mandates of Maryland's Death Penalty Procedures Statute, Md. Code Ann.,

Corr. Servs. §§ 3-905 - 3-909 (West 2005) ("Death Penalty Procedures Statute" or "DPPS"); (2) they also conflict with the Warrant of Execution issued on January 9, 2006 in the case of Plaintiff Vernon Evans, Jr.; and (3) the regulations were promulgated in violation of the State's Administrative Procedure Act ("APA"). Md. Code Ann., State Gov't §§ 10-101 - 10-139.

Plaintiffs are likely to succeed on the merits because, on their face, the regulations are inconsistent with the Death Penalty Procedures Act and the Warrant issued in Mr. Evans's case. Equally plainly, they were promulgated in disregard of the APA. Plaintiffs will be irreparably harmed if injunctive relief is not granted right away; the execution of Plaintiff Vernon Evans is scheduled for the week of February 6, 2006, and, without intervention from this Court, it will take place pursuant to unlawful regulations and in violation of the Warrant of Execution. These violations of the law significantly increase the chance that Mr. Evans will be tortured to death during his execution. A temporary restraining order and a preliminary injunction are necessary in order to maintain the status quo and to restore the balance of justice.

Statement of Facts

The Complaint herein alleges and shows as follows. The Maryland legislature has enacted legislation that governs executions. Md. Code Ann., Corr. Servs. §§ 3-905-3-909. Death sentences are to be carried out by lethal injection, and the Commissioner of the Maryland Department of Public Safety and Correctional Services, Division of Corrections (DOC) is responsible for administering and overseeing the execution process. *Id.* §§ 3-905, 3-906. The Death Penalty Procedures Statute ("DPPS") contains explicit

legislative instructions for carrying out lethal injections, delineating the types of drugs to be used, *id.* § 3-905 ("Method of Execution"), and setting forth an itemized list of the Commissioner's various duties and oversight functions, *id.* §§ 3-906-3-909 (requiring that the Commissioner choose a suitable place for the execution, provide all of the necessary materials, and select and train execution staff). These instructions are unambiguous in their language, and mandatory in nature.

The Division of Corrections has promulgated regulations that purport to implement the DPPS. These regulations are set forth in the DOC's Executions Operations Manual, and Plaintiffs believe that the most recent version of the Manual was adopted in 2004. Exhibit A.

A. Conflicts Between the Execution Operations Manual and the Death Penalty Procedures Statute

Maryland's DPPS specifies the types of drugs to be used during the lethal injection process, the method of administering those drugs, and the training of personnel who will be involved in carrying out executions. These instructions are mandatory, and not open to interpretation: "[t]he manner of inflicting the punishment of death shall be the continuous intravenous administration of" (a) "a lethal quantity of an ultrashort-acting barbiturate or other similar drug;" along with (b) "a chemical paralytic agent." Md. Code Ann., Corr. Servs. § 3-905 (a) (emphasis added). These drugs are to be administered "until a licensed physician pronounces death." *Id.* Furthermore, the execution is to be performed by persons who have been "trained to administer the lethal injection." *Id.* § 3-906(c)(1).

The Execution Operations Manual deviates from the DPPS in three material ways:

First, although section 3-905 expressly calls for the injection of two—and only two—drugs, the regulations set forth in the Execution Operations Manual add a third drug to the mix of chemicals. The DPPS requires the use of "an ultrashort-acting barbiturate" and "*a* chemical paralytic agent". DOC however, employs an ultrashort-acting barbiturate (sodium pentothal) and *two* paralytic agents (pancuronium bromide and potassium chloride). *See* Exhibit E, Lethal Injection Checklist. If administered without proper anesthesia one of the paralytic agents, potassium chloride, will ultimately cause an intensely painful death. Exhibit 2, Declaration of Mark J. S. Heath, M.D. at 6-7 (hereinafter "Heath Declaration"). The second paralytic agent—pancuronium bromide—serves no medical purpose. Heath Declaration at ¶ 16. Potassium chloride is the killing agent in Maryland executions, *id.* at ¶ 9; pancuronium bromide serves only to paralyze the inmate so he appears serene, while in reality he could be experiencing (1) the visceral pain of asphyxiation, brought on pancuronium bromide, and (2) the excruciating sensation of potassium chloride traveling through his veins and ultimately causing cardiac arrest, *id.* at ¶ 11, 16-19.

Second, the DOC's instructions for administering its selected "ultrashort-acting barbiturate" (sodium pentothal) deviate from the DPPS. The Manual calls for the administration of the sodium pentothal in two separate bursts. Exhibit A at ___. This is in complete disregard of the DPPS, which calls for the "continuous intravenous

administration of a lethal quantity of an ultrashort-acting barbiturate" until death. Md. Code Ann., Corr. Servs. § 3-905(a).

Finally, Maryland's Death Penalty Procedures Statute requires the Commissioner to select execution professionals who are "trained to administer the lethal injection." Md. Code Ann., Corr. Servs. § 3-906(c)(1). Though the Executions Operations Manual does perfunctorily require the hiring of "trained" persons, and calls for "drills," there are no assurances as to what type of training is required and what sort of skill sets are involved in the drills. *See* Exhibit A at 10, 12. The policies and practices the DOC has set forth in its Manual do not include adequate directions for training staff to prepare drugs, do not require participation of qualified personnel in performing critical tasks in the lethal-injection process, do not provide for necessary supervision of personnel, and do not establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection process. *Id.*

B. Conflicts Between the Execution Operations Manual and the Warrant of Execution

On January 9, 2006, the Circuit Court for Baltimore County signed a Warrant of Execution, setting Evans's execution for some time in the five-day period beginning February 6, 2006. Exhibit B. The language of the Warrant tracks the language of the DPPS exactly. *Id.* at 2. It provides that Mr. Evans's sentence of death be carried out, "administering to him a continuous intravenous lethal quantity of an ultrashort-acting barbiturate or other similar drug, in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical

practice." *Id.* The Warrant is a mandatory court order, which states in unequivocal terms that the Division of Corrections is "COMMANDED AND CHARGED" to follow its directives. *Id.* Plaintiffs believe that Defendants plan to violate the terms of Warrant in carrying out the execution of Plaintiff Evans, by using an additional, unnecessary paralytic agent during the process, and by administering the required barbiturate in two doses, rather than in a steady stream. Compl. ¶ 40.

C. Violation of Maryland's Administrative Procedure Act

The Department of Public Safety and Correctional Services has not itself adopted any regulations that govern the administration of lethal injections. Instead, it has delegated all responsibility for deciding how executions will be carried out in Maryland to the Division of Corrections. The DOC has, in turn, adopted the regulations set forth in its Execution Operations Manual. Exhibit A. The regulations contained in the Manual govern every step of the execution process, from the drugs to be used, to the types of witnesses that will be allowed to view the execution. *Id.* The Division of Corrections has refused to release a complete copy of the Execution Operations Manual to the public, citing security concerns. *Id.* at 2 ("This manual is considered confidential and should not be disclosed to anyone other than those who have responsibilities associated with the execution process."). It can be amended at the will of the Division of Corrections, with virtually no public oversight. Compl. ¶ 44. In fact, the procedures were amended twice within the three weeks preceding the June 2004 execution of Steven Oken.[1/] Plaintiffs

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[1/] Oken was executed on June 18, 2004. Dan Rodricks, *In 9 Minutes, Witnesses Watch Death Take Hold*, Balt. Sun. June 27, 2004. The Manual was amended on May

do not know whether they were amended again prior to the December 2005 execution of Wesley Baker.

Petitioners believe that the most recent version of the DOC's Execution Operations Manual was made final on June 14, 2004. Exhibit A.

D. Harm Associated with Improper Administration of Lethal Injection

Although the stated purpose of the Execution Operations Manual is to "ensure that the execution process is conducted professionally and with dignity," *id.* at 2, many of the procedures set forth in the Manual actually increase the risk that executions will not be carried out in such a manner. The Commissioner's decision to deviate from the language of the Death Penalty Procedures Statute, and the failure to submit many of the Manual's mandates for approval as regulations, as is required by the Administrative Procedure Act, increase the chances that the death penalty will be administered in ways inconsistent with the legislature's intent, and will heighten the risk that those subject to lethal injection in Maryland will suffer cruelly and unnecessarily.

First, the Commissioner's decision to administer the ultra-short acting barbiturate in two doses increases the risk that the inmate will be fully aware when the pancuronium bromide and the potassium chloride hit his bloodstream. Exhibit 2, Heath Declaration at 8, 13. If administered correctly in a continuous stream, ultrashort-acting barbiturates lead the inmate to slip into unconsciousness and experience a relatively painless death. Compl. ¶ 29. Because the effects of the drug are only temporary, however, they are only

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26, 2004, *Oken v. Sizer*, 321 F. Supp. 2d 658, 660 (D. Md. 2004), and again on June 14, 2004. *See* Execution Operations Manual dated June 14, 2004, Exhibit A.

effective at blocking pain if administered continuously. Applying the drug in two short bursts, as is called for in the DOC's Execution Operations Manual, rather than in a steady stream, as mandated by the Death Penalty Procedures Statute, significantly increases the risk that the inmate will remain conscious during the execution and feel both the agony of suffocation (caused by the pancuronium bromide) and/or the searing pain of the potassium chloride (the third drug administered by the DOC). *Id.*

Second, the DPPS's requirement that personnel be adequately trained is important to ensure that the inmate does not suffer during death. The administration of the three drugs in the proper manner is not easy; only a person properly trained in the use of intravenous anesthetics should administer sodium pentothal. Exhibit 2, Heath Declaration, at 8. Sodium pentothal is the only anesthetic drug administered during a lethal injection, and, as such, it is the only barrier that prevents the inmate from unnecessarily experiencing excruciating pain and/or paralysis. A qualified person must be present to assure that the sodium pentothal is working and that the inmate is rendered unconscious. *Id.* Yet, upon information and belief, none of the procedures for lethal injection employed by the DOC require a trained person to monitor the plane of anesthesia achieved by administering sodium pentothal during an execution. Exhibit A. This creates a significant risk that the inmate will remain fully awake and experience both the horror and pain of his death.

Similarly, administration of intravenous ("IV") anesthesia requires proficiency at achieving and maintaining IV access. On information and belief, Defendants are not

trained and qualified to create and maintain IV access. Again, this increases the risk that the inmate will suffer unnecessarily. Exhibit 2, Heath Declaration, at 9-10.

Indeed, because injection of potassium chloride is so excruciatingly painful, the American Veterinary Medical Association prohibits its use as the sole agent effecting euthanasia of animals, and if the chemical is to be used at all, it may only be administered by a practitioner with the skill and training necessary to assure that the subject to be euthanized has reached and maintains a surgical plane of anesthesia. *Id.* at 13 (citing 2000 Report of the AVMA Panel on Euthanasia at 680-81, *available at*: http://www.avma.org/resources/euthanasia.pdf).

Defendants have conceded misadministration of at least one lethal injection—that of Tyrone X. Gilliam. During Gilliam's execution, the IV line leaked and liquids pooled on the execution room floor. *Oken v. Sizer*, 321 F. Supp. 2d 658, 667 n. 7 (D. Md. 2004). Gilliam's execution took several minutes longer than four of Maryland's five other lethal injections and more than twice as long as its fifth lethal injection.[2/] The failure to adopt adequate regulations governing the training of personnel is a direct violation of the Commissioner's statutory responsibilities.

Finally, the decision to add an additional paralytic agent to the cocktail to be administered to the inmate significantly increases the risk that the inmate will feel pain upon death. Exhibit 2, Heath Declaration, at 6-7. Administration of *either* potassium chloride or pancuronium bromide would be extremely painful to an insufficiently

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[2/] *See* http://www.dpscs.state.md.us/publicinfo/capitalpunishment/historical.shtml (last visited January 17, 2006).

anesthetized inmate. Administration of pancuronium bromide, which masks all pain and suffering potentially experienced by the inmate, compounds the risk of pain created by Defendants' chosen drug cocktail. Both the AVMA and Maryland law prohibit the use of neuromuscular blocking agents, such as pancuronium bromide, in euthanasia of animals because of their impact on the ability of those administering euthanasia to ensure that a subject is sufficiently anesthetized. *Id.*; Md. Code Ann., Criminal Law, § 10-611.

Argument

In deciding whether to grant a preliminary injunction, a judge must consider the following four factors: (1) the likelihood of success on the merits; (2) the "balance of convenience," i.e., "whether greater injury would be done to the defendant by granting the injunction than would result from its refusal;" (3) "whether plaintiff[s] will suffer irreparable injury unless the injunction is granted;" and (4) "the public interest." *DMF Leasing, Inc. v. Budget Rent-A-Car of Maryland, Inc.*, 871 A.2d 639, 647 (Md. Ct. Spec. App. 2005). These factors are not like required elements of a cause of action; rather, they are simply factors "designed to guide trial judges in deciding whether a preliminary injunction should be issued." *Id.* at 648.

To satisfy the requirements for obtaining a temporary restraining order, a court must also find that "it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction." Maryland Rule 15-504(a).

I. Plaintiffs Have Demonstrated a High Probability of Success on the Merits.

Plaintiffs are likely to succeed on their claims for declaratory relief. A regulation is invalid if it: (a) violates any provision of the United States or Maryland Constitution; (b) exceeds the statutory authority of the unit; or (c) the unit "failed to comply with statutory requirements for the adoption of the provision." Md. Code Ann., State Gov't § 10-125(d). Plaintiffs challenge the validity of the regulations contained in the Execution Operations Manual on the latter two of these three grounds.[3/] First, by requiring the use of an additional, unnecessarily painful drug, by unilaterally altering the statutorily mandated method of administering anesthesia to inmates, and by failing properly to train those who administer the drugs, the DOC not only increases the risk of unnecessary suffering—it has "exceeded the statutory authority of the unit." Moreover, these regulations, if followed, will violate the terms of the judicial warrant, which is required to confer authority to hold an execution in the case of Vernon Evans, Jr. Second, in failing to adopt the regulations contained in the Manual according to the State's Administrative Procedure Act, the DOC has "failed to comply with statutory requirements for the adoption" of regulations.

[3/] Plaintiffs also believe that the procedures contained in the Manual pose concerns of constitutional dimension, and that there is a great risk that executions in Maryland will be carried out in violation of both the federal and state constitutions. That claim, however, is not raised in this complaint.

A. The Execution Operations Manual Conflicts With Maryland's Death Penalty Procedures Statute.

The Commissioner's decision to deviate from the requirements of the Death Penalty Procedures Statute in three material respects—by requiring the use of an additional chemical, by failing to require administration of the barbiturate in a steady stream, and by failing to require adequate training of personnel—constitutes an impermissible stretch of his legal authority. Obviously, the construction of a statute adopted by an administrative body "must be in conformity with the provisions of the statute. And it is axiomatic that an administrative regulation must be consistent with the letter and policy of the statute under which the administrative agency acts." *Insurance Comm'r v. Bankers Indep. Ins. Co.*, 606 A.2d 1072, 1075 (Md. 1992). The law on this point is clear: "Legislation may not be enacted by an administrative agency . . . by issuing a rule or regulation which is inconsistent or out of harmony with, or which *alters, adds to, extends or enlarges,* subverts, impairs, limits or restricts the act being administered." *Id.* (emphasis added).

The regulations adopted in the Execution Operations Manual are "out of harmony with" the statutory requirements of section 3-905. The Death Penalty Procedures Statute is mandatory in its language, requiring that the DOC "*shall*" carry out lethal injections via "continuous intravenous administration of" (a) "a lethal quantity of an ultrashort-acting barbiturate or other similar drug;" along with (b) "a chemical paralytic agent." Md. Code Ann., Corr. Servs. § 3-905 (a) (emphasis added). The language of the DPPS could not be more simple and straightforward. The statute requires the administration of two specific drugs, and it does not leave room for the addition of a third. The statute

requires the "continuous" administration of the two drugs, and it does not permit administration the drugs in two individual doses. In short, the Commissioner's interpretation unquestionably "adds to, extends, or enlarges" the authority conferred by the statute. *Insurance Comm'r*, 606 A.2d at 1075.[4/]

Chief Judge Bell of the Maryland Court of Appeals came to the same conclusion when he compared the language of the Death Penalty Procedures Statute with the regulations adopted in the Execution Operations Manual. In a dissenting opinion filed in the *Oken* case,[5/] the Chief Judge observed that the language of the Death Penalty

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[4/] The statute's language with regard to training is similarly straightforward: the Commissioner is explicitly tasked with choosing employees who are "trained to administer the lethal injection." Md. Code Ann., Corr. Servs. § 3-906(c)(1). The failure to provide for any training of staff in the Manual completely impairs the statute's requirement that the executioner shall be "trained to administer the lethal injection." *Id* at § 3-906 (c)(1).

[5/] It is noteworthy that the *Oken* decision did not involve two of the claims raised in this matter: the claim based upon the Administrative Procedure Act, and the claim based upon the Warrant issued by Judge Turnball in the Evans case.

Though the Court of Appeals of Maryland ruled in *Oken* that "the method of execution intended to be implemented by the Division of Correction does not violate the provisions of Maryland Code (1999, 2003 Cum. Supp.) § 3-905 of the Correctional Services Article," this ruling was made with no discussion of the statutory language, no analysis of the legislative history, and no consideration of the policy implications at stake. *See Oken v. Maryland*, 851 A.2d 538, 538 (Md. 2004). Rather, the court summarily rejected the petitioner's claims without comment. In fact, in a later decision, the United States District Court for the District of Maryland refused to give the state court's decisions in *Oken* preclusive effect, stating "there are substantial decisions to doubt the quality, extensiveness, or fairness of procedures" used in that case, and observing that "[t]he Circuit Court, after hearings lasting a matter of minutes, summarily granted summary judgment in a one line order even though there were material facts in dispute." *Oken v. Sizer*, 321 F. Supp. 2d 658 (D. Md. 2004). Plaintiffs respectfully urge this Court not to follow the *Oken* decision in this respect.

Procedures Statute was "clear and unambiguous." Discovering "significant and material inconsistencies" between the statutory language and the regulations contained in the Execution Operations Manual, Chief Judge Bell concluded that the DOC had exceeded its statutory authority in deviating from the DPPS. *Oken,* 321 F. Supp.2d. at 539. As this opinion makes clear, the regulations in the Execution Operations Manual requiring the use of a third drug during lethal injections, and those regarding the administration of the drugs in two separate doses, conflict with the plain language of section 3-905.

Furthermore, the legislative history of section 3-905 suggests that the Maryland legislature *specifically intended* that only two drugs — one barbiturate and one paralytic agent be administered. Maryland's Death Penalty Procedures Statute was adopted in its initial form in 1994, in response to the impending execution of John Thanos. *See* Sabra Chartrand, *Given a Push, Maryland Alters Its Death Penalty*, N.Y. Times, Mar. 25, 1994, at B18. The DPPS was modeled on Oklahoma's lethal injection statute (Oklahoma had been the first state to adopt a lethal injection law), and tracks that state's statute almost to the letter. Okla. Stat. Ann. tit. 22 § 1014(a) (calling for the continuous intravenous administration of an ultrashort-acting barbiturate and a chemical paralytic agent). Like the Maryland statute, the Oklahoma statute does not call for the use of two paralytic agents. When Maryland passed the DPPS in 1994, several states used two paralytic agents (in addition to a barbiturate). *See* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 William & Mary L. Rev. 551, 656 (1994). The Maryland legislature obviously looked at other states' statutes and practices in designing its own statutory language, and yet it

chose to specify the use of only one paralytic agent. This suggests that the exclusion of an additional paralytic agent from the statute was deliberate, and the DOC's unilateral decision to add a second paralytic agent into the mix of chemicals to be used during lethal injections would be contrary to that legislative intent.

Finally, although courts generally give legislative deference to an agency's regulations, at least one court has held that the ban against inflicting cruel and unusual punishment has "significant relevance" in evaluating regulations promulgated by the Division of Corrections for carrying out the death penalty. *In re Readoption With Amendments of Death Penalty Regulations*, 842 A.2d 207, 210 (N.J. App. 2004). Thus, even though Plaintiffs do not ask this Court to reach the issue of whether the challenged regulations violate the United States Constitution or the Maryland Declaration of Rights, the Court should take the constitutional issues at stake into account in evaluating the challenged regulations.

In sum, the plain language of section 3-905, as well as the legislative history behind the statute, suggest that the DOC has overstepped its legal authority in enacting the regulations contained in its Execution Operations Manual. For these reasons, plaintiffs have a high likelihood of succeeding in their request that those regulations be declared invalid as incompatible with the DPPS.

B. The Execution Operations Manual Conflicts With the Warrant of Execution Issued in Plaintiff Evans's Case.

For the same reasons discussed with regard to the DPPS, the regulations contained in the

Manual also conflict with the express provisions in the Warrant of Execution issued on January

9, 2006 in Vernon Evans's case. The Warrant issued in that case is a mandatory court order that tracks the language of the DPPS exactly. Defendants must comply with the terms of the Warrant, just as they must comply with the terms of the DPPS.

C. The Regulations Set Forth in the Execution Operations Manual Were Enacted in Violation of Maryland's Administrative Procedure Act.

The Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-101-10-139, governs the adoption of regulations by Executive Branch agencies. It applies to every unit within the Executive Branch, including both the DOC and the DPSCS. Md. Code Ann., State Gov't § 10-102.

The APA applies to all "Regulations", defined as:

> [A] statement or an amendment or a repeal of a statement that: (i) has general application; (ii) has future effect; (iii) is adopted by a unit to: 1. detail or carry out a law that the unit administers; 2. govern organization of the unit; 3. govern the procedure of the unit; or 4. govern practice before the unit; and (iv) is in any form, including: 1. a guideline; 2. a rule; 3. a standard; 4. a statement of interpretation; or 5. a statement of policy.

Md. Code Ann., State Gov't §§ 10-101(g)(1). Any statement falling within the definition of a "Regulation" must be adopted according to the procedures laid out in the APA. Specifically, a regulation cannot become effective until it has been: (1) submitted to the Attorney General or unit counsel for approval; (2) reviewed by the Joint Committee on Administrative, Executive, and Legislative Review; (3) published in the Maryland Register (both the proposed and final versions); and (4) submitted for publication in the

Code of Maryland Regulations ("COMAR"). *Id.* §§ 10-101-10-139. Upon information and belief, none of these procedures was followed in issuance of the Execution Operations Manual.

There is no question that the statements set forth in the Manual fall within the statutory definition of regulations. They are regulations that have general application to any execution, they are intended to have future effect, and, by their own terms, they were adopted by the DOC to "carry out a law that the unit administers." Md. Code Ann., State Gov't §§ 10-101(g)(1). Because they fall into this definition, the DPSCS was required to follow the procedures of the APA in adopting them.

There is no exemption from the APA that would permit the Division of Corrections to completely bypass the statute's procedural requirements. Granted, the APA exempts from the definition of regulations those statements which: "(1) concern[] only the internal management of the unit; and (2) do[] not affect directly the rights of the public or the procedures available to the public." Md. Code Ann., State Govt., § 10-101(g)(2). Although, plaintiffs concede that *some* of the regulations contained in the Execution Operations Manual may concern only the internal management of the unit, many do not. For example, the Commissioner should be free to adopt his own internal procedures to ensure that the phones in the lethal injection rooms are operable. *See* Exhibit A, at 15 ("The Execution Team Communications Officer-In-Charge shall: (a) Test the operability of each telephone in the lethal injection room . . ."). Indeed, this is the type of day-to-day minutiae that was intended to be exempt from the APA's procedural requirements. *See Massey v. Department of Public Safety and Corr. Servs.*,

886 A.2d 585, 602 (Md. 2005) (explaining that the APA was intended to exempt things like "the myriad of rules governing the details of prison life--what inmates may wear, what they may or may not keep in their cells or on their persons, the rules governing security, sanitation, hygiene, phone calls, mail, and visits.")

But just because *some* of the regulations have to do with the everyday management of the unit does not mean that *all* of the regulations set forth in the Manual are exempt from the APA's requirements. In particular, those regulations having to do with the choice of chemicals and the method of administering those chemicals do not concern the internal administration of the DOC. The Maryland legislature thought that these issues were so important that it chose to set forth rules governing the lethal injection process in a statute. The Division of Corrections should not be able to shroud the same subject in secrecy, labeling it a matter of internal administration.

Furthermore, under Md. Code Ann., Corr. Servs. § 2-109(c), the Secretary of DPSCS is required to adopt regulations that govern the policies and management of the Division of Correction. *See Massey*, 886 A.2d at 592-93. The Execution Operations Manual was drafted and implemented by the Commissioner, and it is the Commissioner who retains the power to alter the regulations contained in the Manual at will, without any notice to the public or other oversight. These are subjects that are of concern to the *Secretary*, as it is the *Secretary* who is charged with statutory responsibility for guiding the Department of Corrections by adopting regulations (according to the APA) in non-routine matters. Md. Code Ann., Corr. Servs. § 2-109(c). Once the Secretary has done so, of course, the Division of Corrections may step in and adopt, in accordance with the

mandates of both statutory and regulatory directives, more routine regulations having to do with the day-to-day administration of the unit. Instead, what both the DSPCS and the Division of Corrections have done here is to bypass the statutory regime set forth by the Maryland legislature for the governance of administrative agencies and proceed according to its own terms.

The failure to follow the procedures set forth in the APA has a palpable impact on the way death sentences are carried out in Maryland. The public has a special interest in knowing that executions are conducted without unnecessary pain or suffering, and inmates themselves have an interest in knowing that they can die with some modicum of dignity, and in the absence of cruel and unusual pain. The fact that these issues raise constitutional concerns weigh heavily in favor of the need to go through the formal review process mandated by the APA. *Massey,* 886 A.2d at 597-98 (finding that, given the due process implications involved in designing prison grievance procedures, the DOC was required to comply with the APA in adopting those procedures). As set forth in more detail above, the procedures currently in place create an unnecessary risk that the prisoner will feel great pain during his execution. Had these procedures been subject to public scrutiny when adopted, they might have benefited from the opinion of doctors, other medical health professionals, and even organizations such as the American Veterinary Medical Association regarding the best, and least painful method of terminating a life. The DOC might have decided to proceed with lethal injections without the use of a third, unnecessary, and terribly painful drug. At the very least, they might have adopted procedures that would have ensured a person was properly

anesthetized before such a painful drug is administered. These are the types of regulatory improvements that can come from public notice and comment, as required by the APA. Unfortunately, the DOC did not receive the benefit of such comments because it bypassed the APA's procedures. Because the Secretary failed to comply with the APA in adopting the Manual, and because Plaintiffs have no adequate remedy at law, the continued enforcement of the regulations contained in the Manual should be enjoined.

II. Preliminary Relief Should Be Granted Because the Potential Harm to the Public Outweighs Any Harm that the Defendants Will Suffer.

There is no question that the potential harm to the Plaintiffs will outweigh any that will be suffered by Defendants. Of course, Defendants have an interest in seeing that their criminal judgments are enforced, but this interest is not threatened by the present litigation. Plaintiffs do not challenge the ongoing existence of the death penalty in Maryland *per se*; they simply ask that this Court order the Defendants to comply with the law of the State in carrying out executions. *See Oken*, 321 F. Supp. 2d at 666. Furthermore, the public shares Plaintiffs' dual interests in making sure that the DOC complies with Maryland law, and in ensuring that executions are performed with dignity, and without excess suffering. These interests—shared both by the public and by Plaintiffs—outweigh the minimal harm caused to the public by delaying executions in Maryland for a short period of time.

III. If Preliminary Relief Is Not Granted, Plaintiffs Will Suffer Irreparable Injury.

Plaintiffs will suffer irreparable injury if this Court does not grant preliminary relief. Plaintiff Vernon Evans, Jr. is scheduled to be executed within a five-day period

beginning on February 6, 2006, just two weeks from now. Exhibit B (Death Warrant). If the procedures for carrying out the death penalty are not amended before Mr. Evans's execution, there is a substantial risk that he will feel both the pain of suffocation caused by pancuronium bromide and the searing burning of potassium chloride as these drugs enter his body. Obviously, this is a harm that cannot be later undone.

Likewise, the organizational plaintiffs will be irreparably harmed. Each of them and their members have an interest in making sure that government officials comply with state law in carrying out their duties, and that they do not carry out executions that are unjust.

III. Preliminary Relief Should Be Granted Because the Public Has an Interest in Ensuring that Executions are Carried Out Humanely.

As noted above, the public has an interest in the outcome of this litigation. Though the public plainly has an interest in the enforcement of its criminal judgments, it has an even greater interest in seeing that its administrative officials operate according to the law, and in ensuring that executions are carried out in a humane fashion. *Oken,* 321 F. Supp. 2d at 667 n. 6 (recognizing a public interest in ensuring the right of individuals to "'die with dignity,' at least consistent with the requirements of the Eighth Amendment."). As such, the public interest weighs in favor of granting injunctive relief.

Conclusion

For all of the foregoing reasons, Plaintiffs' application for a temporary restraining order and motion for preliminary injunction should be granted.

Respectfully Submitted,

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Dated: January 20, 2006

Counsel for Plaintiffs

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, Maryland 21215

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND;
3600 Clipper Mill Road, Suite 350
Baltimore, Maryland 21211

MARYLAND CITIZENS AGAINST STATE EXECUTIONS;
PO Box 39205
Baltimore, Maryland 21212

and

VERNON EVANS, JR.;
Division of Corrections No. 172357
Maryland Correctional Adjustment Center
410 East Madison Street
Baltimore, Maryland 21202

Plaintiffs

vs.

Civil Action No. ____

MARY ANN SAAR, Secretary,
Department of Public Safety and Correctional Services
300 East Joppa Road
Suite 2000
Towson, Maryland 21286;

FRANK C. SIZER, JR., Commissioner,
Maryland Division of Correction;
6776 Reisterstown Road
Baltimore, Maryland 21215;

Defendants.

DECLARATION OF ANNE GERAGHTY

I, Anne Geraghty, declare as follows:

1. I am an associate at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP, attorneys of record for Vernon Evans, Jr., in the above-captioned matter. I am licensed to practice law in the State of Illinois and the District of Columbia. I am familiar with the facts set forth herein, and if called as a witness, I could and would testify to those facts under oath.

2. Plaintiff Evans is indigent and financially unable to file a bond. He has been granted permission to proceed *in forma pauperis* in proceedings before the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court.

2. On March 7, 2005, my colleague, A. Stephen Hut, Jr., a partner at the law firm of Wilmer Culter Pickering Hale and Dorr LLP, sent a letter to Jean Goodman, Secretary of the Maryland Department of Public Safety and Correctional Services ("DPSCS"), requesting access to certain records concerning lethal injection practices and procedures in Maryland pursuant to the Maryland Public Information Act ("MPIA"), State Government Article, §§ 10-611 to 628. Among the records requested were (1) documents describing the past and current procedures of the Maryland Division of Corrections ("DOC") for lethal injection; (2) past and current regulations governing lethal injections; (3) documents reflecting revisions to execution procedures; (4) documents related to the drugs used in lethal injections and their administration; (5) records related to equipment used in lethal injections; and (6) notes, reports, statements, photographs, scientific reports, physical evidence, witness interviews, and other documents prepared in connection with actual executions.

3. Ms. Goodman forwarded Mr. Hut's March 7, 2005 letter to Frank Sizer, Jr., Commissioner of DOC, and the custodian of the requested records.

4. On April 6, 2005, Commissioner Sizer responded to Mr. Hut's letter, granting in part and denying in part Mr. Hut's request for access to records concerning lethal injection. The records released included:

(a) an "Execution Operations Manual," dated June 14, 2004, with nine pages redacted from sections of the manual addressing actions taken "Four Days prior to Execution Week" through "When the execution is completed";

(b) an "Execution Operations Manual," dated May 26, 2004, with nine pages redacted from sections of the manual addressing actions taken "Four Days prior to Execution Week" through "When the execution is completed";

(c) three "Lethal Injection Execution Logs" from the execution of Mr. Gilliam;

(d) the execution warrant for Mr. Oken;

(e) "Execution Reminders," sent via email, concerning the lethal injection of Mr. Oken;

(e) what appear to be three complete "Lethal Injection Execution Logs" from the execution of Mr. Oken, but the three documents bear different dates;

(f) four draft "New Releases" concerning Mr. Oken's execution;

(g) "IV Injection Training/Practice Records";

(h) an article printed from the website www.sunspot.net concerning Governor Ehrlich's lifting of the moratorium on executions imposed by Governor Glendening;

(i) the Warden's report on Mr. Oken's execution;

(j) a "Summary Report" from a Technical Assistance visit by Maryland officials to "Oklahoma's execution-related staff" sponsored by the National Institute of Corrections;

(k) Directives concerning the death penalty issued by the Division of Corrections on September 15, 1998;

(l) Directives concerning the death penalty issued by the Division of Corrections on January 25, 2000; and,

(m) Directives concerning the death penalty issued by the Division of Corrections on January 20, 2004.

4. On May 5, 2005, Mr. Hut sent a letter to Commissioner Sizer requesting administrative review of the Commissioner's complete denial of access to some records and his substantial redactions of the records that were released. By letter dated June 17, 2005, Commissioner Sizer delegated the matter to the Maryland Office of Administrative Hearings ("OAH") for an evidentiary hearing. That hearing is currently scheduled for January 24, 2006.

5. On December 20, 2005, after the execution of Wesley Baker, Mr. Hut sent a supplementary MPIA request to Commissioner Sizer, renewing the March 7, 2005 request as to any such records pertaining to the execution of Wesley Baker and clarifying that the request included autopsy, toxicology, and scene investigation reports. On the same day, Mr. Hut sent an MPIA request to the Office of the Chief Medical Examiner of Maryland, requesting documents related to lethal injections, including autopsy,

toxicology, and scene investigation reports. Neither Commissioner Sizer nor the Office of the Chief Medical Examiner has responded to these requests.

6. To date, DOC has not provided Evans with a complete copy of its Execution Operations Manual, or with other documents related to lethal injections included in Mr. Hut's MPIA requests, and it continues to contest release of those records in the OAH proceedings.

7. Attached as Exhibit A to this Declaration is a true and correct copy of the heavily redacted copy of an Execution Operations Manual, dated June 14, 2004, provided to Mr. Hut in response to his public information request.

8. Attached as Exhibit B to this Declaration is a true and correct copy of the Warrant of Execution signed on January 9, 2006, by Baltimore County Circuit Judge John G. Turnbull II setting Evans's execution for the week of February 6, 2006.

9. Attached as Exhibit C to this Declaration is a true and correct copy of the letter from A. Stephen Hut, Jr. to Jean Goodman, dated March 7, 2005, containing a public information request seeking access to records related to lethal injection.

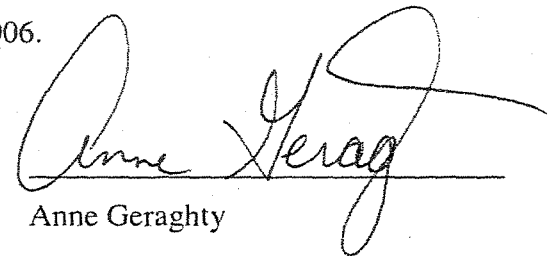
10. Attached as Exhibit D to this Declaration is a true and correct copy of the letter from A. Stephen Hut, Jr. to Frank Sizer dated December 20, 2005, supplementing Mr. Hut's original public information request to include records related to the December 2005 execution of Wesley Baker.

11. Attached as Exhibit E to this Declaration is a true and correct copy of a document entitled "Lethal Injection Checklist," identical copies of which were appended to both Execution Operations Manuals supplied to Mr. Hut in response to his public information request.

12. Attached as Exhibit F to this Declaration is a true and correct copy of the 2000 Report of the American Veterinary Medical Association Panel on Euthanasia.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 20, 2006.



Anne Geraghty

Department of Public Safety and Correctional Services
Division of Correction

Execution Operations Manual

DCM 110-2

FINAL – 6/14/04

CONFIDENTIAL

FOREWORD

This Division of Correction Manual shall be used by all appropriate personnel to ensure the performance of an efficient and successful execution when ordered by a court in the State of Maryland. It is also intended to establish procedures from the time a warrant of execution is received through the post execution process for the care and treatment of inmates sentenced to death. This manual identifies staff responsibilities in the preparation and implementation of the execution process. This manual is considered confidential and should not be disclosed to anyone other than those who have responsibilities associated with the execution process.

The execution of persons sentenced to death in the State of Maryland is a serious and complex assignment. This manual has been developed to ensure that the execution process is conducted professionally and with dignity.

Frank C. Sizer, Jr.
Commissioner

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I. AUTHORITY

The Maryland Code Annotated, Correctional Services Article, §§3-901 through 3-309, governs death penalty procedures.

II. DEFINITIONS

A. Access Control Officers – Personnel responsible for access to Command Center and Special Security Unit immediately prior to, during and after the execution

B. Command Center – Coordinates all activities associated with the execution process and manages MTC operations during the execution

C. Command Center Commander – Officer-In-Charge of the Command Center

D. Commissioner – Commissioner of the Division of Correction

E. DCD – Division of Correction Directive

F. DOC – Division of Correction

G. DMSP – Department of the Maryland State Police

H. DPSCS – Department of Public Safety and Correctional Services

I. Execution Area -- The area located at the west end of the second floor of the Metropolitan Transition Center Hospital and comprised of four separate components: Special Security Unit, Execution Room, Lethal Injection Room, Witness Room

J. Execution Commander – Commissioner or person designated by the Commissioner to have overall responsibility for the execution process

K. Execution Team Commander – Individual who has operational control of the execution process

L. Execution Team Communications Officer-In-Charge – Individual who monitors telephones in the Lethal Injection Room in the event of a last minute stay of execution

M. Execution Room – Area where the execution table is located and the inmate is placed to receive lethal injection

N. Lethal Injection – The administration of a lethal quantity of an ultra short-acting barbiturate or other similar drug in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical practice

O. Lethal Injection Team – Those individuals responsible for the preparation of the pharmaceuticals, insertion of the intravenous catheters, and injection of the pharmaceuticals until death is pronounced on the inmate

P. Lethal Injection Team Officer-In-Charge – Individual who supervises Lethal Injection Team

Q. MCAC – Maryland Correctional Adjustment Center

R. MRDCC – Maryland Reception Diagnostic and Classification Center

S. MTC – Metropolitan Transition Center

T. MTC Operations Supervisor – Individual responsible for institutional operations of MTC during the execution process.

U. Maintenance Team – Individuals responsible for the operation of all electrical, plumbing and audio-visual equipment in the execution area

V. Special Security Unit – An area where the condemned inmate is housed for a relatively short period of time prior to his/her execution

W. Special Security Unit Team – Staff responsible for the security, safety and welfare of an inmate awaiting execution

X. Witness Room – Area located on the south side of the Execution Room for witnesses to observe the execution

III. LOGISTICS AND RESPONSIBILITIES

A. Commissioner

1. Designates the Assistant Commissioner – Security Operations, unless circumstances warrant someone else to act in his/her stead as the designee as Execution Commander. This individual shall have overall responsibility for the execution.

2. Establishes date and time of execution

3. Selects Execution Team

B. The Assistant Commissioner – Security Operations or other designee (Execution Commander)

1. Overall responsibility for the execution process

2. Obtains required pharmaceuticals

3. Schedules and conducts training, audits and inspections related to the Execution Area

4. Advises condemned inmate of receipt of death warrant

5. Ensures personnel, procedures and equipment are prepared for the execution

6. Orders transfer of condemned inmate to Special Security Unit

C. The Warden of the Metropolitan Transition Center or other designee (Execution Team Commander)

1. Establishes and maintains execution records log

2. Prepares letter of acknowledgement for receipt of warrant of execution to Governor's Office

3. Assists with execution

4. Designates other support deemed necessary by Execution Commander

D. Assistant Warden of the Metropolitan Transition Center or other designee

1. Responsible for communications in the Execution Area (Execution Team Communications Officer-In-Charge)

2. Responsible for administrative activities and other assignments delegated to him/her in the event of a scheduled execution

E. Other Assistant Warden of the Metropolitan Transition Center shall be responsible for institutional operations during the time an execution is in progress (MTC Operations Supervisor)

F. The Chief of Security of the Metropolitan Transition Center or other designee

1. Supervises Special Security Unit Team

2. Responsible for the operation of the Special Security Unit

3. Responsible for the security of the condemned inmate after transfer to the Special Security Unit and security operations related to this procedure

4. Assist the Execution Commander in the Execution Room

G. The Warden of the Maryland Correctional Adjustment Center or other designee shall serve as Command Center Commander during an execution

H. A Warden as designated by the Commissioner shall serve as the Alternate Command Center Commander.

I. The Warden of the Maryland Reception Diagnostic and Classification Center or designee:

1. Shall serve as the alternate Execution Team Commander

2. Serve as the liaison/communications officer between the Execution Area and the Command Center

J. The Execution Team shall be comprised of:

1. Lethal Injection Team
2. Special Security Unit Team
3. Maintenance Team
4. Communications Officer-In-Charge

K. The Commissioner shall make the selection of DPSCS staff members to serve on the Execution Team. Selection for members of this team shall be based on:

1. Good attendance record
2. Ability to maintain confidentiality
3. Good moral character
4. Professional appearance
5. Ability to work well with others
6. Completion of the Minnesota Multiphasic Personality Inventory 2
7. Psychological assessment
8. Personal interview with the Commissioner and/or designee

L. The Commissioner may select individuals not employed by DPSCS to serve on the Execution Team. Selection shall be based on:

1. Ability to maintain confidentiality
2. Good moral character
3. Professional appearance
4. Ability to work well with others
5. Professional Credentials
6. Personal interview with the Commissioner and/or designee

M. The Execution Team is responsible for the equipment, security, maintenance and sanitation of the Execution Area. The Execution Area includes:

1. Special Security Unit which consists of:

    a. four cells each of which is 8' 9" in length and 7' 6" in width
    b. each cell has a window with a heavy security screen
    c. each cell is equipped with a bed, toilet and sink with hot and cold running water
    d. officer station
    e. shower

2. The Lethal Injection Room located just beyond the west end of the Special Security Unit and consists of:

    a. a storage room
    b. a lethal injection administration room

3. Execution Room farther along the west end in the Execution Area and contains the execution table

4. Witness Room located immediately south of the Execution Room. The room is divided into two (2) areas:

    a. a general witness observation room with seating for 12 persons
    b. a separate smaller witness observation room for family members of the victim(s)

N. DPSCS Director, Public Information

1. Issues press release to media on pending execution
2. Arranges tour of Execution Chamber for media representatives
3. Selects media witnesses for execution
4. Arranges for news briefing following execution

IV. PRE-EXECUTION PROCEDURES

A. While the procedures listed here are to be applied in every case, the Execution Commander shall consult with the Office of the Attorney General to assess the likelihood of an actual execution. With the approval of the Commissioner, the Execution Commander may modify the frequency of the procedures here.

B. If there is a stay in effect, the Lethal Injection Team and the Special Security Unit Team shall conduct drills quarterly under the direction of the Execution Commander.

C. If, in the opinion of the Attorney General's Office, a Warrant of Execution is pending, these drills shall be conducted monthly.

D. Upon receipt of any Warrant of Execution:

1. The Commissioner shall hand carry the Warrant of Execution to the Execution Commander and shall notify the Execution Team Commander.

2. The Commissioner shall conduct a meeting to plan the pending execution and make assignments. This meeting may include:

    a. Commissioner
    b. Execution Commander
    c. Assistant Commissioner – Baltimore Region
    d. Attorney General's representative
    e. Execution Team Commander

f. Warden – Maryland Reception Diagnostic and Reception Center (MRDCC)
g. Warden – Maryland Correctional Adjustment Center (MCAC)
h. Assistant Warden – MTC
i. Chief of Security – MTC
j. DPSCS Director of Public Information
k. DOC Director of Public Information
l. DPSCS Psychologist
m. Department of Maryland State Police representative
n. Baltimore City Police Department representative
o. Representative of State's Attorney Office which prosecuted the case
p. Office of Victim Services representative
q. Health Care Administrator – Baltimore Region
r. Lethal Injection Team Officer-In-Charge
s. Medical Examiner's Office representative
t. Warden designated by Commissioner to serve as alternate Command Center Commander

3. The Execution Commander shall initiate weekly drills by the Execution Team.

4. The Execution Team Commander shall initiate a log to record all activities and actions related to the Warrant of Execution and the implementation of the death penalty.

e. Receipt of the Warrant of Execution shall be logged immediately.

f. If no stay accompanied the Warrant of Execution, the Execution Commander shall personally notify the inmate as soon as practicable that the Warrant of Execution has been received; this shall be done at a private meeting in the presence of at least one witness, usually the Execution Team Commander. The notification process shall include:

1) The Warrant of Execution shall be read to the inmate.
2) The inmate shall be given a copy of the Warrant of Execution.
3) The inmate shall be asked to sign a receipt for the copy of the Warrant of Execution. (Appendix 1)

4) If the inmate refuses to sign the receipt, it shall be so noted on the receipt and signed by the Execution Commander and the witness present

c. Arrange inspection of the inmate in preparation of intravenous insertion

5. The Warrant of Execution shall be hand-carried to the records department supervisor by a member of the Warden's staff

e. The Warden shall prepare a letter of acknowledgement to the Governor's Office. (Appendix 2)

f. Copies of the letter of acknowledgement shall be sent to the following:

1) Secretary of Public Safety and Correctional Services
2) Attorney General's Office – Criminal Appeals Division
3) Commissioner
4) The inmate's attorney
5) The inmate's commitment folder
6) The Warden's file

6. The DPSCS Director of Public Information shall issue a press release to the news media.

7. Establishment of Date and Time of Execution

a. The Commissioner shall set the date and time, within the period designated in the warrant of execution, when the sentence of death shall be executed.

b. No announcement of the date and time of execution shall be made, except to those individuals who will be present at the execution and to those public officials who have a need to know due to responsibility connected to the execution.

c. An alternate date and time shall be established in the event the execution cannot be carried out on the original date and time.

E. Fourteen days prior to execution week

1. Execution Commander, in conjunction with the Execution Team Commander, shall:

   a. Inspect the Execution Area

   b. Ensure that personnel, procedures and equipment are prepared for the execution

   g. Coordinate with Baltimore City Police Department for traffic control at time of transfer of inmate from MCAC to the Special Security Unit

   h. Order the necessary pharmaceuticals, if needed

2. The Commissioner shall designate the members of the Execution Team who shall participate in the execution as the Lethal Injection Team. This Team shall include:

   a. Lethal Injection Team Officer-In-Charge

   b. One (1) trained individual designated by the Execution Commander as the Execution Recorder to conduct record keeping and key control activities during the execution period.

   c. One (1) trained individual designated to assist in set-up in the Lethal Injection Room

   d. Two (2) trained individuals designated to insert the intravenous lines to the inmate

   e. One (1) or more trained individual(s) designated to administer the drugs

3. The Warden of MTC shall:

   a. Designate a three (3) officer team, under the direction of a DOC supervisor, to escort official witnesses

   b. Designate a four (4) officer team to regulate parking, and other support staff deemed necessary by the Execution Commander

c. Submit a request to the Assistant Commissioner for the Baltimore Region for additional staffing as needed for the week of the execution

4. The Warden of MCAC shall:

a. Develop plans for activation of the Command Center

b. Contact personnel necessary to staff the center

c. Transfer inmate to Alternative Housing Unit at MCAC

d. Establish a log in a bound ledger to record all observations of inmate while in Alternative Housing Unit

e. Establish non-contact visitation procedures for no more than 2 visitors at a time for 30 minutes from 0900-2000. (Attorney and clergy shall be unlimited during these hours)

f. Arrange for medical, psychological and custody supervisory staff to perform checks on the inmate daily

5. The Chief of Security of MTC shall designate seven (7) officers to function as the Special Security Unit Team who shall staff the Special Security Unit when the inmate is transferred.

6. Execution Commander or designee shall arrange for a licensed physician to be available to pronounce death on the condemned inmate at the time of execution.

7. DPSCS Director of Public Information shall meet with the Governor's Press Secretary to review media procedures and conduct media activities.

F. Nine Days prior to Execution Week

The DPSCS Director of Public Information shall arrange a tour of the Execution Room for representatives of the news media.

G. Five Days prior to Execution Week

1. The Commissioner shall identify at least six (6) witnesses but no more than twelve (12). Individuals who may be invited to attend and witness the execution shall include:

a. Prosecuting Attorney or designee

b. Chief Law Enforcement Officer (or designee) of the County/City where the crime was committed

c. County Executive, County Commissioner or Mayor (or designee) where the crime was committed

d. Victim family members and/or representatives

e. Media representatives as recommended by the DPSCS Director of Public Information

1. 1 representative of the Associated Press
2. 1 representative of a television news outlet
3. 1 representative of the print media
4. 1 representative of a radio news outlet

f. Others as deemed appropriate

2. In order to enter the secure perimeter of the institution, the Commissioner shall ensure that all witnesses:

a. Be 18 years of age or older
b. Undergo and pass a criminal history and security check
c. Be properly attired in accordance with the Division of Correction visitor dress code
d. Complete and sign a witness agreement (Appendix 3)

3. The Commissioner shall arrange, if desired by the inmate, the attendance of:

a. Inmate's attorney
b. A religious representative, which may be designated by the inmate and must be approved by the Warden of MTC

4. Execution Commander shall:

a. Inspect the Command Center
b. Inspect Execution Area
c. Designate medical support staff for the execution
d. Announce the date and time of the execution to those directly involved in the execution.

5. The Warden of MTC shall brief MTC Shift Commanders and Department Heads regarding the execution. Under no circumstances shall the date or time or any details of the execution be communicated to them.

6. The Maintenance Team shall conduct equipment tests to include emergency generator, telephones, closed circuit camera and other equipment to be utilized.

7. The Commissioner shall give the Governor's Counsel a status update.

H. Four Days prior to Execution Week

1. The Execution Commander shall:

   a. Conduct a status update briefing with individuals having responsibilities for activities associated with the execution, including the Baltimore City Police Department, regarding crowd control.

   b. Plan crowd control strategies with the Baltimore City Police Department to include designation of areas for demonstrators both pro and anti-death penalty groups.

   c. Inspect the Command Center, Special Security Unit, Execution Area and Witness Room.

   d. Verify receipt of pharmaceuticals.

2. The Execution Team Communications Officer-In-Charge shall:

   a. Test the operability of each telephone in the lethal injection room and advise the Execution Commander of the results

   b. Develop a list of all persons who may be admitted entry into the Command Center and/or the Execution Area (Appendix 4) for use by the Access Control Officers on the date of execution

   c. Develop a list of persons permitted in the designated parking area for the persons involved in the execution (Appendix 5). This list shall include the names of the individuals, makes and models of vehicles and vehicle license tag numbers.

8. When the execution is completed:

   a. Witnesses shall be returned to the witness waiting area. The Execution Commander or designee will report to this

area to obtain signatures of all official witnesses on the Certification of Execution (Appendix 7).

b. Victim family witnesses shall be escorted to the family witness waiting room. The Execution Commander or designee will report to this area to obtain signatures of all official witnesses on the Certification of Execution (Appendix 7).

c. The physician shall complete and sign the Certification of Pronouncement of Death (Appendix 6).

Q. Stay of Execution

1. In the event a notice of a last-minute stay or revocation of the Warrant of Execution is received from the Governor or from the Attorney General communicating an order from a Court, is received prior to the initial surge of sodium pentothal, the Execution Team Communications Officer-In-Charge shall inform the Execution Team Commander, and the execution process shall immediately cease.

2. The witness drapes shall be closed and the witnesses shall be escorted downstairs to their respective witness waiting rooms.

3. The Execution Commander shall personally confirm the order to halt the execution process.

4. The Execution Commander shall personally advise the witnesses of the circumstances.

V. POST-EXECUTION PROCEDURES

A. The representative of the Medical Examiner's Office shall complete the Certificate of Death.

B. The Chief of Security shall contact the designated funeral director and advise him/her that the execution is complete and the funeral director should report to MTC to retrieve the body. If no funeral arrangements have been made, the Commissioner shall arrange for disposal of the body in accordance with DOC procedures.

C. If no victim family members were present to witness the execution, the Commissioner shall designate an individual to immediately notify the

victim family members of the completion of the process if such notification has been requested.

D. The DPSCS Director of Public Information shall arrange the media briefing for the press in the lobby of MRDCC.

E. Witnesses attend and participate in the media briefing if they choose.

F. If any witnesses elect not to remain, they shall be immediately escorted back to the witness staging area(s). If they elect to remain, they shall be escorted back to the witness staging area(s) after the media briefing.

G. Immediately following the media briefing, the Execution Commander shall have all persons involved in the execution process report to the Command Center and conduct a critique of the entire execution process.

H. No later than twenty-four (24) hours after the completion of the execution, the Warden of MTC shall submit to the Execution Commander, a Serious Incident Report in accordance with DCD 20-3, which shall include:

1. Completed Serious Incident Report form
2. List of Division of Correction personnel present and their roles. **Names of Execution Team members shall be sealed in an envelope attached to the Serious Incident Report, which may only be opened by order of court**
3. List of official witnesses
4. List of all staff from other agencies involved and their roles
5. Lethal Injection Checklist as recorded by the recorder or copy of it
6. Certificate of Death or copy of it
7. Certification of Execution or copy of it
8. Certification of Pronouncement of Death or copy of it
9. Any other document, report, photographs, etc. required by the Commissioner, Secretary of DPSCS, or Governor of the State of Maryland

I. The Execution Commander shall prepare a report summarizing the execution for the Commissioner. The Commissioner shall distribute this report to the Governor, Secretary of DPSCS and the DPSCS Public Information Office

J. Within ten (10) days after the execution, the Commissioner shall file the Certificate of Execution with the Clerk of the Court in the jurisdiction in which the inmate was indicted.

VI. SPECIAL SECURITY UNIT

A. The Maryland Division of Correction has the absolute responsibility to provide security for those individuals awaiting execution. Due to the varying circumstances and contingencies, routine details of security and preparation for execution shall be made at the discretion of the Assistant Commissioner – Security Operations or the Warden of MTC. Whenever an inmate is housed in the Special Security Unit, there shall always be at least three (3) members of the Special Security Unit Team on duty. Post Orders shall be established for the normal operation of the SSU.

B. Mail

Inmate mail shall be photocopied upon receipt and the inmate will receive the photocopy. The original letter will be placed in the inmate's base file. Legal mail will not be photocopied but must be opened and inspected in the presence of a Correctional Officer assigned to the SSU.

C. Visitation

1. Visitation will be permitted in the SSU between the hours of 1:00 p.m. and 7:00 p.m., except for attorney and clergy.

2. The inmate will be permitted three (3) visitation periods each day with no more than two (2) visitors at a time.

3. A maximum of ten (10) visitors will be permitted on the inmate's visiting list. If immediate family members exceed 10, the Warden may approve additional visitors.

4. The inmate's attorney should, as much as possible, visit during normal visiting hours.

5. All visitations shall be non-contact and be no longer than one (1) hour in length.

6. Six (6) hours prior to the designated date and time of the execution, visitation shall be terminated except attorney and clergy.

D. Telephone

1. The inmate may not receive any incoming calls.

2. The inmate shall provide a list of no more than ten (10) telephone numbers that he would elect to call. The MTC Warden must approve this list. The inmate's attorney is not included in the list of numbers.

3. Telephone calls may be made between the hours of 10:00 a.m. and 9:00 p.m.

E. Exercise

Exercise shall be permitted in the cell only.

F. Property

1. Allowable property is limited to the following state issued items:

1	mattress	1	pillow
1	pillow case	2	blankets
2	sheets	1	jumpsuit
1	tee shirt	1	underwear
1	pair socks	1	pair shower shoes
1	towel	1	washcloth
1	bar soap	1	religious book

2. The following items may be issued to the inmate as needed:

1	toothpaste	1	toothbrush
1	cordless electric razor	1	reading material
1	comb		toilet paper
1	deck of playing cards		stationery

3. A radio and television set may be allowed outside of the cell.

4. The inmate may purchase snack items from the commissary but items may not be kept in the cell. The officer assigned to Special Security Unit shall issue them to the inmate.

G. Meals

A Correctional Dietary Officer will deliver all meals to the Special Security Unit where a Special Security Unit Team member will serve them to the inmate.

VII. COMMAND CENTER

The Command Center is responsible for the management of the institution during the execution process and immediately following. It is also responsible for coordination of all activities associated with the execution process to include allied agencies. The Command Center Commander will work closely with the Baltimore City Police Department in handling crowd control outside of MTC. Communication will be established with all principals involved.

A. Command Center staff shall include:

1. Command Center Commander
2. Communications Officer
3. DOC Director of Public Information
4. Witness Escort Team
5. Allied Agencies Representatives as needed
6. Allied Agencies Coordinator
7. Historian
8. Access Control Officers
9. DPSCS Psychologist
10. Representative of the Attorney General's Office
11. Victim Services Coordinator

B. Command Center Commander

1. Open Command Center six (6) hours before the designated time of execution.

2. Coordinate witness transportation and arrival -- at three (3) hours prior to the designated execution time, the witnesses shall be paged and instructed to report to the designated

staging area(s). Witness escorts shall leave MTC and report to the designated staging area(s) to pick up witnesses.

3. When directed by the Assistant Execution Team Commander, have the physician and designated Lethal Injection Team Members escorted to the Lethal Injection Room.

4. As the Execution Team follows the Lethal Injection Checklist, the Assistant Execution Team Commander shall coordinate with the Command Center Commander to direct appropriate staff to carry out their duties.

C. MTC Operations Supervisor – Assistant Warden of MTC

1. Monitor and maintain normal operations of MTC.

2. Communicate with other institutions in the Baltimore Region to monitor activities and mood of the inmate population at those institutions

D. Communications Officer

1. Set up equipment for Command Center to include necessary radios and telephones. Telephone numbers for the Command Center shall be distributed to appropriate personnel.

2. Maintain a list of personnel authorized in the Execution Area and the Command Center. (Appendix 4)

3. Coordinate and maintain a log of all external and internal communications

4. Maintain communication with #1 Wall, #3 Wall and the first floor hospital officer

E. DOC Director of Public Information

1. Prepare news release of the execution for the DPSCS Director of Public Information

2. Serve as liaison between the Command Center and the DPSCS Director of Public Information of activities as they occur

F. Witness Escort Team

1. Shall arrive at the Command Center four (4) hours prior to the designated execution time.

2. When instructed by the Command Center Commander, proceed to the witness staging area(s) and transport the witnesses to MTC.

3. Ensure that witnesses, other than victim family witnesses, shall enter MTC through the #1 Wall gate and escorted to the witness waiting area in room #H9A of the MTC Hospital

4. Ensure that victim family witnesses shall enter MTC through #1 Wall gate and be escorted to the witness waiting room in room #108 of the MTC Hospital

5. The supervisor of the Witness Escort Team shall return to the Command Center and await further instructions

6. Notify the DPSCS Psychologist that the witnesses have arrived and are in the waiting rooms

7. Ensure that, at the completion of the execution process, the witnesses are transported to the witness staging area(s) as directed

G. Correctional Maintenance Officer

1. Ensure the closed circuit camera and all communication equipment is in working order and set-up as required

2. When instructed by the Command Commander, turn on the closed circuit camera and monitor

3. At the conclusion of the execution process, disconnect and store all closed circuit camera equipment and all communication equipment

H. Allied Agencies Coordinator shall serve as liaison between the Command Center and agencies operating outside of MTC.

I. Historian shall maintain an accurate log of events occurring during the execution process that are processed through the Command Center

J. Access Control Officers

1. Maintain security of the Command Center and the entrance to the Special Security Unit

2. Limit access to persons based on the color of badge displayed by personnel (Appendix 8).

3. Perform other duties as assigned by Command staff

K. DPSCS Psychologist

1. Provide briefing and guidance to witnesses prior to the witnessing of the execution itself

2. Be available to all staff needing or requesting Critical Incident Stress Debriefing

L. Representative of the Attorney General's Office

1. Monitor any pending legal issues that may arise during the execution process

2. Immediately notify appropriate staff in the Lethal Injection Room in the event of a stay or revocation of the warrant of execution

M. Victim Services Coordinator shall attend to the needs of the victim family witnesses and provides assistance to those needs.

N. Food Service Contractor shall provide food service as needed to Command Center staff, Execution Team and witnesses.

NOTICE OF WARRANT

I certify that I have read/have had read to me the warrant of execution issued by the Honorable_____ on _____ and have received a copy.

I further certify that I have been made aware the execution of this warrant shall occur during the week of_____.

Inmate Name and Number	Inmate Signature	Date
Witness Name	Witness Signature	Date
DOC Representative and Title	Signature	Date

Department of Public Safety and Correctional Services

Division of Correction
Metropolitan Transition Center
954 FORREST STREET • BALTIMORE, MARYLAND 21202
(410) 837-2135 • FAX (410) 385-1049 • TTY USERS 1-800-735-2258 • www.dpscs.state.md.us

STATE OF MARYLAND

ROBERT L. EHRLICH, JR.
GOVERNOR

MICHAEL S. STEELE
LT. GOVERNOR

MARY ANN SAAR
SECRETARY

MARY L. LIVERS, Ph.D.
DEPUTY SECRETARY
FOR OPERATIONS

DIVISION OF CORRECTION

FRANK C. SIZER JR.
COMMISSIONER

Bobby Shearin
A/DEPUTY COMMISSIONER

METROPOLITAN
TRANSITION
CENTER

GARY N. HORNBAKER, CCE
WARDEN

CHARLES H. SMITH
ASSISTANT WARDEN

JOHN W. SCHMITT
ASSISTANT WARDEN

ARMSTEAD JOHNSON
CHIEF OF SECURITY

The Honorable
Governor of Maryland
State House
Annapolis, Maryland 21401

Re:

Dear Governor

This will acknowledge receipt of a Warrant of Execution for the above-named inmate, who was convicted by (judge or jury) in the Circuit Court for _____ on _____.

On _____ in the Circuit Court for_____ _____, _____ was sentenced under § 2-303 of the Criminal Law Article, Maryland Annotated Code, to death by lethal injection.

In accordance with § 3-905 of the Correctional Services Article, Maryland Annotated Code:

The Warrant of Execution dated_____ and signed the same date, designates the execution to be during a five day period beginning_____.

Sincerely,

Warden

cc: Secretary of Public Safety and Correctional Services
Attorney General's Office – Criminal Appeals Division
Commissioner of Correction
Inmate's Attorney
Commitment File
File

WITNESS AGREEMENT

This is to certify that _____ has agreed to attend and witness the execution of _____ currently scheduled for the week of _____.

It is understood that:

1. The inmate will be executed through the administration of lethal injection.

2. The execution chamber is located within the confines of the Metropolitan Transition Center in Baltimore, Maryland. The witness area is relatively small and the room temperature will be approximately 75 degrees Fahrenheit. Witnesses may be subject to a criminal history check and upon entry into the institution, will be searched. Weapons of any kind, including pocketknives and personal pepper spray canisters, are not permitted inside the institution or witness transport vehicles.

3. In order to satisfy the legal requirement that the specific date and time not be disclosed prior to the execution, witnesses will receive notice to appear no more than three (3) hours prior to the time they are to be present. Witnesses may be requested to report to some location other than the Metropolitan Transition Center, in which case transportation to the facility will be provided by the Maryland Division of Correction, Maryland State Police or a local law enforcement agency. Court intervention or other factors may cause delays in the execution schedule and these delays may necessitate either waiting at the institution or returning on another occasion.

4. By agreeing to become a witness, you are acknowledging that the Commissioner of Correction has requested you sign the Certificate of Execution at the conclusion of the execution process. This is a public document and will become a matter of public record.

5. Outbursts, demonstrations, protests, or any other lack of decorum will not be tolerated. Witnesses shall not annoy, harass, attempt to interview, or otherwise disturb any other witness or persons in the execution process within the confines of the institution. Any witness engaging in such conduct shall be promptly removed from the institution.

6. Witnesses must abide by the visitor dress code of the Division of Correction and must be 18 years of age or older.

7. Persons having any physical or mental condition that may be affected by witnessing the above-described execution shall not be eligible to witness the execution process. Any person affixing a signature hereto certifies that he/she is unaware of any health condition that would be affected by participation as a witness.

8. Radios, tape recorders, video or still cameras, transmitting devices, artist equipment, etc. will not be permitted into the Metropolitan Transition Center on the date of the execution.

I hereby certify that I have read and understand the matters set forth above and agree to abide by the terms and conditions therein. I further release and forever discharge the State of Maryland, its agencies, departments, divisions, officials and employees, from any and all claims and liabilities under the laws of Maryland and laws of the United States for damages, losses, and/or injuries arising out of the witnessing of an execution.

Signed, sealed and witnessed this _____ day of _____, 20__.

_____
Attending Witness

_____
Witness to Agreement

BADGE DISTRIBUTION ROSTER

NAME/ TITLE	AGENCY	DATE ISSUED	WORK PHONE	BADGE COLOR/ NUMBER

PARKING ROSTER

NAME	CAR MAKE & MODEL	TAG #	STATE

Appendix 5
DCM 110-2

CERTIFICATION OF PRONOUNCEMENT OF DEATH

I, _____, certify that on the _____ day of _____, 200 at _____ a.m./p.m., I pronounced that _____ had expired.

_____
Signature Date

CERTIFICATION OF EXECUTION

To the Honorable
Judge of the Circuit Court for

In accordance with Maryland Code, Annotated, Correctional Services Article, Section 3-908, I, , the Commissioner of the Division of Correction, certify that was executed at the Metropolitan Transition Center by lethal injection on 20 , at o'clock in conformity with the sentence of the court and provisions of law. Those present and witnessing the execution have affixed their signatures below.

_____
Commissioner

_____ _____
Witness Witness

_____ _____
Witness Witness

_____ _____
Witness Witness

_____ _____
Witness Witness

_____ _____
Witness Witness

_____ _____
Witness Witness

_____ _____
Witness Witness

INSTRUCTION SHEET

The attached Lethal Injection Checklist shall be completed in detail by the Lethal Injection Team Recorder at the time of an execution by lethal injection. The actual time, any movement that occurred, problems that were encountered, etc. shall be reported on this form. If additional space is needed, use the reverse side and/or additional sheets, as necessary. Once the form is completed, it shall be immediately turned in to the Execution Commander.

CONTENTS OF SYRINGES

LABEL MARKED	CONTENTS	QUANTITY
#1 (color coded RED)	Sodium Pentothal, (4.5 gr) (Nine 500 mg. packages, mixed as directed on the packages)	3 Syringes 60 cc per syringe
#2 (color coded GREEN)	Pavulon (Pancuronium Bromide) (Five 10 cc. ampules of 10 mEq. each in each syringe)	2 Syringes 50 cc per syringe
#3 (color coded BLUE)	Potassium Chloride (One 50 cc ampule of 50 mEq. in each syringe)	2 Syringes 50 cc per syringe

Total Injection: 120cc/ 3 gr./ two 60cc syringes of Sodium Pentothal
50cc/50 mEq./ one 50cc syringe of Pavulon
50cc/50 mEq./ one 50cc syringe of Potassium Chloride

One extra syringe of each made up as a stand-by.

LETHAL INJECTION CHECKLIST CONFIDENTIAL

DATE SET FOR EXECUTION: _____

PROCEDURE	Y	TIME
REQUIRED STAFF:		
Execution Commander		
Execution Team Commander		
Back-up Execution Team Commander		
Lethal Injection Team Officer-in-Charge		
Designated Lethal Injection Team Members		
Set-up		
IV hook-up (No. 1)		
IV hook-up (No. 2)		
Drug Administrator		
Lethal Injection Team Recorder		
Execution Team Communications Officer-in-Charge		
Special Security Team Commander		
Special Security Officer (No. 1)		
Special Security Officer (No. 2)		
Special Security Officer (No. 3)		
Special Security Officer (No. 4)		
Special Security Officer (No. 5)		
Special Security Officer (No. 6)		
Physician		
Maintenance Team		
Maintenance Officer (No. 1)		
Maintenance Officer (No. 2)		
Medical Provider & Crash Cart (On stand-by on 2nd floor for any medical needs of staff or witnesses)		
PREPARATIONS FOR OPERATIONS OF THE LETHAL INJECTION ROOM		
The Lethal Injection Team shall conduct an inventory of all necessary materials. (Not more than 96 hours prior to the execution).		
Not less than 24 hours prior to the execution, the agents are obtained.		
Drugs are issued, checked, and placed in the lethal injection drug box by the Lethal Injection Team. The lethal injection drug box is locked and sealed.		

PROCEDURE	Y	TIME
A Lethal Injection team member shall maintain personal control of the lethal injection drug box key.		
The Lethal Injection Team shall re-inventory all necessary materials at least 2 hours prior to execution.		
The Lethal Injection Team Officer-in-Charge shall ensure that the Gas Chamber drape and the Witness Room drapes are in their closed positions and that there are two (2) sheets on the Execution table.		
Execution Team Commander has the ***Certification of Execution*** and ***Certification of Pronouncement of Death*** completed with necessary information, except time of death and signatures.		
I.V. SET-UP PROCEDURES		
90 minutes prior to the execution, members of the Lethal Injection team that are designated to do set-up procedures assemble in the Lethal Injection Room.		
Back-up Execution Team Commander reports to the Lethal Injection Room and shall be equipped with headset to maintain communications with the Command Center.		
The Lethal Injection Officer-in-Charge shall prepare the necessary equipment, complete with pre-execution inventory and equipment check.		
PREP-TABLE		
7 60 cc. Syringes		
3 I.V. Bags		
2 Administration Sets		
2 Luer Locks		
4 Extensions		
7 18 gauge 1 ½ Straight Needles		
2 Pressure Infusion Bags		
INSTRUMENT STAND #1		
4 Alcohol Prep Pads		
2 Angiocath 22 gauge		
2 Angiocath 20 gauge		
2 Angiocath 18 gauge		
2 Angiocath 16 gauge		
1 Constricting Band		
1 Roll Tape		
2 4 x 4 Pads		
INSTRUMENT STAND #2		
3 Pairs Gloves		

PROCEDURE	Y	TIME
3 Pairs Eye Protectors		
3 Surgical Masks		
1 Needle Box		
The Lethal Injection Officer-in-Charge notifies the Execution Team Commander that the equipment has been prepared.		
Execution Commander approves set-up of equipment.		
Execution Commander instructs Lethal Injection Team Officer-in-Charge to begin set-up process.		
FIRST LINE		
1a. The I.V. Bag is opened and inspected.		
2a. The administration set is opened and the flow control valve closed.		
3a. Attach two extensions.		
4a. Attach Luer lock to end of extensions.		
5a. Spike the I.V. Bag and secure with a twist. Fill the drip chamber halfway.		
6a. Start the flow of I.V. fluid until all air is purged.		
7a. Place the pressure infuser over the I.V. Bag and inflate to green line.		
SECOND LINE		
1b. The I.V. Bag is opened and inspected		
2b. The administration set is opened and the flow control valve closed.		
3b. Attach two extensions.		
4b. Attach Luer lock to end of extensions.		
5b. Spike the I.V. Bag and secure with a twist. Fill the drip chamber halfway.		
6b. Start the flow of I.V. fluid until all air is purged.		
7b. Place the pressure infuser over the I.V. Bag and inflate to green line.		
Execution Team Commander instructs Execution Team Officer-in-Charge to prepare medications.		
MEDICATION PREPARATION		
Prepare 3 syringes (60 cc. Sodium Pentothal). Label using code **#1 (color coded RED).**		
Prepare 2 syringes (50 cc. Pavulon). Label using code **#2 (color coded GREEN).**		
Prepare 2 syringes (50 cc. Potassium Chloride). Label using code **#3 (color coded BLUE).**		
Lethal Injection Officer-in-Charge notifies Execution Commander that MEDS are prepared.		
Execution Commander in Execution Room and Execution Team Commander in Lethal Injection Room test the red and green lights. Lights returned to the off position.		
PLACEMENT OF INMATE IN EXECUTION ROOM (10 mins. before designated execution time)		
Execution Commander directs Execution Team Commander to have the inmate escorted from the Special Security Unit to the Execution Room and placed on the Execution Table. One member of the Special Security Unit Team shall videotape the entire movement process, from the time the inmate is removed from the cell until he/she is strapped down to the Execution Table.		

PROCEDURE	Y	TIME
Execution Team Commander directs Special Security Team to prepare the inmate for execution.		
Special Security Team places inmate on the Execution Table in the Execution Room and straps him down. Check arm straps to ensure they are not acting as tourniquets.		
Physician and designated Lethal Injection Team members shall assemble in the Lethal Injection Room.		
Special Security Team exits the Execution Room and stands by in the Special Security Area. The Special Security Team Commander shall remain in the Execution Room.		
Execution Team Commander directs designated Lethal Injection Team members to enter the Execution Room and prepare the inmate for injection.		
INJECTION PREPARATION – LEFT ARM		
A sterile absorbent pad shall be placed on the floor under the left arm.		
1a. Place a constricting band on the left arm, one inch above the antecubital fossa (ACF). Select a vein.		
2a. Clean the I.V. site with alcohol.		
3a. Open an angiocath of appropriate size.		
4a. Stretch the skin at the site and insert the angiocath, bevel up.		
5a. Advance the catheter over the stylette.		
6a. Apply pressure to the distal end of the catheter and remove the stylette.		
7a. Attach the I.V. tubing and start the flow of fluid.		
8a. Remove the constricting band.		
9a. Observe for swelling or discoloration. Confirm flow of I.V.		
10a. Secure the I.V. with tape.		
11a. Slow the I.V. to KVO.		
12a. Check arm straps to ensure they are not acting as tourniquets.		
INJECTION PREPARATION – RIGHT ARM		
A sterile absorbent pad shall be placed on the floor under the right arm.		
1b. Place a constricting band on the right arm, one inch above the antecubital fossa (ACF). Select a vein.		
2b. Clean the I.V. site with alcohol.		
3b. Open an angiocath of appropriate size.		
4b. Stretch the skin at the site and insert the angiocath, bevel up.		
5b. Advance the catheter over the stylette.		
6b. Apply pressure to the distal end of the catheter and remove the stylette.		
7b. Attach the I.V. tubing and start the flow of fluid.		
8b. Remove the constricting band.		
9b. Observe for swelling or discoloration. Confirm flow of I.V.		
10b. Secure the I.V. with tape.		
11b. Slow the I.V. to KVO.		
12b. Check arm straps to ensure they are not acting as tourniquets.		

PROCEDURE	Y	TIME
The sterile pads under the arms shall be removed.		
EKG monitor leads shall be passed through the port from the Lethal Injection Room and attached to the inmate by designated members of the Lethal Injection Team.		
Cover the inmate with a sheet chest high.		
Rotate Execution Table to face Witness Room at a 45-degree angle.		
Pass both I.V. Bags through the port into the Lethal Injection Room and place on stands.		
Lethal Injection Team Officer-in-Charge verifies that the execution process is ready to begin and notifies the Execution Team Commander.		
Execution Commander and designated Lethal Injection Team members remain in Execution Room. Remaining Lethal Injection Team members return to Lethal Injection Room.		
Lights are turned down in the Lethal Injection Room.		
ESCORT OF WITNESSES TO WITNESS ROOM		
Back-up Execution Team Commander directs Command Center to have witnesses escorted to Witness Room (Victim's Family, then Media & Citizens)		
Victim's Family witnesses are escorted into Witness Room.		
Door is closed between Victim's Family Witnesses and remaining area.		
Media and Citizen Witnesses are escorted into Witness Room.		
Witness escort officer dims lights in Witness Room and Execution Room.		
Lethal Injection Team members in Execution Area confirm operability of IV and return to the Lethal Injection Room.		
Back-up Execution Team Commander directs Command Center to have member of the Maintenance Team turn on Execution Room Camera.		
Special Security Team Commander opens drapes between Execution Room and Witness Room.		
Execution Commander asks clergy if he wishes to speak to the inmate.		
Execution Commander turns on green light in Lethal Injection Room.		
EXECUTION PROCEDURE		
Note: If at any time, the Execution Commander, Execution Team Commander, or Lethal Injection Officer-in-Charge finds it necessary to **stop the execution process, he/she** shall **light the red light** and **turn off the green light.** If open, the **Witness Room drapes shall be immediately closed** until the cause is determined. **Escorts shall immediately conduct Witnesses to assembly rooms on the first floor if the Execution Commander closes the Witness Room drapes. The Back-up Execution Team Commander shall direct the Command Center to notify the witness escorts of a delay. When ready to resume, the Back-up Execution Team Commander shall direct the Command Center to have the witnesses escorted to the Witness Room in a manner identical to the original procedure.**		
The Execution Team Commander shall light the green light in the Execution Room indicating the **FIRST MED** (Sodium Pentothal) coded **#1 (color coded RED)** should be administered.		
60 cc syringe coded **#1 (color coded RED)** is inserted and locked into Y Port, flow clamp opened and the medication administered at the rate of approximately 1 to 1.5 ml per second. Syringe is removed.		
Second 60 cc. Syringe coded **#1 (color coded RED)** is locked into the Y Port and administered at the rate of approximately 1 to 1.5 ml per second.		
Execution Team Commander shall turn off the green light in the Execution Room indicating **#1 (color coded RED)** MED has been administered.		
Second **#1 (color coded RED)** syringe is removed; the I.V. run wide open for 10 seconds.		

PROCEDURE	Y	TIME
The Execution Team Commander shall light the green light in the Execution Room indicating #2 **(color coded GREEN)** MED is being administered.		
SECOND MED (Pavulon) coded #2 **(color coded GREEN)** is inserted and locked into the Y Port and the medication administered at the rate of approximately 1 to 1.5 ml per second.		
Execution Team Commander shall turn off the green light in the Execution Room indicating the #2 **(color coded GREEN)** MED has been administered.		
#2 **(color coded GREEN)** syringe is removed and the I.V. run wide open for 10 seconds.		
The Execution Team Commander shall light the green light in the Execution Room indicating #3 **(color coded BLUE)** MED is being administered.		
THIRD MED (Potassium Chloride) coded #3 **(color coded BLUE)** is inserted and locked into the Y Port and the medication administered at the rate of approximately 1 to 1.5 ml per second.		
Execution Team Commander shall turn off the green light in the Execution Room indicating the #3 **(color coded BLUE)** MED has been administered.		
#3 **(color coded BLUE)** syringe removed and the I.V. continued to run wide open for 10 seconds and reduce to KVO.		
When the EKG monitor indicates that no heart activity is occurring, the physician observing the inmate from the Lethal Injection Room shall advise the Execution Team Commander.		
The Execution Team Commander shall continuously turn the green light on/off in a blinking manner until the Special Security Team Commander begins closing the drapes to the Witness Room.		
Back-up Execution Team Commander directs Command Center to have Maintenance Team member turn off Execution Room camera.		
The physician shall pronounce death and complete and sign the ***Certification of Pronouncement of Death.***		
Shut off I.V.		
POST EXECUTION		
Back-up Execution Team Commander shall direct the Command Center to make appropriate notifications.		
After closing the drapes to the Witness Room, the Execution Commander shall: Turn off the green light in the Lethal Injection Room. Have the Witnesses escorted downstairs. (Ensure Witness Room door is closed and locked.)		
The Execution Commander shall enter the time of death on the ***Certification of Execution.***		
The Execution Commander shall have ***Certification of Execution*** taken downstairs for signature by the Citizen and Media witnesses and the Victim's family witnesses.		
The Back-up Execution Team Commander shall notify the Command Center of the time of death.		
Lethal Injection team members shall remove I.V. and EKG monitor leads and pass them through the port into the Lethal Injection Room.		
Lethal Injection Team Officer-in-Charge collects all equipment.		
Unused drugs (vials that had been opened for the execution) are secured, placed in the Lethal Injection Drug Box and held for 10 days.		
Body is photographed by the Special Security Team.		
Body is placed in a body bag by the Special Security Team.		
Body is disposed of per predetermined arrangements.		
Execution Commander collects all completed and signed *Lethal Injection Checklists.*		
Execution Commander verifies that the time of death is noted and all signatures are in place on the *Certification of Execution* and *Certification of Pronouncement of Death.*		

PROCEDURE	Y	TIME
The Execution Commander shall conduct a debriefing and critique of the execution process in the Command Center immediately following the media briefing.		
DISPOSAL OF DRUGS (approximately 10 days after execution)		
Execution Team Commander (upon notification from Execution Commander) designates staff member to dispose of drugs.		
Drugs are disposed of according to proper procedures.		

Name and title of person completing form (PRINT) **Signature** **Date**

STATE OF MARYLAND	*	**IN THE CIRCUIT COURT**
VS.	*	**FOR BALTIMORE COUNTY**
VERNON EVANS, JR.	*	**CASE NO. 03-K-83002339**

* * * * * * * * * * *

WARRANT OF EXECUTION

TO THE COMMISSIONER OF CORRECTION:

WHEREAS, Vernon Evans, Jr. was convicted by a Jury in the Circuit Court for Worcester County, on the 8th day of May, 1984, of two counts of Murder in the First Degree; and,

WHEREAS, on the 5th day of November, 1992, in the Circuit Court for Baltimore County, the said Vernon Evans, Jr. was sentenced, under Article 27, Sections 412-413, of the Annotated Code of Maryland, to death by administration of a lethal gas; and

WHEREAS, Chapter 5, Section 2, of the 1994 Session Laws of Maryland General Assembly provides that "any person who is sentenced to death by lethal gas prior to the effective date of this Act [March 25, 1994] shall be executed by lethal injection. However, the person may elect to be executed by lethal gas. If a person elects to be executed by lethal gas, the person shall submit a written request for execution by lethal gas to the Clerk of Court that imposed the sentence of death with a copy to the Commissioner of Correction within 60 days after the effective date of this Act [March 25, 1994] . . . . If such a request is not made, the right to elect execution by lethal gas shall be waived"; and

WHEREAS, Vernon Evans, Jr. did not elect execution by lethal gas within 60 days after March 25, 1994, pursuant to Chapter 5, Section 2, of the 1994 Session Laws of Maryland General Assembly, he must be executed by lethal injection.

NOW, THEREFORE, in accordance with the provisions of the Correctional Services Article, Sections 3-901 et. seq., of the Annotated Code of Maryland, YOU ARE HEREBY COMMANDED AND CHARGED that the sentence of this Court shall be executed within a five day period beginning on Monday, February 6, 2006, by taking the said Vernon Evans, Jr. to a suitable and efficient place, enclosed from public view, and there administering to him a continuous intravenous lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical practice. For all of which this shall be your sufficient warrant and authority.

WITNESS the hand and seal of the Circuit Court for Baltimore County, duly attested by the Clerk of said Court, this 9th day of January, 2006.

THE HONORABLE JOHN G. TURNBULL, II
JUDGE, CIRCUIT COURT FOR BALTIMORE COUNTY

ATTEST:

Clerk, Circuit Court for Baltimore County

WILMER CUTLER PICKERING
HALE AND DORR LLP

A. Stephen Hut, Jr.

2445 M STREET NW
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stephen.hut@wilmerhale.com

March 7, 2005

VIA OVERNIGHT MAIL

Ms. Jean Goodman
Secretary of the Department of Public Safety
and Correctional Services
300 East Joppa Road
Towson, MD 21286

Re: Maryland Public Information Act (MPIA) Request

Dear Ms. Goodman:

On behalf of this firm's client, Vernon Evans, Jr., I make the request set forth below under the Maryland Public Information Act (MPIA), State Government Article §§ 10-611 to 628. As you may be aware, Mr. Evans is currently under a warrant of execution commanding that he be executed during the week of April 18, 2005. The following request is therefore of paramount urgency. We request:

1. DCM 110-2, or the most recent form of "The Execution Operations Manual";

2. Any and all documents describing the procedures for execution by lethal injection or the administration of lethal chemicals separate and distinct from DCM 110-2;

3. Any and all documents in any way relating to lethal injection and its administration, including, but not limited to all Maryland Division of Corrections (DOC) Regulations promulgated or revised since lethal injection became the sole manner of execution in the State of Maryland;[1]

4. Any and all documents produced, prepared, or generated by witnesses or officials connected to executions by lethal injection, including, but not limited to the executions of Tyrone X. Gilliam and Steven Howard Oken, and including, but not limited to reports by:

---

[1] As used herein, "relating to" means having any relationship to, pertaining to, evidencing, constituting, comprising, containing, setting forth, showing, disclosing, describing, explaining, summarizing, mentioning, or in any way referencing directly or indirectly.

a. the Wardens of the Maryland Correctional Adjustment Center, Maryland Penitentiary, and/or the Maryland Transition Center;

b. the coroner of the City of Baltimore or the State of Maryland Medical Examiner or their deputies; and/or

c. the person selected by the relevant Warden to administer a lethal injection;

5. Any and all documents in any way relating to the administration of lethal injection reflecting revisions in the process, including, but not limited to any changes in consideration of factors such as weight, age, and/or physical condition of an inmate in administering the dosage of chemicals and the relation between the timing of the lethal injection and the time and quantity of food last ingested by the an inmate;

6. Any and all documents prepared, generated, or produced by DOC personnel concerning preparation of Maryland inmates for execution by lethal injection;

7. Any and all documents itemizing the name, amount, and concentration of chemical substances utilized during execution by lethal injection;

8. Any and all documents outlining or in any way relating to DOC's plan for administering drugs in future executions, including, but not limited to, the timing of each step of the process, a description of the persons administering the lethal injection (redacting names for privacy, as necessary), and information concerning the medical training, if any, of those persons administering lethal injection;

9. Any and all notes (printed, typed, or handwritten), reports, statements, photographs, initial reports, supplemental reports, memoranda, scientific reports, tapes of statements, interview notes, interview summaries, narratives, affidavits, files, audio and video recordings, drawings, sketches, physical evidence, inventory logs, chronologies, summaries, witness statements, and/or witness interviews concerning execution by lethal injection, including, but not limited to, all such material related to the executions of Tyrone X. Gilliam and Steven Howard Oken;

10. Any and all requisition forms for equipment to be used during execution; and

11. Any and all documents that have been adopted specifically for the execution by lethal injection of Vernon Lee Evans, Jr.

For the purposes of this request under MPIA, the terms "reports," "documents," "records," or "materials" are intended to include, without limitation, any and all written, typed, printed, recorded graphic computer-generated, or other matter of any kind from which information can be derived, whether produced, reproduced, stored on paper, cards, tapes, films, electronic facsimiles, computer storage devices, or any other medium. They include, without limitation, letters, memoranda (including internal memoranda), calendars, schedules, books,

indices, notes, printed forms, publications, press releases, notices, minutes, summaries or abstracts, reports, files, transcripts, computer tapes, printouts, drawings, photographs, recordings (including videotapes and audiotapes), telegrams, and telex messages, as well as any reproductions thereof which differ in any way from any other reproduction, such as copies containing marginal notations.

I also anticipate that we will want copies of the requested records. Therefore, please advise me immediately as to the cost, if any, for obtaining a copy of the records and the total cost, if any for all the records described above.

If all or any part of this request is denied, I request that I be provided with a written statement of the grounds for the denial and notification of any and all appeal processes available to me under Maryland law. If you determine that some portions of the requested records are exempt from disclosure, please provide me with the portions that can be disclosed.

In light of Mr. Evans's scheduled execution in approximately 6 weeks, I ask that you please respond to this request immediately. If you have any questions regarding this request, please telephone me at the above number. Thank you for your cooperation.

Sincerely,

A. Stephen Hut, Jr.

WILMERHALE

A. Stephen Hut, Jr.

+1 202 663 6235 (t)
+1 202 663 6363 (f)
stephen.hut@wilmerhale.com

December 20, 2005

By Overnight Mail

Commissioner Frank C. Sizer, Jr.
Maryland Division of Corrections
Department of Public Safety and Correctional Services
6776 Reisterstown Road, Suite 310
Baltimore, MD 21215-2342

Re: Maryland Public Information Act Request

Dear Commissioner Sizer:

I am writing on behalf of Maryland inmate, Vernon Evans, Jr., to supplement my March 7, 2005 letter requesting access to certain public records within the custody of the Department of Corrections ("DOC"), pursuant to the Maryland Public Information Act ("MPIA"), State Government Article §§ 10-611 to 628. By letter dated April 6, 2005, Commissioner Frank C. Sizer, Jr., granted in part and denied in part that request. An administrative appeal of the part of the disposition denying my request is now pending and scheduled for an evidentiary hearing on January 24, 2006. As you know, Mr. Evans is currently incarcerated under a sentence of death. **The following supplement to my March 7 request is therefore urgent.** We request:

> Any and all documents produced, prepared, or generated by officials from the Office of the Medical Examiner in connection with executions by lethal injection, including, but not limited to the executions of John Thanos, F. Gregory Hunt, Tyrone X. Gilliam, Steven Howard Oken, and Wesley Eugene Baker and including, but not limited to, autopsy reports, toxicology reports, and scene investigation reports.

For the purposes of this request under MPIA, the terms "reports," "documents," "records," or "materials" are intended to include, without limitation, any and all written, typed, printed, recorded graphic computer-generated, or other matter of any kind from which information can be derived, whether produced, reproduced, stored on paper, cards, tapes, films, electronic facsimiles, computer storage devices, or any other medium. They include, without limitation, letters, memoranda (including internal memoranda), calendars, schedules, books, indices, notes, printed forms, publications, press releases, notices, minutes, summaries or abstracts, reports, files, transcripts, computer tapes, printouts, drawings, photographs, recordings (including videotapes and audiotapes), telegrams, and telex messages, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

I also anticipate that we will want copies of the requested records. Therefore, please advise me immediately as to the cost, if any, for obtaining a copy of the records and the total cost, if any for all the records described above.

If all or any part of this request is denied, I request that I be provided with a written statement of the grounds for the denial and notification of any and all appeal processes available to me under Maryland law. If you determine that some portions of the requested records are exempt from disclosure, please provide me with the portions that can be disclosed.

Given that Mr. Evans is currently incarcerated under a sentence of death, and that an evidentiary hearing on my related-March 7, 2005 request is scheduled for January 24, 2006, I ask that you please respond to this request immediately. If you have any questions regarding this request, please telephone me at 202-663-6235. Thank you for your cooperation.

Sincerely,

A. Stephen Hut, Jr.

CONTENTS OF SYRINGES

LABEL MARKED	CONTENTS	QUANTITY
#1 (color coded RED)	Sodium Pentothal, (4.5 gr) (Nine 500 mg. packages, mixed as directed on the packages)	3 Syringes 60 cc per syringe
#2 (color coded GREEN)	Pavulon (Pancuronium Bromide) (Five 10 cc. ampules of 10 mEq. each in each syringe)	2 Syringes 50 cc per syringe
#3 (color coded BLUE)	Potassium Chloride (One 50 cc ampule of 50 mEq. in each syringe)	2 Syringes 50 cc per syringe

Total Injection: 120cc/ 3 gr./ two 60cc syringes of Sodium Pentothal
50cc/50 mEq./ one 50cc syringe of Pavulon
50cc/50 mEq./ one 50cc syringe of Potassium Chloride

One extra syringe of each made up as a stand-by.

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, Maryland 21215

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND;
3600 Clipper Mill Road, Suite 350
Baltimore, Maryland 21211

MARYLAND CITIZENS AGAINST STATE EXECUTIONS;
PO Box 39205
Baltimore, Maryland 21212

and

VERNON EVANS, JR.;
Division of Corrections No. 172357
Maryland Correctional Adjustment Center
410 East Madison Street
Baltimore, Maryland 21202

Plaintiffs,

vs.

Civil Action No. ____

MARY ANN SAAR, Secretary,
Department of Public Safety and
Correctional Services
300 East Joppa Road
Suite 2000
Towson, Maryland 21286;

FRANK C. SIZER, JR., Commissioner,
Maryland Division of Correction;
6776 Reisterstown Road
Baltimore, Maryland 21215;

Defendants.

DECLARATION OF MARK J. S. HEATH, M.D., BOARD-CERTIFIED ANESTHESIOLOGIST

I, Dr. Mark J.S. Heath, declare as follows:

1. I am an Assistant Professor of Clinical Anesthesiology at Columbia University in New York. I obtained my Bachelor of Arts degree from Harvard University in 1983, magna cum laude, and graduated with honors from the University of North Carolina Chapel Hill Medical School in 1986. My current practice is devoted one-third to clinical care, one-third to education of medical residents and fellows, and one-third to laboratory research in the field of neuroscience. As a result of my training and research, I am familiar and proficient with the use and pharmacology of the chemicals used to perform lethal injection. I am qualified to do animal research at Columbia University and am familiar with the American Veterinary Medical Association's guidelines.

2. Over the past several years, as a result of concerns about the mechanics of lethal injection as practiced in the United States, I have performed many hundreds of hours of research into the techniques that are used during this procedure. I have testified as an expert witness medical witness in the following actions:

Baker v. Saar, No. Civ. WDQ-05-3207 (D. Md.);

Reid v. Johnson, No. Civil Action. 3:03cv1039 (E.D. Va.);

Abdur'Rahman v. Bredesen, No. 02-2236-III (Davidson County Chancery Ct., Tenn.);

State v. Michael Wayne Nance, 95-B-2461-4 (Ga. Superior Ct.);

Ralph Baze & Thomas Bowling v. Rees, 04-CI-01094, (Franklin County Circuit Ct., Kent.);

I also testified in a case before the Hon. Ramona Emanuel, state District Court judge, in Shreveport, Louisiana on February 11, 2003, but at this time am unable to find the case number for this hearing.

3. I have filed affidavits that have been reviewed by courts in the above states and also, New York, Alabama, Maryland, North Carolina, South Carolina, Ohio, Oklahoma, Texas, California, Connecticut, Missouri, and by the United States Supreme Court. During court proceedings, I have heard testimony from prison wardens who are responsible for conducting executions by lethal injection. I have testified by invitation before the Nebraska Senate Judiciary Committee regarding proposed legislation to adopt lethal injection. I have testified by invitation before the Pennsylvania House Judiciary Committee regarding legislation proposing to prohibit the use of pancuronium and other neuromuscular blockers during lethal injection procedures. My research regarding lethal injection has involved both extensive conversations with experts in fields including lethal injection, toxicology, and forensic

pathology; and personal correspondence with the individuals responsible for introducing lethal injection as a method of execution in the United States.

4. I have been asked to review available information concerning Maryland's lethal injection protocols and to provide expert opinion. In addition to my education, training, research, and experience as a practicing anesthesiologist in a teaching hospital, I have reviewed information concerning Maryland executions by lethal injection, including affidavits and accounts of witnesses to executions by lethal injection in Maryland, the Execution Operations Manual, and the affidavit of Randall Watson, Assistant Commissioner for Security Operations of the Maryland Division of Correction. I have also reviewed similar materials for litigation in other states.

5. Currently 37 states, the federal government and the United States military use lethal injection as a method of execution. Maryland has recently revised its procedure so that the sequence of drugs is comparable to the sequence used to my knowledge in other jurisdictions.

6. It is my opinion to a reasonable degree of medical certainty that the lethal injection procedures selected by Defendants for use in Maryland and used elsewhere subject the prisoner to an increased and unnecessary risk of experiencing excruciating pain in the course of execution. The potassium chloride selected by Defendants to cause death causes extreme pain and requires induction and maintenance of an appropriate plane of anesthesia. The risk of a prisoner suffering the pain that accompanies injection of potassium chloride is increased by the Defendants' failure to eliminate obvious flaws in the selection, training, and supervision of the personnel charged with inducing and maintaining anesthesia. This risk is further increased by the circumstances and environment under which anesthesia is to be induced and maintained. The Defendants' procedures do not comply with the medical standard of care for inducing and maintaining anesthesia prior to and during a painful procedure. Likewise, Defendants' procedures are not compliant with the guidelines set forth by the American Veterinary Medical Association for the euthanasia of animals. Further, Defendants have made insufficient preparation for possibility, encountered in many other jurisdictions, and planned for in those jurisdictions, that peripheral IV access cannot be successfully established.

A. Sequence of Drugs Administered Under the Maryland Lethal Injection Protocol

7. It is my understanding, based on review of documents provided by counsel for the Plaintiffs, that the essential steps in the conduct of lethal injection procedures in Maryland are the following:

a. The two IV lines are prepared.
b. Pressure bags are placed over the IV bags and inflated.

c. Medications are prepared in color-coded and numerically-code syringes.
d. The condemned prisoner is strapped to the Execution Table.
e. An angiocath is inserted into the left arm and attached to IV tubing.
f. An angiocath is inserted into the right arm and attached to the IV tubing.
g. EKG leads are passed through the port and attached to the inmate.
h. The Execution Table is rotated.
i. The IV bags are passed through the port.
j. When the signal to commence the execution is given, a 60 cc syringe containing 1.5 grams of Pentothal is locked into the Y port, the flow clamp is opened, and the medication is administered at the rate of 1 to 1.5 ml per second. The syringe is removed.
k. A second 60cc syringe containing 1.5 grams of Pentothal is locked into the Y port and administered at the rate of 1 to 1.5ml per second and then removed.
l. The IV is run "wide open" for 10 seconds.
m. A syringe containing 50 cc of Pavulon is locked into the Y port and administered at the rate of approximately 1 to 1.5 ml per second and then removed.
n. The IV is run "wide open" for 10 seconds.
o. A syringe containing 50 mEq of potassium chloride in 50 cc is locked into the Y port and administered at the rate of approximately 1 to 1.5 ml per second and then removed.
p. The IV is run "wide open" for 10 seconds, and then slowed to "KVO".
q. When the physician observes the cessation of EKG activity he or she notifies the Execution Team Commander.
r. The physician pronounces death.

8. Of note, the protocols I have reviewed from Maryland do not address the real possibility that it may not be possible for the execution team to obtain peripheral IV access, and that placement of a central venous catheter (also called a "central line") might be necessary. Were placement of a central venous catheter to be needed, an array of equipment would be necessary, both for the placement of the catheter and for treating any complications that might occur during the procedure. Further, it is essential that placement of a central line be performed by and individual with adequate proficiency and demonstrated licensure and credentialing in an appropriate medical field. There are multiple cases in other states in which it has proven necessary to place a central venous catheter in order to proceed with the execution, because it was not possible for the execution team to place peripheral IV catheters. Failure by the DOC to provide staffing of personnel to perform the placement of a central venous catheter invites an extreme misadventure that could include exsanguination (severe blood loss), pneumothorax (collection of air between the lung and the inner chest wall, which if progressive and untreated results in an excruciating death by suffocation), pain, unstable cardiac rhythms requiring delivery of electrical shocks, perforation of the bladder, and multiple other complications. I am aware that other states have formally promised that a central venous catheter will not be placed. As an example, it is my understanding that as a result of litigation in Kentucky, if a peripheral IV line cannot be placed within 60 minutes, there will be no attempt to place a central line and the lethal injection procedure will be postponed. Thus, intrinsically and in comparison to other states,

Maryland's lethal injection procedures are deficient in that there appears to be a failure to plan for the need for a central line. Failing to plan is planning to fail.

9. Under the Maryland execution protocol, the prisoner is rendered dead by the administration of potassium chloride, a salt solution that, when given in high concentrations, causes cardiac arrest. The other drugs that are administered during the procedure, thiopental and pancuronium, while intended to be administered in lethal doses, are not responsible for the death of the prisoner. It is certainly the case that, if successfully delivered into the circulation, thiopental and pancuronium in high doses would be lethal. But it is important to understand that the lethality of thiopental and pancuronium is due to respiratory arrest, which takes several minutes and does not typically occur prior to the administration of potassium. In the execution sequence, before death is caused by respiratory arrest from thiopental and pancuronium, death is caused by potassium. I base this opinion, that the potassium and not the pancuronium or thiopental is responsible for the death of prisoners during lethal injection, on the following:

A) Review of records from EKGs from lethal injection procedures conducted in other states. During lethal injection, cardiac activity consistent with generating perfusion persists through the administration of thiopental and pancuronium, and only stops after potassium has been administered. The relatively sudden cessation of organized EKG activity is not consistent with what would be expected so long after the administration of thiopental and/or pancuronium, and is exactly consistent with what would be expected after the administration of a large dose of potassium chloride.

B) Statements by expert witness Dr. Mark Dershwitz. Dr. Dershwitz, who frequently appears as an expert witness for State corrections officials, in affidavits relating to litigation in North Carolina, has made statements such as, "...during an execution by lethal injection, circulation is slowed immediately by the administration of thiopental, and circulation is stopped completely by the administration of potassium chloride..." (Affidavit of Mark Dershwitz dated September 27, 2004, at p. 9, *Perkins v. Polk, et. al*, No. 5:04-CT-643-BO). While I agree with Dr. Dershwitz that the successful delivery into the circulation of large doses of thiopental will slow the circulation, slowing of the circulation is a common consequence of the induction of general anesthesia and does not cause death. I also agree with Dr. Dershwitz that circulation is completely stopped by the administration of potassium. For circulation to be completely stopped by potassium, it is logical that circulation is present prior to the administration of potassium, and that therefore the prisoner is alive until the potassium is administered and has traveled via the circulation to the heart.

C) Statements by Wardens in North Carolina. In Responses to Interrogatories, the Wardens involved in North Carolina litigation responded that "in the five executions which have occurred since the execution protocol was modified in

September 2004 he has observed the condemned inmate remained alive from the beginning of the first injection of a lethal chemical until all signs of cardiac activity were no longer visible to the medical observers, *which occurred following the injection of the full doses of all three lethal injection chemicals*." North Carolina administers lethal injections in the same sequence as Maryland: first thiopental, second pancuronium, third potassium chloride.

D) Properties of Thiopental and Pancuronium. Thiopental and pancuronium exert their effects by interacting with molecular targets in the nervous system and on muscles cells. Thiopental and pancuronium do not kill cells or tissue, rather they act very selectively to induce unconsciousness and stop breathing. This is in contrast to chemicals that directly kill cells, tissues, and organs, such as cyanide. Thiopental and pancuronium are useful to clinicians because they do not kill or harm cells or tissues. The reason that thiopental and pancuronium can cause death is that they cause the patient to stop breathing. Failure to breathe will result in brain damage, brain death, and cardiac arrest as the level of oxygen in the blood declines over time. These processes take a varying amount of time, depending on many factors. Physicians generally use 4 minutes of not breathing as the approximate benchmark time after which irreversible brain damage from lack of oxygen occurs.

E) Executions in which a second round of chemicals, including potassium, has been required to produce cardiac arrest. In some instances, including the California execution of Clarence Ray Allen two days ago (January 17, 2006), the first "round" of thiopental, pancuronium, and potassium does not cause death, and an additional dose is required. This demonstrates that thiopental and pancuronium alone do not cause rapid death.

10. In the context of lethal injection, thiopental and pancuronium, if successfully delivered into the circulation in large doses, would indeed each be lethal, because they would stop breathing. However, as described above, the administration of potassium precedes the cardiac arrest that would be caused by thiopental and pancuronium.

1. Potassium Chloride

11. Intravenous injection of concentrated potassium chloride solution causes excruciating pain. The vessel walls of veins are richly supplied with sensory nerve fibers that are intensely activated by potassium ions. The intravenous administration of concentrated potassium in doses intended to cause death would be extraordinarily painful. There is absolutely no medical doubt or dispute about the pain-producing properties of concentrated potassium administered intravenously. Defendants' selection of potassium chloride to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain prior to execution. Defendants failed to select one of the several alternatives that do not activate the nerves in the vessel walls of the veins in the way that potassium chloride does and

do not cause any pain. The language of the legislation enacting lethal injection in Maryland does not specify or require the use of potassium.

12. Since the introduction of the techniques of intravenous anesthesia in the 19th century, the provision of anesthesia has become a mandatory standard of care whenever a patient is to be subjected to a painful procedure. Throughout the civilized world, the United States, and Maryland, whenever a patient is required to undergo a painful procedure, it is the standard of care to provide some form of anesthesia. It would be unconscionable to forcibly subject any person, including a prisoner in Maryland, to a planned and anticipated highly painful procedure without first providing an appropriate anesthetic.

13. Presumably because of the excruciating pain evoked by potassium, lethal injection protocols plan for the provision of general anesthesia by the inclusion of thiopental. When successfully delivered into the circulation in sufficient quantities, thiopental causes sufficient depression of the nervous system to permit excruciatingly painful procedures to be performed without causing discomfort or distress. Failure to successfully deliver into the circulation a sufficient dose of thiopental would result in a failure to achieve adequate anesthetic depth and thus failure to block the excruciating pain of potassium administration.

14. Based on my extensive clinical experience caring for patients in Intensive Care Units, and based on common sense, there is no medical or legal status that a human can occupy that lies between life and death. Until the prisoner is rendered dead by the potassium, he or she is necessarily a living human being. I am not aware of any articulated legal or ethical notion that would allow a prisoner who is undergoing lethal injection but who has not yet undergone potassium-evoked cardiac arrest to be considered to be anything other than a living human person.

15. As a living person who is about to be subjected to the excruciating pain of potassium injection, it is imperative that all prisoners undergoing lethal injection be provided with adequate anesthesia. This imperative is of the same order as the imperative to provide adequate anesthesia for any Maryland prisoner undergoing surgery at any of the hospitals to which prisoners are admitted for surgical procedures. Given that the injection of potassium is a scheduled and premeditated event that is known without any doubt to be extraordinarily painful, it would be unconscionable and barbaric for potassium injection to take place without the provision of sufficient general anesthesia to ensure that the prisoner is rendered and maintained unconscious throughout the procedure.

2. Pancuronium Bromide (Pavulon)

16. The second chemical to be administered during the Maryland's lethal injection protocol is pancuronium bromide or Pavulon. Pancuronium is a neuromuscular blocking agent, the effect of which is to render the voluntary muscles unable to contract. Pancuronium does not affect the brain or nerves; rather, this drug affects the voluntary muscle system of the body and causes asphyxiation or suffocation. In the lethal injection process, pancuronium

makes the prisoner appear serene because of the drug's paralytic effect on the muscles. The facial muscles cannot move or contract to show pain or suffering if they are present, but become relaxed, thereby generating an impression of tranquility. The use of pancuronium serves no legitimate medical or legal purpose in an execution, as it has no effect on the efficacy of the lethal injection. Nor does administration of pancuronium in any way render the execution more humane, because it is devoid of anesthetic properties.

17. Administration of pancuronium to a person who is not anesthetized would necessarily result in extraordinary suffering and torture. A person who is awake but paralyzed would be desperately straining to draw breath, but the respiratory muscles would not respond. Such a person would be unable to move or signal that they were awake and experiencing the agony of suffocation. There is no medical doubt or dispute about the fact that death by suffocation while conscious and paralyzed by pancuronium would be excruciatingly agonizing.

18. The Maryland lethal injection protocol is required by statute to include the administration of a chemical paralytic agent, such as pancuronium. While many other paralytic agents could be used, and in other states many other paralytic agents have been used, they all would result in the same excruciating suffering that pancuronium would cause were it administered to an inadequately anesthetized person.

19. Again, as with the potassium chloride, a person receiving a paralyzing (and thus lethal) dose of pancuronium requires appropriate anesthetic care. Specifically, because the administration of a paralyzing dose of pancuronium to a conscious person would necessary result in excruciating suffering, it would be unconscionable to do so without first taking all reasonable and feasible steps to ensure that the person is adequately anesthetized.

B. Qualification and Training Required for Personnel Involved in the Administration and Monitoring of Anesthesia

20. In Maryland and elsewhere in the United States, the provision of anesthetic care is performed only by personnel with advanced training in the medical subspecialty of Anesthesiology. This is because the administration of anesthetic care is complex and risky, and can only be safely performed by individuals who have completed the extensive requisite training to permit them to provide anesthesia services. Failure to properly administer a general anesthetic engenders a high risk of medical complications including death and brain damage. Failure to properly administer a general anesthetic is also recognized to engender a risk of inadequate anesthesia, resulting in the awakening of patients during surgery, a dreaded complication known as "intraoperative awareness." If the individual providing anesthesia care is inadequately trained or experienced, the risk of these complications (death, intraoperative awareness) is enormously increased. In Maryland, and elsewhere in the United States, general anesthesia is administered by physicians who have completed residency training in the specialty of Anesthesiology, and by nurses who have undergone the requisite training to

become Certified Registered Nurse Anesthetists (CRNAs). Physicians and nurses who have not completed the requisite training to become anesthesiologists or CRNAs are not permitted to provide general anesthesia.

21. Hospitals in Maryland and other states require that physicians undergo a credentialing process, before they are permitted to render clinical care. In the credentialing process the physician applies to the hospital for specific privileges. The hospital reviews the physician's CV, letters of reference, licensure, board certification, and other documentation in order to ensure that the physician applicant possesses the requisite training and certification to practice clinical medicine. Additionally, the hospital determines whether a physician should be given privileges, or credentialed, to perform a variety of procedures. For example, physician applying for privileges to perform surgery on the brain or spinal cord would only be given privileges to do so if he or she could demonstrate the requisite experience, training and certification, which in this instance would typically be achieved by completion of a Neurosurgery residency. Similarly, a physician applying for the privilege of performing general anesthesia would be required to have completed a residency in Anesthesiology, a process that in the United States takes three years.

22. In my opinion, individuals providing general anesthesia for Maryland prisoners who require surgery should not be held to a different or lower standard than is set forth for individuals providing general anesthesia in any other setting in Maryland. Specifically, the individuals providing general anesthesia for prisoners in Maryland should possess the experience and proficiency of anesthesiologists and/or CRNAs. Conversely, a physician who is not an anesthesiologist or a nurse who is not a CRNA should not be permitted to provide general anesthesia to prisoners in Maryland or to any person in Maryland.

23. The infliction of lethal injection is among the most serious and solemn actions ever undertaken by a state government. Because the Maryland lethal injection protocol employs two drugs (pancuronium and potassium) that individually and together would, in the absence of general anesthesia, necessarily cause excruciating pain and agony, it is imperative that the preceding provision of general anesthesia be performed by individuals who have no less experience or training than the individuals who provide general anesthesia in all other instance in Maryland.

24. I have reviewed information about the criteria used in the selection of the personnel who participate in lethal injection procedures in Maryland. There does not appear to be any process involving the review of licensure and credentialing of the candidates. Therefore, there appears to be no requirement that the individuals who are responsible for the provision of general anesthesia possess any training in the field of Anesthesiology.

25. In my opinion, there is no justification for the apparent failure to provide to prisoners undergoing lethal injection a practitioner with the same or higher level of training and credentialing as would be provided to any other prisoner who is about to undergo a procedure that is known in advance to be agonizing. Specifically, it is my opinion to a

reasonable degree of medical certainty that the general anesthesia that is necessary for the humane conduct of the execution should not be provided by individuals who have not completed anesthesiology training.

26. Errors are never completely preventable in any human activity. However, it is self-evident that errors in the attempted administration of general anesthesia are more likely to occur in the hands of personnel who do not possess the training held by anesthesiologists or CRNAs. While the administration of intravenous medications may seem like a simple task, in fact it is not. Opportunities for problems with the administration of thiopental and other drugs during lethal injection include, but may not be limited to, the following:

a) *Errors in preparation.* Thiopental is delivered in powdered form and must be mixed into an aqueous solution prior to administration. This preparation requires the correct application of pharmaceutical knowledge and familiarity with terminology and abbreviations. Calculations are also required, particularly if the protocol requires the use of a concentration of drug that differs from that which is normally used.
b) *Error in labeling of syringes.* This risk is compounded by Maryland's needless use of an arcane color-coding system to de-identify the syringes.
c) *Error in selecting the correct syringe* during the sequence of administration.
d) *Error in correctly injecting the drug into the intravenous line.*
e) *The IV tubing may leak.* An "IV setup" consists of multiple components that are assembled by hand prior to use. If the personnel who are injecting the drugs are not at the bedside but are instead in a different room or part of the room, multiple IV extension sets need to be inserted between the inmate and the administration site. Any of these connections may loosen and leak. In clinical practice, it is important to maintain visual surveillance of the full extent of IV tubing so that such leaks may be detected. The configuration of the death chamber and the relative positions of the executioners and the inmate may hinder or preclude such surveillance, thereby causing a failure to detect a leak. The practice of covering the inmate's body and extremities with a sheet; if the IV tubing runs under a sheet, makes it difficult or impossible to detect the leakage of drugs during injection. In particular, if the IV tubing were to be incorrectly inserted into the hub of the catheter, there would be leakage of the drug under the sheet and under the inmate's body that would not be detectable. Notably, review of execution logs and witness reports show that Maryland has encountered this problem, and failed to address it during the course of the execution even though it was recognized.
f) *Incorrect insertion of the catheter.* If the catheter is not properly placed in a vein, the thiopental will enter the tissue surrounding the vein but will not be delivered to the central nervous system and will not render the inmate unconscious. This condition, known as infiltration, occurs with regularity in the clinical setting. Recognition of infiltration requires continued surveillance of the IV site during the injection, and that surveillance should be performed by the individual who is performing the injection so as to permit correlation between visual observation and tactile feedback from the plunger of the syringe.

g) *Migration of the catheter.* Even if properly inserted, the catheter tip may move or migrate, so that at the time of injection it is not within the vein. This would result in infiltration, and therefore a failure to deliver the drug to the inmate's circulation and failure to render the inmate unconscious.

h) *Perforation or rupture or leakage of the vein.* During the insertion of the catheter, the wall of the vein can be perforated or weakened, so that during the injection some, or all, of the drug leaves the vein and enters the surrounding tissue. The likelihood of this occurring is increased if too much pressure is applied to the plunger of the syringe during injection, because a high-pressure injection results in a high velocity jet of drug in the vein that can penetrate or tear the vessel wall.

i) *Excessive pressure on the syringe plunger.* Even without damage or perforation of the vein during insertion of the catheter, excessive pressure on the syringe plunger during injection can result in tearing, rupture, and leakage of the vein due to the high velocity jet that exits the tip of the catheter. Should this occur, the drug would not enter the circulation and would therefore fail to render the inmate unconscious.

j) *Securing the catheter.* After insertion, catheters must be properly secured by the use of tape, adhesive material, or suture. Movement by the inmate, even if restrained by straps, or traction on the IV tubing may result in the dislodging of the catheter. If this were to occur under a sheet, it would not be detected, and the drug would not enter the inmate's circulation and would not render the inmate unconscious.

k) *Failure to properly administer flush solutions between injections of drugs.* Paralytic agents such as pancuronium cause thiopental to precipitate out of solution on contact, thereby interfering with the delivery of the drug to the inmate and to the central nervous system.

l) *Failure to properly loosen or remove the tourniquet from the arm or leg* after placement of the IV catheter will delay or inhibit the delivery of the drugs by the circulation to the central nervous system. This may cause a failure of the thiopental to render and maintain the inmate in a state of unconsciousness.

m) *Impaired delivery due to restraining straps.* Restraining straps may act as tourniquets and thereby impede or inhibit the delivery of drugs by the circulation to the central nervous system. This may cause a failure of the thiopental to render and maintain the inmate in a state of unconsciousness. Even if the IV is checked for "free flow" of the intravenous fluid prior to commencing injection, a small movement within the restraints on the part of the inmate could compress the vein and result in impaired delivery of the drug.

27. In an article entitled "Physicians' attitudes about involvement in lethal injection for capital punishment," Neil Farber and colleagues surveyed U.S. physicians in 2000 and found that 34% approved of eight actions related to the conduct of lethal injection, including the injection of the lethal drugs. (Arch. Intern Med. 2000 Oct. 23; 160(19):2912-6). In a related study, Farber and colleagues found that 25% of physicians would personally perform five or more actions intrinsic to the conduct of lethal injection. ("Physicians' willingness to participate in the process of lethal injection for capital punishment", Ann Intern Med. 2001

Nov. 20; 135(10):884-8). Nineteen percent of responding physicians stated that they would personally administer the lethal drugs. The study concluded that, "[d]espite medical society policies, many physicians would be willing to be involved in the execution of adults." Based on these surveys, it appears highly likely that the Maryland D.O.C. would not encounter significant difficulty in recruiting and contracting for an adequately trained physician to provide the general anesthetic that necessarily must precede the administration of thiopental and pancuronium.

28. It is my personal opinion that it is not acceptable for physicians or nurses, including anesthesiologists and CRNAs, to participate in the design or implementation of lethal injection procedures. It is also my personal opinion that it is not acceptable to deliberately take human life under any circumstance in which conditions of civilized order exists. However, as clearly shown by the work of the Farber group, these personal views are not shared by a large proportion of physicians, and therefore my personal opinions are irrelevant to the Maryland DOC process of recruitment and selection of the individuals who are to provide the necessary and required general anesthesia that must precede the administration of pancuronium and potassium. I am not aware of any laws in Maryland that prohibit the participation of physicians or nurses, including anesthesiologists and CRNAs, in the design or implementation of lethal injection procedures.

29. It is important to recognize that, in the United States, the medical profession has very limited experience in the provision of euthanasia. This is in contrast to the veterinary profession, whose practitioners routinely perform euthanasia. The introduction of lethal injection protocols in the United States was led by physicians, and to my knowledge no input was obtained from the veterinary profession. However, it is very informative to review the approach taken by the veterinary profession to the use of lethal injection as a technique for providing euthanasia to household pets.

30. Characteristic of professions in general, the profession of veterinary medicine has developed and set in place multiple institutions and practices that serve to ensure to the greatest extent possible that their patients receive the best care possible. These include, but are not limited, a specific regimen of education and training, an examination process, the award of a doctoral degree, the conduct of research, the generation of scholarly publications, conferences and meetings, and promulgation of guidelines for best practice. Because medical and veterinary knowledge are constantly advancing, and because new drugs and techniques are constantly being introduced, the approaches taken by veterinarians to clinical problems have evolved over time.

31. In keeping with the practices described above, the American Veterinary Medical Association (AVMA) periodically convenes a panel of veterinary experts to review, refine, and update a set of recommendations about the conduct of euthanasia. The purpose of this periodic review is to ensure, as much as is reasonably possible, that the recommendations of the AVMA regarding euthanasia have taken into account advances and developments in the veterinary field and in the sub-field of veterinary euthanasia. The most recent panel released

the report entitled "2000 Report of the AVMA Panel on Euthanasia"; a copy of this report is available under the internet address: http://www.avma.org/resources/euthanasia.pdf.

32. Page 680 of the AVMA report states that "although unacceptable and condemned when used in unanaesthetized animals, the use of a supersaturated solution of potassium chloride injected intravenously or intracardially is an acceptable method to produce cardiac arrest and death." This statement firmly establishes the utter unacceptability of administering potassium chloride to an animal that is not anesthetized.

33. On page 681 the AVMA report goes on to state that "[i]t is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously." As discussed above, the information thus far provided in exhibits provides no meaningful information about the training, competency, or proficiency of the executioners in the assessment of anesthetic depth. Therefore, it is not possible to conclude that reasonable steps have been set in place to ensure that the execution of prisoners in Maryland is compliant with the AVMA requirements set forth for animals.

34. On page 681 the AVMA report also states that "administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by a loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli." The Maryland lethal injection protocol fails to provide for the testing, after the administration of thiopental and prior to the administration of potassium, of the prisoner's surgical plane of anesthesia as described and required by the AVMA.

35. It is critical to understand that the use of pancuronium greatly increases the difficulty of making the assessment of anesthetic depth as described and required by the AVMA report. For example, a common way in which veterinarians assess anesthetic depth is to use a surgical clamp to pinch the tail or paw. If the animal is not adequately anesthetized it will withdraw the pinched appendage, and may possibly exhibit generalized escape or withdrawal responses, and may even vocalize. By contrast, if an animal is adequately anesthetized, it will not exhibit any of these responses. However, if the animal has been administered a neuromuscular blocker such as pancuronium, this pinch test cannot be used, because the animal will not be able to exhibit such reflexive withdrawal responses because it is paralyzed. If the animal is not properly anesthetized it will feel the extreme pain caused by the clamping of its tail or paw, but will be unable to withdraw, struggle, or vocalize because of the entombing effect of pancuronium. If the veterinarian is not closely monitoring subtle indicators of anesthetic depth such as pupil size, heart rate, and blood pressure, they would have no knowledge that the animal is in fact feeling the pain but unable to respond.

36. The "2000 Report of the AVMA Panel on Euthanasia" discusses the use of barbiturates and neuromuscular blockers in euthanasia. At the bottom of page 680 it is stated

(in its own paragraph, presumably to underscore its importance) that "a combination of pentobarbital with a neuromuscular blocker is not an acceptable euthanasia agent." While this statement refers specifically to pentobarbital it is clearly intended to be generalized to all barbiturates, because earlier on this page it discusses the use of "all barbituric acid derivatives." Consistent with the concerns raised in paragraphs 9-11 above, the AVMA recommends the use of pentobarbital (not thiopental) in part because it is long-acting (in contrast to the ultra-short acting thiopental used in Maryland executions). Indeed, the use of thiopental in combination with a neuromuscular blocker would certainly be considered by the AVMA to be even more repugnant than the use of pentobarbital with a neuromuscular blocker, because of the increased chance that the animal would regain consciousness as described above.

C. Risks in the Current Maryland Execution Procedure.

37. The deliberate induction of cardiac arrest or paralysis of the entire body by any means, should whenever possible, be preceded by the induction of general anesthesia. Thus, regardless of any changes that the Maryland D.O.C. might make in the selection of the drug or drugs used to cause cardiac arrest, it is my opinion to a reasonable degree of medical certainty that all reasonable steps must be taken to ensure that an adequate general anesthetic has been provided. It is important to understand, however, that the specific drugs selected for use in the Maryland lethal injection protocol possess attributes that increase, needlessly, the risk that the procedure will cause excruciating suffering and agony.

38. For example, for reasons that are unclear, the legislation enacted in Maryland requires the use of an ultra-short acting barbiturate for the provision of anesthesia. As the name implies, ultra-short acting barbiturates wear off faster than other classes of barbiturates that exhibit longer lasting effects. Thus, the accidental administration of a low dose of thiopental instead of the high dose intended by the protocol could easily result in transient unconsciousness. Had the legislature permitted the use of different anesthetic drugs the undesirable and needlessly risky attribute of ultra-short duration of action could have been avoided. The use of an ultra-short acting barbiturate, with its attendant risk of inadequate depth of anesthesia, therefore renders even more important the need to have the general anesthetic provided by a properly trained and credentialed individual.

39. There is no medical purpose served by the administration of pancuronium during lethal injection procedures. The administration of a lethal dose of potassium necessarily renders redundant the use of pancuronium; if potassium is to be given in a lethal dose then pancuronium contributes neither to the death of the prisoner nor to the provision of the general anesthetic that is necessary to make the procedure humane. The use of a chemical paralytic agent such as pancuronium, with its attendant risk of the extreme distress of conscious paralysis, therefore renders even more important the need to have the general anesthetic provided by a properly trained and credentialed individual.

40. The Maryland lethal injection protocol fails to provide for the testing, after the administration of thiopental and prior to the administration of potassium, of the prisoner's surgical plane of anesthesia. Further, any theoretical attempt to assess anesthetic depth would be made much more challenging and subject to error by the needless administration of pancuronium.

41. An additional concern regarding the Maryland lethal injection protocol is that it does not articulate a procedure for addressing the foreseeable situation in which a stay of execution could be issued and communicated to the prison after some or all of the drugs for the lethal injection have been administered. If one of these instruments were to be furnished prior to the pronouncement of death it would be incumbent on the Division of Corrections to take all possible steps to resuscitate the prisoner from the effects of the drugs that had been administered. In this regard Maryland departs from the practices of other states in which systems, equipment, and personnel are set in place prior to the start of the execution. The fact that other states have addressed this important issue underscores the recognized need to plan for this unlikely yet very possible event, and also underscores that resuscitation can realistically be considered to be achievable.

42. It is my understanding that Plaintiffs' counsel has sought from Defendants, pursuant to public information requests, all documents generated in the course of Maryland lethal injections, but that Defendants have refused to release all such documents. Thus, in an effort to understand how lethal injections have been conducted by Defendants, I have reviewed information concerning the capital punishment process found on the website of the Maryland Department of Public Safety and Correctional Services ("DPSCS"), as well as press articles reporting on lethal injections that have taken place in the State. The DPSCS website declares that its lethal-injection procedure "lasts about seven minutes." Press reports, however, reveal that only one of the 5 lethal injections conducted by Defendants-that of Flint Gregory Hunt-has been completed within 7 minutes. Rather, the execution of Steven Oken lasted approximately 9 minutes, the execution of Wesley Baker lasted approximately 10 minutes, the execution of John Thanos lasted approximately 12 minutes, and the execution of Tyrone Gilliam lasted approximately 23 minutes. It is my understanding, from my participation in litigation concerning the execution of Steven Oken, that Defendants have conceded that the execution of Tyrone Gilliam was botched--namely, that a primary IV line used during that execution leaked, allowing liquids to pool on the execution chamber floor. I also spoke with a reporter who witnessed the Gilliam execution who, along with the other witnesses, observed the IV fluid dripping onto the floor and forming an expanding puddle. The reporter said that at the subsequent press conference the warden, when asked about the leakage, said something to the effect that it is a "normal thing that can happen anytime." This extraordinary level of disregard for the centrally important element of the execution, namely the effective delivery of all of the drugs, is very concerning.

Conclusion.

43. In conclusion, as stated earlier in this report, it is my opinion to a reasonable degree of medical certainty that the lethal injection procedures selected by defendants for use in Maryland and used elsewhere subject the prisoner to an increased and unnecessary risk of experiencing excruciating pain in the course of execution. The potassium chloride selected by defendants to cause death causes horrible pain and requires induction and maintenance of an appropriate plane of anesthesia. The risk of a prisoner suffering the pain that accompanies injection of potassium chloride is increased by the defendants' failure to eliminate obvious flaws in the selection, training, and supervision of the personnel charged with inducing and maintaining anesthesia. This risk is further increased by the circumstances and environment under which anesthesia is to be induced and maintained. The defendants' procedures do not comply with the medical standard of care for inducing and maintaining anesthesia prior to and during a painful procedure. Likewise, defendants' are procedures are not compliant with the guidelines set forth by the American Veterinary Medical Association for the euthanasia of animals. Further, the defendants have made insufficient preparation for the real possibility, encountered in many other jurisdictions, and planned for in those jurisdictions, that peripheral IV access cannot be successfully established. The protocol as currently formulated, and the procedure as currently staffed, should not be performed.

Dr. Mark J.S. Heath, pursuant to 28 U.S.C. § 1746, declares as follows:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this19th day of January 2006.

Mark J.S. Heath, M.D.