

1 IN THE SUPREME COURT OF THE STATE OF MONTANA

2 No. OP 06-0492

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

13 Petitioners,

14 v.

15 STATE OF MONTANA; DEPARTMENT OF CORRECTIONS;
16 DIRECTOR MIKE FERRITER; WARDEN MIKE MAHONEY;
17 ATTORNEY GENERAL MIKE McGRATH; JOHN DOES 1-10,

18 Defendant and Appellant.

19 **RESPONSE TO PETITION FOR INJUNCTIVE RELIEF**

20 Without presenting any evidence of any past or present problem related
21 to Montana's lethal injection procedure, and only thirty days prior to his
22 scheduled execution on August 11, 2006, Petitioners ask this Court to invoke
23 its original jurisdiction to stay the execution of David Thomas Dawson
24 (Dawson) on the ground that Montana's lethal injection procedure may pose a
25 risk of error that may violate the Eighth Amendment prohibition against cruel
26 and unusual punishment. Noticeably absent from the long list of Petitioners is
27 David Dawson. In fact, Dawson has specifically informed this Court that he
does not desire to participate in this lawsuit, and that he desires that his
execution proceed as scheduled. Also absent are the other inmates subject
to a death penalty in Montana: William Gollehon, Ronald Smith, and

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Ed Smith

CLERK OF THE SUPREME COURT
STATE OF MONTANA

1 Daniel Johnson. These inmates' executions are not imminent, and no
2 execution dates have been set.

3 The Petition must be denied because the Court lacks jurisdiction based
4 on Petitioners' lack of standing. Further, the petition should be denied
5 because it fails to satisfy the requirements for the Court's acceptance of
6 original jurisdiction: it presents factual, not purely legal, issues; and
7 Petitioners have been dilatory. Finally, Petitioners' request for a preliminary
8 injunction must be denied because they have failed to show any probability of
9 success on the merits.

10 11 **BACKGROUND**

12 In April 1986, the four members of the Rodstein family were
13 kidnapped at gunpoint and robbed, and three of the family members were
14 murdered by strangulation. Fifteen-year-old Amy Rodstein was held hostage
15 for two days until rescued by Billings, Montana police officers. Amy's father
16 and mother, David and Monica Rodstein, and her 11-year-old brother,
17 Andrew, were strangled to death in Dawson's motel room at the Airport
18 Metra Inn, in Billings Montana. A jury trial was conducted on February 9 to
19 28, 1987. The jury found the Defendant, David Thomas Dawson guilty
20 beyond any reasonable doubt of three counts of deliberate homicide for the
21 deaths by strangulation of Andrew, David, and Monica Rodstein. Dawson
22 was also convicted of four counts of the aggravated kidnapping of David,
23 Monica, Andrew, and Amy Rodstein, and one count of robbery.

24 Following a sentencing hearing, the district court sentenced
25 Dawson to death on April 15, 1987. This Court affirmed, State v. Dawson,
26 233 Mont. 345, 761 P.2d 352 (1988), and the Supreme Court denied
27 certiorari, Dawson v. Montana, 491 U.S. 910 (1989).

1 At the time Dawson was sentenced, § 46-19-103(3) provided that “[t]he
2 punishment of death must be inflicted by hanging the defendant by the neck
3 until he is dead or, at the election of the defendant, by administration of a
4 continuous, intravenous injection of a lethal quantity of an ultra-fast-acting
5 barbiturate in combination with a chemical paralytic agent until a licensed
6 physician pronounces that the defendant is dead according to accepted
7 standards of medical practice.” In 1997, the Legislature further amended the
8 statute to eliminate hanging as an option. See Langford v. State, 287 Mont.
9 107, 951 P.2d 1357, 1359 (1997).

10 On October 5, 1989, Dawson filed a petition for writ of habeas corpus
11 in the federal district court. The federal petition was held in abeyance while
12 Dawson exhausted his state posconviction remedy. Dawson filed his
13 postconviction relief petition in the state district court on March 25, 1991,
14 which was ultimately denied. This Court unanimously affirmed the denial of
15 relief on August 15, 2000, and the United States Supreme Court denied
16 certiorari. Dawson v. State, 2000 MT 219, 301 Mont. 135, 10 P.3d 49,
17 cert. denied, 532 U.S. 928 (2001). In neither proceeding did Dawson
18 challenge the constitutionality of the execution of a sentence of death by
19 lethal injection.

20 In July 2002, Dawson filed, through counsel, a motion for new trial
21 and to vacate his death sentences under Mont. R. Civ. P. 60(b)(6), based on
22 Ring v. Arizona, 536 U.S. 584 (2002), and state constitutional grounds. In
23 July 2003, the state district court denied both motions, and on July 24, 2003,
24 Dawson appealed.

25 On July 27, 2004, during the pendency of his federal habeas corpus
26 petition, Dawson filed a pro se request in the federal district court to cease all
27 of his appeals, and on September 8, 2004, he moved to dismiss his habeas

1 counsel, Kathryn Ross and William Hooks (Ross and Hooks). On August 24,
2 2004, Dawson filed in this Court a pro se motion to dismiss all ongoing
3 appeals, and to discharge his appellate counsel, Ross and Hooks. He also
4 moved the state district court to set a new date for his execution.

5 In the federal district court, Magistrate Judge Anderson conducted an
6 extensive evidentiary inquiry into Dawson's competency to waive his
7 appeals. On June 1, 2005, Magistrate Anderson filed his Findings and
8 Recommendations, recommending that Dawson's pro se motions to dismiss
9 his federal habeas corpus petition and to dismiss his counsel be granted.
10 United States District Judge Shanstrom adopted Magistrate Anderson's
11 findings and recommendations and granted Dawson's pro se motions to
12 dismiss his federal habeas petition and his counsel. On December 27,
13 2005, Ross and Hooks filed a notice of appeal. On March 21, 2006,
14 Judge Shanstrom denied Ross's and Hooks' motion for a Certificate of
15 Appealability (COA), under 28 U.S.C. § 2253(c)(1).

16 The Ninth Circuit Court of Appeals has since rejected the request of
17 Ross and Hooks for a stay of execution and for a COA, noting that there was
18 "not a shred of evidence" to suggest that Dawson was not competent to waive
19 his appeals. Dawson v. Mahoney, 2006 U.S. App. LEXIS 14145, ___ F.3d
20 ___ (9th Cir. June 8, 2006), (Order attached hereto as Exhibit A). The Court
21 denied reconsideration on July 10, 2006. (Order attached as Exhibit B).

22 This Court, on July 26, 2005, remanded Dawson's pro se motions to
23 dismiss his appeal and his counsel to the district court with instructions to
24 determine whether they were made knowingly, voluntarily, and intelligently.
25 On February 6, 2006, Judge Todd issued the court's Findings of Fact and
26 Conclusions of Law Regarding Defendant's Pro Se Motions, concluding that
27 Dawson's pro se motions to dismiss his appeal and discharge his counsel

1 should be granted because his motions have been made knowingly,
2 voluntarily, intelligently, and unequivocally.

3 On April 11, 2006, this Court issued its Opinion and Order,
4 unanimously concluding that Dawson's motions to discharge appellate
5 counsel, and dismiss his state court appeal, were made knowingly,
6 voluntarily, and intelligently, and must be granted. The Court remanded to
7 the state district court for execution of the judgment and sentence. State v.
8 Dawson, 2006 MT 69, ___ Mont. ___, ___ P.3d ___. Justice Nelson
9 concurred in the Court's Opinion and Order, but primarily on the ground that
10 because Dawson has been found to be mentally competent, he has the
11 paramount right to end his appeals, and thus his life, under the personal
12 autonomy component of the right of individual privacy guaranteed under
13 Article II, Section 10, of Montana's Constitution. Id. at ¶ 46.

14 On May 15, 2006, the state district court set Dawson's execution date
15 for August 11, 2006, and issued the death warrant.

16 On July 11, 2006, the Montana Association of Criminal Defense
17 Lawyers and other third parties filed this petition asking this Court to exercise
18 its original jurisdiction and issue a temporary restraining order, and
19 preliminary and permanent injunctions, barring all executions by lethal
20 injection in the State of Montana. Petitioners also request a remand to a
21 district court for discovery, and an evidentiary hearing.

22 Petitioners base their constitutional claim for injunctive relief on their
23 speculation that "Montana's protocol for lethal injection exposes inmates to
24 an unacceptable risk that they will feel excruciating pain during their
25 execution." (Pet. at 26.) At the time they filed the Petition, Petitioners knew
26 the names of the three drugs used in the Langford execution, i.e., sodium
27 pentothal, pavulon, and potassium chloride. See App. 1 to Pet., Death

1 Certificate of Terry Langford. Other than Appendix 1, Petitioners rely
2 exclusively on affidavits and evidence from other cases from other States.
3 They have produced no evidence of any error with the executions by lethal
4 injection of Duncan McKenzie or Terry Langford. Nor have they produced
5 any evidence of any potential problem with the execution of David Dawson.

6 7 DISCUSSION

8 **I. THIS COURT LACKS JURISDICTION AND THE PETITION** 9 **MUST BE DISMISSED WITH PREJUDICE BECAUSE** 10 **PETITIONERS LACK STANDING TO BRING THIS ACTION** 11 **ON BEHALF OF DAWSON AND OTHER MONTANA** 12 **INMATES SUBJECT TO THE DEATH PENALTY.**

13 Petitioners assert they have standing in this case because they are
14 “residents, citizens, electors, and taxpayers,” who “are concerned that a lethal
15 injection may be performed in a cruel and unusual manner.” They also assert
16 they have standing based on their Article II, Section 9, “right to know” the
17 Department of Corrections’ (Department) lethal injection protocol. (Pet. at
18 6.) Because Petitioners have failed to allege facts that establish that
19 Montana’s lethal injection procedure has caused or will cause an injury that is
20 personal to Petitioners, as distinguished from the community in general, this
21 action must be dismissed because they lack standing.

22 Further, Petitioners’ alleged “right to know” has not been violated. As
23 set forth in the attached affidavit of the Director of the Department of
24 Corrections, Mike Ferriter, Exhibit C, one of the Petitioners, Rep. Paul Clark,
25 requested information regarding the Department’s lethal injection protocol on
26 Thursday, July 6, 2006, only two business days prior to filing this lawsuit on
27 July 11, 2006. The information Rep. Clark requested was timely provided to
him on Thursday, July 13, 2006. A copy of Rep. Clark’s letter to the
Department is attached to the Petition as Exhibit 4. A copy of the

1 Department's response to Rep. Clark's letter is attached hereto to Director
2 Ferriter's affidavit, Exhibit C.

3 Standing to sue refers to a "party's right to make a legal claim or seek
4 judicial enforcement of a duty or right." In re B.F. and A.W., 2004 MT 61, ¶
5 15, 320 Mont. 261, 87 P.3d 427, quoting Black's Law Dictionary, Seventh
6 Edition. Standing is a threshold jurisdictional question, especially in cases
7 where it is claimed that a statutory or constitutional violation has occurred, or
8 will occur. Lohmeier v. Gallatin County, 2006 MT 88, ¶ 16, 332 Mont. 39,
9 135 P.3d 775, citing Fleenor v. Darby Sch. Dist., 2006 MT 31, ¶ 7, 331 Mont.
10 124, 128 P.3d 1048. A party lacks standing when he or she has no personal
11 stake in the outcome of the controversy. In re B.F. and A.W., ¶ 15. The
12 general rule is that "a litigant may only assert his own constitutional rights or
13 immunities." Id. at ¶ 16, quoting McGowan v. Maryland, 366 U.S. 420, 429
14 (1961). The injury alleged must be personal to the plaintiff as distinguished
15 from the community in general. Fleenor, ¶¶ 9, 10 (rejecting plaintiff's
16 assertion that simply being an "informed and interested citizen" is sufficient
17 to confer standing in an action alleging a violation of the plaintiff's "right to
18 know" under Article II, Section 9 of the Montana Constitution). See also
19 State v. Krantz, 241 Mont. 501, 788 P.2d 298, 301 (1990) (to challenge the
20 constitutionality of a criminal statute or procedure, petitioners must show a
21 direct, personal injury resulting from application of the law in question); State
22 v. Goodwin, 208 Mont. 522, 679 P.2d 231, 235 (1984) (because the statute
23 complained of was not applied to the defendant, the defendant was not
24 subjected to any of the alleged constitutional errors he complains of and the
25 issue is therefore not before the Court); State v. Bruns, 213 Mont. 372, 691
26 P.2d 817, 822 (1984) (same).

1 This Court has stated that the standing requirement in Montana is based
2 on the Montana Constitution and embodies the same limitations that are
3 imposed by the federal courts under the “case or controversy” provision of
4 Article III of the United States Constitution. Olson v. Department of
5 Revenue, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986), citing Stewart v.
6 Board of County Comm’rs, 175 Mont. 197, 201, 573 P.2d 184, 187 (1977);
7 see also Roosevelt v. Montana Dep’t of Revenue, 1999 MT 30, ¶¶ 47-49, 293
8 Mont. 240, 975 P.2d 295 (same); Carter v. Montana DOT, 274 Mont. 39, 44,
9 905 P.2d 1102, 1105 (1995) (Nelson, J. concurring) (“Originating in Article
10 VII, section 4 of the Montana Constitution, the standing doctrine limits
11 judicial power to ‘cases at law and equity.’ This Court has interpreted ‘cases
12 at law and equity’ to embody the same limitations as the Article III ‘case or
13 controversy’ provision in the United States Constitution”).

14 In Whitmore v. Arkansas, 495 U.S. 149, 155 (1990), the Court stated
15 that the burden is on the plaintiff to clearly and specifically set forth facts
16 sufficient to satisfy Article III standing requirements, including a showing
17 that the alleged harm is actual or imminent, not conjectural” or
18 “hypothetical.” A threatened injury must be “certainly impending” to
19 constitute injury in fact. Whitmore, 495 U.S. at 158. Whitmore presented the
20 question whether the petitioner, a death row inmate, has standing to challenge
21 the validity of a death sentence imposed on another death row inmate,
22 Simmons, who had elected to forgo his right of appeal to the state supreme
23 court. The United States Supreme Court dismissed the appeal for lack of
24 jurisdiction, holding that Whitmore did not have standing to press an Eighth
25 Amendment objection to Simmons’ conviction and sentence. The Court
26 stated that its threshold inquiry into standing in no way depends on the merits
27 of Whitmore’s allegation of an Eighth Amendment violation (495 U.S. at

1 155); that Whitmore's claim of injury was too speculative to invoke Art. III
2 jurisdiction (495 U.S. at 158); and that a generalized interest of all citizens in
3 constitutional governance was not an adequate basis on which to grant
4 standing. 495 U.S. at 148. Further, the fact that this was a death penalty case
5 did not create an exception to traditional standing doctrine. 495 U.S. at 160.

6 The Ninth Circuit has also rejected standing by third parties. Johns v.
7 County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997) ("[C]onstitutional
8 claims are personal and cannot be asserted vicariously"); United States v.
9 Valdovinos-Valdovinos, 743 F.2d 1436, 1437 (9th Cir. 1984) (a defendant is
10 precluded from raising due process violations allegedly suffered by third
11 parties); United States v. Mitchell, 915 F.2d 521, 526 (9th Cir. 1990) (same).

12 The cases relied upon by Petitioners do not support their standing in
13 this case. Petitioners cite Grossman v. Department of Natural Resources,
14 209 Mont. 427, 682 P.2d 1319, 1325 (1984), for the alleged principle that the
15 Court will recognize standing in "special circumstances, presenting issues of
16 an urgent or emergency nature" (Pet. at 6-7.) The quoted language from
17 Grossman, however, relates to the Court's discussion of its original
18 jurisdiction. In Grossman, the Court recognized a limited exception to
19 traditional standing principles for a taxpayer to question the state
20 constitutional validity of a tax or use of tax monies, where the issue presented
21 directly affects the constitutional validity of the state or its political
22 subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof.
23 682 P.2d at 1325. In the instant case, the Petitioners are alleging a speculative
24 Eighth Amendment violation regarding Montana's lethal injection procedure
25 which will not be applied to any of them. They are not challenging the
26 constitutional validity of the collection of any tax, the issuance of bonds, or
27

1 the use of the proceeds thereof. Therefore, the narrow exception stated in
2 Grossman is not applicable here.

3 Petitioners also rely on Committee for an Effective Judiciary v. State,
4 209 Mont. 105, 679 P.2d 1223 (1984). In Committee for an Effective
5 Judiciary, 679 P.2d at 1225, the Court held that the petitioners had standing
6 under the facts of that case because they were registered voters and the
7 statutes they challenged adversely affected the election process contemplated
8 by the 1972 Montana Constitution. The Court stated that the operation of the
9 statutes challenged denied the petitioners their right to vote for a class of
10 judicial candidates that allegedly is expressly permitted by the Montana
11 Constitution to be candidates for other judicial offices. 679 P.2d at 1227.
12 The Court emphasized that a special interest exists in a registered voter whose
13 vote may be denied by legislation; that the right to vote is a personal and
14 constitutional right; and that a voter who is denied his or her right to vote is
15 sufficiently affected to invoke the judicial power to challenge the validity of
16 the Act. 679 P.2d at 1226-27. Committee for an Effective Judiciary cannot
17 confer standing on the Petitioners in this case. Petitioners here are not
18 alleging the denial of their constitutional right to vote, but are alleging a
19 speculative Eighth Amendment violation regarding Montana's lethal injection
20 procedure which will not be applied to any of them.

21 Petitioners lack standing because they do not and cannot allege a direct
22 personal stake in the outcome of this litigation. They allege a conjectural or
23 hypothetical harm, an alleged harm that is common to all members of the
24 general public. The Petitioners do not and cannot allege that they are subject
25 to a sentence of death. Absent standing, the Petitioners are not entitled to an
26 adjudication of the merits of the petition, either in this Court or in the district
27 court.

1 The Court lacks jurisdiction and the petition must be dismissed with
2 prejudice.

3
4 **II. IF THE COURT FINDS THAT PETITIONERS HAVE**
5 **STANDING, THE COURT SHOULD REFUSE TO ACCEPT**
6 **ORIGINAL JURISDICTION IN THIS CASE.**

7 This Court has an initial obligation to determine the question of
8 whether Petitioners have the requisite standing to bring these claims, and if
9 standing is absent, the Court must dismiss the Petitioners' claims with
10 prejudice. Respondent submits that the standing issue is dispositive and the
11 Court need go no further in resolving this case. However, should the Court
12 agree with Petitioners that an exception to the traditional standing rules
13 applies here, the Court should nevertheless dismiss this Petition because it
14 fails to satisfy the requirements for invocation of the Court's original
jurisdiction.

15 This Court's assumption of original jurisdiction is proper when
16 (1) constitutional issues of major state wide importance are involved; (2) the
17 case involves pure legal questions of statutory and constitutional construction;
18 and (3) urgency and emergency factors exist making the normal appeal
19 process inadequate. Butte-Silver Bow Local Gov't v. State, 235 Mont. 398,
20 401, 768 P.2d 327, 329 (1989).

21 Even assuming arguendo that the first requirement is met, Petitioners
22 have failed to satisfy the second and third requirements. Petitioners do not
23 even address the second requirement that the case must involve pure legal
24 questions of statutory and constitutional construction. (Pet. at 1-3.) Indeed,
25 Petitioners have raised a fact-bound, speculative claim, i.e., that Montana's
26 current method of administering lethal injections subjects death row inmates
27 to a significant risk of suffering cruel and unusual pain during their

1 executions. (Pet. at 7). Petitioners have failed to satisfy the second
2 requirement for acceptance of original jurisdiction. Ingraham v. Ninth
3 Judicial District Court, 2006 MT LEXIS 220, ¶¶ 2-4 (denying original
4 jurisdiction and declining to address factual issues, noting “[w]e are
5 extremely critical of these sorts of eleventh hour petitions”); Gates v.
6 Missoula County Comm’rs, 235 Mont. 261, 262, 766 P.2d 884, 885 (1988)
7 (concluding that the court should not accept jurisdiction because of, inter alia,
8 disputed factual questions); cf. Langford v. State, 951 P.2d at 1361 (accepting
9 jurisdiction of a petition for writ of injunction when the only issues were
10 constitutional challenges to a statutory amendment eliminating hanging as a
11 method of execution).

12 The third requirement is that urgency and emergency factors exist,
13 making the normal appeal process inadequate. To the extent that an
14 emergency exists in this case, however, it is of the Petitioners’ own making.
15 Injunction is an equitable remedy. Boyer v. Karagacin, 178 Mont. 26, 31,
16 582 P.2d 1173, 1177 (1978). Petitioners cannot needlessly wait until 30 days
17 prior to a scheduled execution, and then demand that the Court accept original
18 jurisdiction and stay Dawson’s execution because there is not enough time to
19 develop the factual basis of their claim in the district court prior to the
20 execution date.

21 Petitioners summarily state that their petition is timely because it “has
22 been filed within a month of the United States Supreme Court ruling in Hill v.
23 McDonough [126 S. Ct. 2096, 165 L. Ed. 2d 44].” (Pet. at 27.) Petitioners’
24 assertion makes no sense because Petitioners acknowledge that the
25 constitutionality of lethal injection was not before the Court, and that the issue
26 in Hill was purely procedural: whether an Eighth Amendment claim based on
27 a state’s lethal injection chemical sequence must be brought by an action for a

1 writ of habeas corpus under 28 U.S.C. § 2254, or whether it may proceed as
2 an action for relief under 42 U.S.C. § 1983. Hill, 165 L. Ed. 2d at 49; Pet. at
3 16. Hill itself is of no help to Petitioners in this case because they did not file
4 a § 1983 action. Also, there was no standing issue in Hill because the plaintiff
5 was the inmate facing execution.

6 Lethal injection challenges have been filed in the courts since at least
7 2004. See Cooper v. Rimmer, 2004 U.S. Dist. LEXIS 1624 (N.D. Cal. Feb. 6,
8 2004); Reid v. Johnson, 333 F. Supp 2d 543 (E.D. Va. Sept. 3, 2004);
9 Beardslee v. Woodford, 2005 U.S. Dist. LEXIS 144 (N.D. Cal. Jan. 7, 2005);
10 Taylor v. Crawford, 2006 U.S. Dist. LEXIS 42949 (W.D. Mo. Jun. 26, 2006)
11 (the complaint was filed on June 3, 2005); (Hicks v. Taft, 431 F.3d 916 (6th
12 Cir. 2005); White v. Johnson, 429 F.3d 572 (5th Cir. 2005); Boyd v. Beck,
13 404 F. Supp. 2d 879 (E.D.N.C. 2005). Dawson was sentenced to death in
14 1987. Lethal injection has been the sole method of execution in Montana
15 since March 19, 1997. Petitioners possessed Terry Langford's 1998 death
16 certificate (Exhibit 1 to the Petition) and so they were aware of the three
17 drugs Montana uses in its lethal injection procedure. Petitioner Paul Clark
18 submitted his letter asking for information about Montana's procedure only
19 two business days before filing the lawsuit. Dawson's August 11, 2006
20 execution date was set by Judge Todd on May 15, 2006. Yet Petitioners
21 inexplicably waited until July 11, 2006 to file their lawsuit.

22 Hill does, however, contain discussion that highlights the
23 inappropriateness of Petitioners' request for a stay. A stay of execution is an
24 equitable remedy. It is not available as a matter of right, and equity must be
25 sensitive to the State's strong interest in enforcing its criminal judgments.
26 Both the State and the victims of crime have an important interest in the
27 timely enforcement of a sentence. Hill, 165 L. Ed. 2d at 54. The Court stated

1 that inmates seeking time to challenge the manner in which the State plans to
2 execute them must satisfy all of the requirements for a stay, including a
3 showing of a significant possibility of success on the merits. Citing
4 Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) (preliminary
5 injunction not granted unless the movant, by a clear showing, carries the
6 burden of persuasion). Id.

7 Further, the Court in Hill said that when considering a stay, a court
8 must apply “a strong equitable presumption against the grant of a stay where a
9 claim could have been brought at such a time as to allow consideration of the
10 merits without requiring entry of a stay.” 165 L. Ed. at 54, citing Nelson v.
11 Campbell, 541 U.S. 637, 650 (2004) (Nelson held that a challenge to a
12 surgical procedure preliminary to the lethal injection may proceed under
13 § 1983 when Nelson’s action, if successful, would not necessarily prevent the
14 State from executing him by lethal injection); and Gomez v. United States
15 Dist. Court, 503 U.S. 653, 654 (1992) (per curiam) (noting that the “last-
16 minute nature of an application” or an applicant’s “attempt at manipulation”
17 of the judicial process may be grounds for denial of a stay). Id. See also
18 McKenzie v. Day, 57 F.3d 1461, 1464, 1468 (9th Cir. 1995) (a court may
19 consider the last-minute nature of an application to stay execution in deciding
20 whether to grant equitable relief. McKenzie could and should have raised his
21 Lackey¹ claim at a time when it was capable of being resolved without
22 staying a scheduled execution).

23 The Hill Court noted that after Nelson was decided, a number of federal
24 courts invoked their equitable powers to dismiss suits they saw as speculative
25

26 ¹ See Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., respecting the
27 denial of certiorari).

1 or not timely filed. 165 L. Ed. 2d at 54, citing Hicks v. Taft, 431 F.3d 916
2 (6th Cir. 2005) (denying the inmate's request for a stay of execution pending
3 appeal because the motion was untimely); White v. Johnson, 429 F.3d 572
4 (5th Cir. 2005) (affirming the district court's dismissal of the inmate's action
5 seeking injunctive relief under § 1983, in which he alleged that Texas's
6 method of execution violated the Eighth and Fourteenth Amendments,
7 because he was dilatory in filing his action for equitable relief); Boyd v. Beck,
8 404 F. Supp. 2d 879 (E.D.N.C. 2005) (denying Boyd's request for a
9 preliminary injunction to bar his execution until the merits of his claims
10 challenging the lethal injection protocol can be heard and determined because
11 his claims were speculative and because his challenge was untimely).

12 Following the decision in Hill, the Court in Reese v. Livingston,
13 ____ F.3d ____, 2006 U.S. App. LEXIS 15166 at *6 (5th Cir. June 20, 2006)
14 denied Reese's request for a stay of execution as untimely, stating that as it
15 read Hill, "a plaintiff cannot wait until a stay must be granted to enable it to
16 develop facts and take the case to trial--not when there is no satisfactory
17 explanation for the delay."

18 Petitioners have failed to satisfactorily explain why they waited until 30
19 days prior to the execution to file their lawsuit. They have been dilatory.
20 Therefore, Petitioners have not complied with the third requirement for
21 invoking the Court's original jurisdiction.

22 The Court's assumption of original jurisdiction is not proper in this
23 case.

1 **III. PETITIONERS ARE NOT ENTITLED TO A PRELIMINARY**
2 **INJUNCTION BECAUSE THEY HAVE NOT PRESENTED A**
3 **SUFFICIENT CASE TO WARRANT SUCH AN**
4 **EXTRAORDINARY REMEDY.**

4 As discussed above, Petitioners have no standing to bring this action,
5 and the assumption of the Court's original jurisdiction would not be proper.
6 The Petition should be dismissed on those grounds, alone. However, even if
7 the Court desires to examine the merits, it should refuse to issue a preliminary
8 injunction to stop the scheduled execution of David Dawson. The Petition
9 must be dismissed with prejudice.

10 The burden is on the Petitioners to show that they satisfy the
11 requirements for a preliminary injunction. Porter v. K & S Partnership,
12 192 Mont. 175, 182, 627 P.2d 836, 839 (1981). "Injunctions are
13 extraordinary remedies, granted with caution, and in the exercise of sound
14 judicial discretion." State ex rel. Blackwood v. Lutes, 142 Mont. 29, 34,
15 381 P.2d 479, 482 (1963). Petitioners must show that a "sufficient case has
16 been made out" to warrant the issuance of such an extraordinary remedy.
17 Sweet Farms, LTD v. County Board of Comm'rs, 2000 MT 147, ¶ 28,
18 300 Mont. 66, 2 P.3d 825. See also Mont. Code Ann. § 27-19-201(1) (a
19 preliminary injunction may be granted when it appears that the applicant is
20 "entitled to the relief demanded").

21 Petitioners have failed to meet their burden for the Court's issuance of
22 a preliminary injunction. They rely exclusively on affidavits and evidence
23 from other cases from other states. Respondents, on the other hand, have
24 affirmatively established that the likelihood of a condemned inmate in
25 Montana suffering excruciating pain from the manner in which Montana
26 intends to carry out the sentence is so remote as to be nonexistent. Petitioners
27 then, without presenting any evidence whatsoever, engage in pure speculation

1 that Montana's lethal injection protocol will not be executed as written.
2 Respondents, on the other hand, have affirmatively shown that, based on the
3 two prior executions in Montana, there is no foreseeable probability that
4 Montana will not carry out a condemned inmate's execution according to its
5 lethal injection protocol. Petitioners have failed to sustain their burden to
6 demonstrate that they are entitled to the equitable relief they demand. Lethal
7 injection as conducted under Montana's protocol does not violate the Eighth
8 Amendment. Their request for injunctive relief must be denied.

9 Only the "unnecessary and wanton infliction of pain" implicates the
10 Eighth Amendment. Wilson v. Seiter, 501 U.S. 294, 297 (1991), quoting
11 Gregg v. Georgia, 428 U.S. 153, 173 (1976). A condemned inmate is not
12 entitled to a painless execution, but only to one free of purposeful cruelty.
13 Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994), citing Louisiana ex rel.
14 Francis v. Resweber, 329 U.S. 459, 464 (1947). Further, "the risk of accident
15 cannot and need not be eliminated from the execution process in order to
16 survive constitutional review." Campbell, 18 F.3d at 687; Resweber,
17 329 U.S. at 462 ("Accidents happen for which no man is to blame"). See also
18 McKenzie v. Day, 57 F.3d at 1469 ("The state has broad discretion to
19 determine the procedures for conducting an execution; we are aware of no
20 authority for the proposition that a prisoner is entitled, for example, to have a
21 lethal injection administered by a physician. Montana's procedures are
22 reasonably calculated to ensure a swift, painless death and are therefore
23 immune from constitutional attack" citing Campbell, 18 F.3d at 687).

24 As demonstrated by the attached declaration of Dr. Mark Dershwitz,
25 Exhibit D, who has examined Montana's current lethal injection protocol,
26 there is no foreseeable probability that, under Montana's current protocol,
27 Dawson's execution will involve "torture or lingering death." See In re

1 Kemmler, 136 U.S. 436, 447 (1890). On the contrary, it is Dr. Dershwitz's
2 opinion, "to a reasonable degree of medical certainty, that the application of
3 Montana's protocol for execution by lethal injection will result in the rapid
4 and painless death of the condemned inmate." (Dershwitz Decl. at ¶ 28.)

5 Dr. Dershwitz is a board certified anesthesiologist, associated with the
6 University of Massachusetts. Dr. Dershwitz also has a doctorate in
7 pharmacology. He has performed extensive research and written numerous
8 review articles and research papers on the use of anesthetics and he regularly
9 practices medicine in that capacity. His research includes the study of the
10 pharmacokinetics and pharmacodynamics of drugs. Pharmacokinetics is the
11 study of the time course of medications in the body, and Pharmacodynamics
12 is the study of the effect of medications on the body. Dr. Dershwitz has
13 testified as an expert witness in court on 13 occasions, and has given 22
14 depositions as an expert witness. (Dershwitz Decl., at ¶¶ 1-3.)

15 After hearing the in-court testimony of Dr. Dershwitz, the Court in
16 Reid v. Johnson, 333 F. Supp. 2d 543, 547 n. 7 (E.D. Virginia 2004)
17 concluded that Dr. Dershwitz's clinical and academic experience with the
18 administration of sodium thiopental and pancuronium bromide made him a
19 "convincing witness." Further, Dr. Heath, whose declaration from a death
20 penalty case in California is referenced in the Petition, has conceded that with
21 respect to the pharmacokinetics and pharmacodynamics of sodium thiopental,
22 he defers to Dr. Dershwitz's expertise. Id.

23 Dr. Dershwitz examined Montana's current lethal injection protocol
24 (attached to the Department's response to Rep. Clark's letter, Exhibit C), in
25 which death is caused by the sequential injection of thiopental sodium 3 g,
26 pancuronium bromide 100 mg, and potassium chloride 140 mEq. (Dershwitz
27 Decl. at ¶¶ 5-6.) He performed a detailed pharmacokinetic and

1 pharmacodynamic analysis of the effects of a 3-g dose of thiopental sodium
2 given to an average man weighing about 176 pounds. It is Dr. Dershwitz's
3 opinion, to a reasonable degree of medical certainty, that a condemned inmate
4 who is administered a 3-g dose of thiopental sodium will be rendered
5 unconscious, and not experience pain, for the period of time necessary to
6 complete the execution. (Dershwitz Decl. at ¶ 7.) Dr. Dershwitz then
7 quantitated and discussed the "minuscule probability" that the person could
8 be conscious during the period of time that elapses between the administration
9 of the thiopental sodium and the person's death. (Dershwitz Decl. at ¶ 7-9.)
10 Even in persons of greater size or with inherent drug tolerance, the listed
11 probabilities would not be altered in a meaningful way. (Dershwitz Decl. at
12 ¶ 7.)

13 It is Dr. Dershwitz's opinion, to a reasonable degree of medical
14 certainty, that the dose of thiopental sodium used by Montana would render
15 most people unconscious within 60 seconds from the time of the start of
16 administration. By the time the entire 3-g dose of thiopental sodium solution
17 is injected, over 99.99999999 % of the population would be unconscious.
18 Further, this dose of thiopental sodium will cause virtually all persons to stop
19 breathing within a minute of drug administration. Thus, virtually every
20 person given a 3-g dose of thiopental sodium will have stopped breathing
21 prior to the administration of the pancuronium bromide. Even in the absence
22 of the administration of pancuronium bromide and potassium chloride, the
23 administration of a 3-g dose of thiopental sodium by itself would be lethal in
24 almost everyone. (Dershwitz Decl. at ¶10.)

25 There is approximately a 0.000003 % probability that a condemned
26 inmate given a 3-g dose of thiopental sodium would be conscious, and able to
27 experience pain, after a period of five minutes; an approximately 0.00012 %

1 probability after ten minutes; an approximately 0.0014 % probability after
2 thirty minutes; an approximately 0.029 % probability after sixty minutes.
3 (Dershwitz Decl. at ¶¶ 11-14.) Most people would be rendered unconscious
4 for a period of approximately 4.7 hours, assuming they continued to breathe.
5 (Dershwitz Decl. at ¶ 15.) As such, there is an exceedingly small risk that a
6 condemned inmate under the circumstances of Montana's execution protocol
7 would experience any pain associated with the administration of lethal doses
8 of pancuronium bromide and potassium chloride." (Dershwitz Decl. at ¶ 16.)

9 The Petitioners rely on an article in *The Lancet* in asserting that the
10 likelihood that an inmate will be conscious during his execution is significant.
11 (Pet. at 13.) *The Lancet* article authors cited postmortem blood
12 concentrations of thiopental obtained at autopsy, in some states other than
13 Montana, that they say demonstrated that a significant fraction of executed
14 inmates were conscious at the time the pancuronium bromide and potassium
15 chloride were administered. Dr. Dershwitz states that the authors of *The*
16 *Lancet* article, none of whom was a pharmacologist or toxicologist,
17 misinterpreted the postmortem toxicology reports. It is crucial that the blood
18 sample be obtained within a short time of the inmate's death. (Dershwitz
19 Decl. at ¶ 18.) Samples taken from Michael Ross's execution in Connecticut
20 on May 13, 2005, shortly after the time of death and at the time of the autopsy
21 seven hours later, strongly support the conclusion that post-mortem
22 redistribution occurs with thiopental, and it occurs in the opposite direction
23 from many of the medications previously reported. "[T]hese results tend to
24 refute any conclusions that low concentrations of thiopental from samples
25 taken during autopsies such as those cited in *The Lancet*, were the result of
26 improperly performed execution processes." (Dershwitz Decl. at ¶ 19.) See
27 also Reid v. Johnson, 333 F. Supp. 2d at 548 (concluding that the thiopental

1 level found in the post-mortem toxicology reports from other states are not
2 indicative of the consciousness of that inmate during his execution). Properly
3 obtained toxicological blood samples were obtained following recent
4 executions in Connecticut, Maryland, and North Carolina, and “every one of
5 those has been consistent with a very high probability of unconsciousness at
6 the time of the inmate’s death.” (Dershwitz Decl. at ¶ 20.) Dr. Dershwitz
7 notes that even Dr. Heath has criticized the conclusions of *The Lancet* article.
8 (Dershwitz Decl. at ¶ 21.)

9 Dr. Dershwitz also notes that in paragraph 16 of Dr. Heath’s
10 declaration in the California death penalty case, Dr. Heath concedes that
11 “When successfully delivered into the circulation in sufficient quantities,
12 sodium thiopental causes sufficient depression of the nervous system to
13 permit excruciatingly painful procedures to be performed without causing
14 discomfort or distress.” (Dershwitz Decl. at ¶ 23.)

15 Petitioners also assert that Montana’s lethal injection protocol is not an
16 acceptable euthanasia agent for animals. (Pet. at 13.) This assertion has been
17 made in many states and it prompted the American Veterinary Medical
18 Association (AVMA) to issue a press release that stated: “The *2000 Report of*
19 *the AVMA Panel on Euthanasia* has been widely misinterpreted in the media,
20 particularly how it relates to capital punishment. Capital punishment
21 opponents and the media have attempted to use the AVMA report to infer that
22 the AVMA deems this procedure an inhumane method of nonhuman
23 euthanasia. When referring to the *2000 Report of the AVMA Panel on*
24 *Euthanasia*, reporters are strongly encouraged to contact the AVMA to
25 ensure the association’s position is stated correctly.” (Dershwitz Decl. at
26 22.) The disclaimer can be found on the AVMA’s Web Site at
27 http://www.avma.org/issues/animal_welfare/euthanasia.pdf.

1 Dr. Dershwitz disagrees with paragraph 37 of Dr. Heath's declaration
2 in the California case where he argues that the inclusion of pancuronium
3 bromide in the protocol "serves no rational or legitimate purpose."
4 Dr. Dershwitz states that "the administration of a large dose of potassium
5 chloride will, in addition to stopping the heart, cause widespread stimulation
6 of nerve and muscle tissue throughout the body. This may lead to generalized
7 contraction of skeletal muscles that would be manifested as involuntary
8 jerking movements. Such movements, which may be misperceived by lay
9 witnesses as consistent with suffering on the part of the inmate, will be
10 substantially mitigated by the prior administration of pancuronium bromide."
11 (Dershwitz Decl. at ¶ 25.)

12 Without presenting any evidence whatsoever to support their assertion,
13 Petitioners summarily state that "[b]ased on prior executions in Montana", it
14 is likely that Montana's lethal injection procedure subjects inmates to an
15 unconstitutional risk for pain and suffering." (Pet. at 19.) On the contrary,
16 the execution logs from the McKenzie and Langford executions do not
17 indicate that there was any error in the administration of the protocol. See
18 Affidavit of Cheryl Coughlin Bolton, which contains the execution logs for
19 the McKenzie and Langford executions, attached hereto as Exhibit E.
20 Further, Dawson's recent filing with this Court stated that a witness at
21 McKenzie's execution told Dawson that "Mr. McKenzie seemed to be very
22 peaceful." (Mot. of David T. Dawson to Continue His Execution and in
23 Response to the Petition Filed by Ron Waterman, et al., at 3.) There is no
24 reason to believe, and Petitioners have presented none, that the speculative
25 errors described by Petitioners are likely to come to pass in Montana. See
26 Resweber, 329 U.S. at 462 ("As nothing has been brought to our attention to
27

1 suggest the contrary, we must and do assume that the state officials carried
2 out their duties under the death warrant in a careful and humane manner”).

3 The cases relied upon by Petitioners, Taylor v. Crawford and Nooner v.
4 Davis, which involve a lack of written protocol, and witness observations,
5 execution logs, and media reports which indicated possible problems with the
6 actual practice of prior executions in that state, are not applicable to Montana.
7 Montana has a written lethal injection protocol, and there is no evidence of
8 any error occurring in the actual practice of prior executions in Montana.

9 Dr. Dershwitz’s declaration confirms that the likelihood of a
10 condemned inmate in Montana suffering excruciating pain from the manner
11 in which Montana intends to carry out the sentence is so remote as to be
12 nonexistent. Petitioners’ argument then shifts to pure speculation that
13 Montana’s lethal injection protocol will not be implemented as written.
14 However, there is no foreseeable probability that Montana will not carry out a
15 condemned inmate’s execution according to its lethal injection protocol.
16 Petitioners have failed to sustain their burden to demonstrate that there is a
17 substantial risk that a condemned inmate in Montana will be subjected to the
18 unnecessary and wanton infliction of pain. Lethal injection as conducted
19 under Montana’s protocol does not violate the Eighth Amendment.

20 21 CONCLUSION

22 The petition for injunctive relief must be denied with prejudice.
23
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27

1 Respectfully submitted this 24th day of July, 2006.

2 MIKE McGRATH
3 Montana Attorney General
4 C. MARK FOWLER
5 Assistant Attorney General
6 215 North Sanders
7 P.O. Box 201401
8 Helena, MT 59620-1401

9 By: Pamela P. Collins
10 PAMELA P. COLLINS
11 Assistant Attorney General
12

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that I caused a true and accurate copy of the foregoing
15 Response to Motion for Injunctive Relief to be mailed to:

16 Mr. Ronald F. Waterman
17 Ms. Julie A. Johnson
18 Gough, Shanahan, Johnson
19 & Waterman
20 P.O. Box 1715
21 Helena, MT 59624

22 Mr. David Dawson
23 A.O. # 25284
24 700 Conley Lake Road
25 Deer Lodge, MT 59722

26 Mr. Edmund F. Sheehy, Jr.
27 Cannon & Sheehy
P.O. Box 5717
Helena, MT 59604-5717

Ms. Diana Koch
Chief Legal Counsel
Department of Corrections
1539 Eleventh Avenue
Helena, MT 59620-1301

DATED: July 24, 2006 Pamela P. Collins

1 **CERTIFICATE OF COMPLIANCE**

2 Pursuant to Rule 17(b) of the Montana Rules of Appellate Procedure, I certify
3 that this Response to Petition for Injunctive Relief is printed with a
4 proportionately spaced Times New Roman text typeface of 14 points; and the
5 word count as calculated by Microsoft Word for Windows is not more than
6 7,000 words, not averaging more than 280 words per page, excluding
7 certificate of service and certificate of compliance.

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9 _____
10 PAMELA P. COLLINS
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1 IN THE SUPREME COURT OF THE STATE OF MONTANA

2 No. OP 06-0492

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

13 Petitioners,

14 v.

15 STATE OF MONTANA; DEPARTMENT OF CORRECTIONS;
16 DIRECTOR MIKE FERRITER; WARDEN MIKE MAHONEY;
17 ATTORNEY GENERAL MIKE McGRATH; JOHN DOES 1-10,

18 Defendant and Appellant.

19 LIST OF EXHIBITS

- 20 Exhibit A Dawson v. Mahoney, 2006 U.S. App. LEXIS 14145,
21 ____ F.3d ____ (9th Cir. June 8, 2006).
- 22 Exhibit B. Dawson v. Mahoney, (9th Cir. July 10, 2006), Order
23 denying motion for reconsideration of June 8, 2006
24 Order
- 25 Exhibit C Affidavit of Mike Ferriter, Director of the
26 Department of Corrections, and attached July 13,
27 2006 response of the Department of Corrections to
Rep. Clark's letter.
- 28 Exhibit D. Declaration of Dr. Mark Dershwitz.
- 29 Exhibit E Affidavit of Cheryl Coughlin Bolton which includes
the execution logs for the McKenzie and Langford
executions.

EXHIBIT A

RECEIVED

JUN 13 2006

ATTORNEY GENERALS OFFICE
HELENA, MONTANA
FOR PUBLICATION

FILED

JUN - 8 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID THOMAS DAWSON,

Petitioner-Appellant,

v.

MICHAEL MAHONEY, Warden,

Respondent-Appellee.

No. 06-99004

D.C. No. CV-89-00246-JDS
Montana (Billings)

ORDER

Before: CANBY, T.G. NELSON, and KLEINFELD, Circuit Judges

Montana state prisoner David Thomas Dawson was convicted and sentenced to death in 1987 for three counts of deliberate homicide. In 2004, Mr. Dawson moved to discharge his federal habeas counsel, to waive further habeas proceedings, and for the appointment of an independent expert to determine his competency. The federal district court appointed two independent mental health experts to evaluate Mr. Dawson and ordered the parties to provide all relevant materials to those experts. After considering the experts' reports, the federal district court found that Mr. Dawson is competent to waive further proceedings and has made that decision knowingly, intelligently, and voluntarily. On December 12, 2005, the federal district court granted Mr. Dawson's motion to

discharge his habeas counsel, Kathryn Ross and William Hooks, and granted his motion to waive further habeas proceedings. The federal district court later denied habeas counsel's motion for a certificate of appealability (COA).

On December 15, 2005, the Montana district court conducted a competency hearing at which Mr. Dawson appeared by video. After an extensive colloquy with Mr. Dawson, the Montana district court found that Mr. Dawson is competent and has made a knowing, intelligent, and voluntary decision to waive further habeas proceedings. On April 11, 2006, the Montana Supreme Court granted Mr. Dawson's motion to dismiss counsel Ross and Hooks and granted Mr. Dawson's motion to dismiss all appeals. On May 15, 2006, the Montana district court set an execution date for August 11, 2006.¹

On December 27, 2005, habeas counsel filed a notice of appeal in federal district court. In this Court, habeas counsel filed "Habeas Counsels' Motion For Certificate of Appealability" (COA) and "Petitioner's, Through Habeas Counsel, Motion For Stay of Execution." Mr. Dawson opposes "former counsel's" COA and stay motions, as does Respondent.

An appeal may not be taken from the final order in a habeas corpus

¹ We take judicial notice of the Montana state court orders and proceedings. See Fed. R. Evid. 201(b),(c); see also *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

proceeding unless a COA is granted. *See* 28 U.S.C. § 2253(c)(1); *see also* 28 U.S.C. § 2253(c)(2) (a COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (a substantial showing of the denial of a constitutional right includes a showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further), citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983).

Both the federal district court and the Montana state courts found Mr. Dawson competent and granted his motions to discharge habeas counsel Ross and Hooks. Habeas counsel do not contend that Mr. Dawson has a mental disorder or mental defect, nor do they dispute that Mr. Dawson has no history of mental illness.² Counsel, relying on *Comer v. Stewart*, 215 F.3d 910 (9th Cir. 2000), argue instead that Mr. Dawson's decision to waive further proceedings is involuntary due to the combination of the harsh conditions on Montana's death

² *See Rees v. Peyton*, 384 U.S. 312, 314 (1966) (the test for competency to waive further proceedings is "whether [petitioner] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises").

row and his reaction to the suicides of two other inmates on death row. *See Comer*, 215 F.3d at 917 (in addition to competency, the district court must also determine the separate question of whether petitioner's decision is voluntary); *see id.* at 918 ("The issue is whether Mr. Comer's conditions of confinement constitute punishment so harsh that he has been forced to abandon a natural desire to live"). Mr. Dawson, however, in state and federal court has expressly disavowed these explanations for his decision to waive further habeas proceedings. *See, e.g.*, December 15, 2005 Montana district court RT at 19-25. Because there is no suggestion that Mr. Dawson is not competent, the state court did not err in accepting Mr. Dawson's testimony that his decision to waive further proceedings is not based on intolerable prison conditions nor on the suicides of two inmates on death row.

Because there was not a shred of evidence proffered in federal district court or in the Montana state courts (or in this Court) that Mr. Dawson is not competent to discharge his counsel, no reasonable jurist would debate that the district court did not err when it granted Mr. Dawson's motions to discharge his habeas counsel and to waive further proceedings. *See Demosthenes v. Baal*, 495 U.S. 731, 736 (1990) ("In the absence of any 'meaningful evidence' of incompetency, . . . the District Court correctly denied petitioners' motion for a further evidentiary hearing

on the question of Baal's competence to waive his right to proceed"); *see also* *Dennis ex. rel. Butko v. Budge*, 378 F.3d 880, 891 (9th Cir. 2004); *Wells By and Through Kehne v. Arave*, 18 F.3d 656, 658 (9th Cir. 1994).

Because Mr. Dawson has competently discharged his habeas counsel, they lack standing to appeal on Mr. Dawson's behalf. We accordingly dismiss habeas counsel's motions for a COA and for a stay of execution. *See Baal*, 495 U.S. at 737 (stay improper absent substantial grounds upon which relief might be granted), citing *Barefoot*, 463 U.S. at 895.

The Court has also received motions for clarification of status and to submit further briefing from Assistant Federal Defender Donahoe, who was appointed as special counsel in the district court to assist Mr. Dawson. Mr. Dawson, however, has informed this Court that Mr. Donahoe no longer represents Mr. Dawson. Accordingly, we dismiss Mr. Donahoe's motions for lack of standing.

Any motion for reconsideration must be filed by June 19, 2006. Any response is due June 26, 2006. Any reply is due June 30, 2006.

EXHIBIT B

RECEIVED

JUL 11 2006

CLERK OF COURT
HELENA, MONTANA

UNITED STATES COURT OF APPEALS

FILED

JUL 10 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID THOMAS DAWSON,

Petitioner-Appellant,

v.

MICHAEL MAHONEY, Warden,

Respondent-Appellee.

No. 06-99004

D.C. No. CV-89-00246-JDS
Montana (Billings)

ORDER

Before: CANBY, T.G. NELSON, and KLEINFELD, Circuit Judges

The motion filed by former habeas counsel, for reconsideration of our
June 8, 2006 order, is denied.

EXHIBIT C

1 IN THE SUPREME COURT OF THE STATE OF MONTANA

2 No. OP 06-0492

3 MONTANA ASSOCIATION OF CRIMINAL
4 DEFENSE LAWYERS; AMERICAL CIVIL LIBERTIES
5 UNION OF MONTANA; MONTANA ASSOCIATION
6 OF CHURCHES; MONTANA CATHOLIC CONFERENCE;
7 GORDON BENNETT; JOHN C. SHEEHY; SENATORS
8 BRENT CROMLEY, STEVE GALLUS, DAN HARRINGTON,
9 DON RYAN AND DAN WEINBERG; REPRESENTATIVES
10 NORMA BIXBY, PAUL CLARK, GAIL GUTSCHE, JOEY
11 JAYNE, AND JEANNE WINDHAM; MARIETTA JAEGER
12 LANE; EVE MALO,

13 Petitioners,

14 v.

15 STATE OF MONTANA; DEPARTMENT OF CORRECTIONS;
16 DIRECTOR MIKE FERRITER; WARDEN MIKE MAHONEY;
17 ATTORNEY GENERAL MIKE McGRATH; JOHN DOES 1-10,

18 Respondents.

19 **AFFIDAVIT OF MIKE FERRITER**

20 STATE OF MONTANA)
21 : ss.
22 County of Lewis and Clark)

23 I, Mike Ferriter, being first duly sworn upon my oath, depose and state
24 as follows:

25 1. This Affidavit is made in support of the Respondents in the
26 above-entitled action.

27 2. This Affidavit is made of my own personal knowledge except
where stated on information and belief, as to those matters, I believe them to
be true. If called as a witness, I would competently testify thereto.

3. I am the Director for the Montana Department of Corrections
(DOC). I have served in that capacity since July 1, 2006. Before that, I

1 served as the Administrator of the Adult Community Corrections Division
2 with the DOC since 1995.

3 4. On or about Wednesday July 5 or Thursday morning on the 6th,
4 Representative Paul Clark contacted me by phone and informed me that he
5 would be sending a letter to me asking for copies of the lethal injection
6 protocols of the DOC.

7 5. On Thursday, July 6, 2006, my e-mail in-box indicated receipt of
8 an e-mail and attachment at 4:18 p.m. from Rep. Clark. I opened and read the
9 e-mail and attachment that afternoon at about 5 p.m. In this e-mail, Rep.
10 Clark stated that the "letter I discussed with you on the phone is attached,"
11 and "I hope for a timely response to my request."

12 6. After reviewing Rep. Clark's letter, I decided to direct that a
13 response for my signature be drafted by the person(s) within the DOC most
14 appropriate to handle such a request. On Friday, July 7 at 8:30 a.m., I
15 forwarded Rep. Clark's letter to DOC Chief Legal Counsel, Diana Koch, and
16 directed that she prepare a response.

17 7. On Thursday, July 13, Diana Koch's draft response letter was
18 finalized for my signature. Because I was on vacation and away from the
19 office at the time, one of our employees read the contents of the draft over the
20 phone to me. I authorized the acting director to sign the letter under my name
21 by proxy. A copy of my July 13 letter to Rep. Clark is attached to this
22 Affidavit.

23 8. Further your affiant sayeth not.

24 I hereby affirm under penalty of perjury that the assertions of this
25 Affidavit are true to the best of my knowledge.

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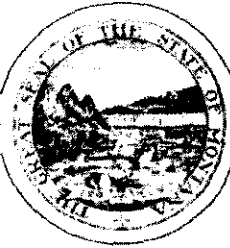
DATED this 21st day of July, 2006

By: Mike Ferriter
MIKE FERRITER

SUBSCRIBED and SWORN to before me this 21st day of July, 2006.

Teddy J. Ward
Teddy J. Ward
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires November 7, 2006

DEPARTMENT OF CORRECTIONS



BRIAN SCHWEITZER, GOVERNOR

1539 H " AVENUE

STATE OF MONTANA

(406) 444-3930
FAX (406) 444-4920

PO BOX 201301
HELENA, MONTANA 59620-1301

July 13, 2006

Representative Paul Clark
20 Fox Lane
Trout Creek, MT 59874

Dear Rep. Clark:

In your letter of July 6, you requested information from the Montana Department of Corrections concerning procedures the department uses to carry out a court-ordered execution by lethal injection. This is the response to your inquiry.

1. **Question:** You asked whether and how the lethal injection protocol ensures that the personnel responsible for anesthesia are appropriately trained and qualified.

Answer: Mont. Code Ann. § 46-19-103 (6) (a) states: "An execution must be performed by a person selected by the warden and trained to administer a lethal injection. The person administering the injection need not be a physician, registered nurse, or licensed practical nurse licensed or registered under the laws of this or any other state." Further, Mont. Code Ann. § 46-19-103 (5) states, in pertinent part: "The identity of the executioner must remain anonymous. Facts pertaining to the selection and training of the executioner **must remain confidential.**" (emphasis added). The department, therefore, cannot give you details about the qualifications or training of the person who will carry out the execution without violating the statute.

2. **Question:** You asked whether and how the lethal injection protocol employs adequate standards for administering injections and monitoring consciousness.

Answer: The department employs standard medically accepted practices for administering injections. The department works in

conjunction with a registered pharmacist to mix and prepare the drugs utilized in the execution process. The drugs are administered in a lethal dose, sequentially, with intervening saline flushes over a period of approximately five minutes. This is a protocol utilized by the Texas DOC in numerous executions carried out by that department since 1977. This department monitors consciousness through visual observation by Warden Mahoney, the Powell County coroner, and a medically trained person.

3. **Question:** You asked what chemicals were used in lethal injections and in what doses.

Answer:

- a. The first drug used is sodium thiopental (sodium pentothal); 3 grams are administered. Sodium thiopental is an "ultra fast-acting barbiturate" that satisfies the mandates of Mont. Code Ann. § 46-19-103.
 - b. Second, pancuronium bromide (Pavulon) is administered in a dose of 100 mg. Pavulon is the "chemical paralytic agent" mandated in Mont. Code Ann. § 46-19-103.
 - c. Lastly, potassium chloride is administered in a quantity of 140 mEq (milliequivalents).
 - d. Please see attached medical protocol for additional information.
4. **Question:** You asked whether and how the current lethal injection protocol employs adequate standards for measuring and understanding the reaction to pain.

Answer:

- a. Montana's lethal injection protocol calls for a dosage of 3 grams of the first drug, sodium thiopental. Dr. Mark Dershwitz, a board certified anesthesiologist, associated with the University of Massachusetts, who has a doctorate in pharmacology, and has performed extensive research in the area of the pharmacokinetics and pharmacodynamics of intravenous anesthetic agents, testified at a hearing in federal district court in Virginia that 2 grams of

sodium thiopental is approximately five to eight times the dosage that would be used to render a 176-pound individual unconscious for general surgery. Within moments after the injection of the sodium thiopental, the inmate will be rendered unconscious. The condemned inmate will slip into unconsciousness in the same manner as that experienced by a general surgery patient. The probability of the inmate regaining consciousness within the ensuing 10 minutes is 3/1000 of 1 percent. The probability of the inmate regaining consciousness in 15 minutes is 6/1000 of 1 percent. The probability of the inmate regaining consciousness within 20 minutes never rises above 1/100 of 1 percent. Flushing of the IV line prevents the sodium thiopental and the second and third drugs from interacting outside the body of the inmate. See Reid v. Johnson, 333 F. Supp. 2d 543, 546-47 and n. 7 (E.D. Virginia 2004). The U.S. District Court in that case found that Dr. Dershwitz's clinical and academic experience with the administration of sodium thiopental and pancuronium made him a "convincing witness."

- b. The department monitors any pain reaction through visual observation by Warden Mahoney, the Powell County Coroner, and a medically trained person. In the last two executions the department carried out using lethal injection, witnesses were in extremely close proximity to the condemned inmate. No witness reported any visual manifestation of pain or for that matter, consciousness of the inmate after the process started. Warden Mahoney said he observed no such manifestations.

5. Question: You asked whether and how the lethal injection protocol makes adequate efforts to identify and address contingencies that may arise during executions.

Answer:

- a. The department has contingencies in place to ensure an intravenous line can be inserted in the inmate, that the drugs continue into the intravenous line, and that the quantities of drugs are adequately measured.
- b. Please see attached medical protocol for additional information.

6. Question: You asked if today's lethal injection protocols are the same as those used when the state executed Duncan McKenzie and Terry Langford.

Answer: No. The department has changed the dosages of the chemicals it expects to use in this execution after consultation with corrections colleagues in other states that carry out executions far more frequently than Montana. This was not done in response to anything related to the two previous lethal-injection executions in Montana.

We hope this answers your questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Ferriter", written over a horizontal line.

Mike Ferriter
Director

Att.

TM 01/05.12 Execution by Lethal Injection

- A. At least one hour prior to the execution the Executioners and Setup Officer shall be escorted into the Execution Chamber by the Deputy Warden or Designee.
- B. The Executioner shall complete a pre-execution inventory and equipment check (reference TM 01/05.08); and
- C. The Medical Officer shall prepare the IV set-up.
- D. IV Set-Up Procedure
 - 1. The connector of Administration Set (Braun CSP 152VSL or equivalent) shall be inserted into the bag of Normal Saline IV solution.
 - 2. The flow of solution shall be controlled by the Flo-Trol clamp.
 - 3. A 35-inch extension set (Braun SCE 33SL or equivalent) shall be connected to the needle adapter of the Administration set.
 - 4. All connections should then be taped to ensure they do not come apart during the procedure.
 - 5. The tubing shall be cleared of air by removing the protector from the needle adapter and opening the Flo-Trol clamp letting the tube fill with solution.
 - 6. The Flo-Trol clamp shall then be closed and the protective cap over the needle adapter replaced.
 - 7. Steps 1 through 7 shall be repeated for the second set-up.
- C. Preparation of Syringes
 - 1. Six hours prior to the execution the pharmacist shall begin to prepare the necessary syringes except the Sodium Pentothal for the lethal injection. Two hours prior to the execution, on command of the Deputy Warden, the Pharmacist will prepare the Sodium Pentothal.
 - 2. The pharmacist shall prepare the syringes as follows, witnessed by the Deputy Warden and/or the Infirmary designee:
 - a. One set of syringes for the lethal injection;
 - b. One backup set of syringes for the lethal injection.
 - 3. The syringes containing the drugs shall be prepared and loaded in the following order:

- a. Two 60-cc syringes, each containing 70 milliequivalents of Potassium Chloride in 35 cc. (label syringes "3");
- b. One 60-cc syringe, containing 100 milligrams of Pavulon in 50 cc. (label syringe "2");
- c. One 60-cc syringe containing 3 grams of Sodium Pentothal (contents of 1 gram kits X3)
- d. The Sodium Pentothal, being a Federally controlled drug, shall be prepared last (within two hours of the execution), when it appears that it shall actually be used and as directed by the Deputy Warden (label syringe "1"); and
- e. One extra set of syringes are to be prepared and labeled as "stand-bys", in the event one of the others is dropped or otherwise becomes inoperative in handling during the injection procedure.

D. Injection Procedure

1. The angiocath shall be inserted into the vein of the left arm.
2. The inner needle is then withdrawn and the needle adapter is placed on the angiocath.
3. The flow of normal saline shall be started and administered at a slow rate, TKO (to keep open).
4. Step 1 through 3 shall be repeated for the right arm.
5. The administration sets shall be running at a slow rate of flow, TKO, and ready for insertion of the syringes containing the injection agents.
6. Both set-ups shall be observed to ensure they are both patent and functioning properly.
7. No further action is necessary at this time.

E. Lethal Injection Procedure

1. When all preliminaries are completed and when the Warden is ready to proceed with the execution, he shall signal the Executioner.
2. The execution procedures shall then be followed with the Executioner administering a continuous intravenous injection simultaneously.
 - a. The flow of the normal saline into the arm shall be cut off utilizing the Flo-Trol clamp.

- b. The clamp should be moved as close to the "Y" site as possible.
- c. Syringe #1 (Sodium Pentothal) shall be inserted into the "Y" site and the injection shall commence.
 - (1) A slow, even flow of the injection shall be maintained with only a minimum amount of force applied to the syringe plunger.
 - (2) When the entire contents of the syringe have been injected syringe #1 shall be removed from the "Y" site.
- d. The Flo-Trol clamp should then be opened fully and allowed to run for 15 seconds.
- e. The Flo-Trol clamps shall then be closed.
- f. Syringe #2 shall be inserted into the "Y" site;
 - (1) The entire contents shall be injected with slow even pressure.
 - (2) After syringe #2 has been given, the Flo-Trol clamp should be opened fully for 15 seconds.
- g. The Flo-Trol clamp should be closed and the first #3 syringe (KC1) shall be inserted.
 - (1) The entire contents shall be injected with a slow, even pressure.
 - (2) The second #3 syringe shall then be repeated until death has been pronounced.
- h. Upon completion of injections, or at such earlier time as may be appropriate, the medically trained person shall examine the inmate to pronounce death.
- i. If at any time one of the lines become blocked and the flow ceases the lethal injection shall be injected into the line which is not blocked.

TM 01/05.08 Equipment Check/Inventory: Lethal Injection

A. Responsibility

1. The Director or Nursing or Designee shall conduct a check of equipment and materials necessary to conduct the execution.
2. The inventory shall be conducted 72 hours prior to the execution.

B. Inventory

1. An inventory checklist shall be completed, dated and initialed by the Montana State Prison Director of Nursing or Designee. Items marked "A" in the "code" column shall be carried into the Execution Chamber by the Executioners at the time of the execution.
2. Quantities of items in, or adjacent to, the cabinet in the Execution Chamber shall include at least those indicated with a "B" in the "code" column.
3. Expiration dates of all items shall be checked individually.
 - a. Outdated items (e.g., normal saline bags) shall be replaced immediately.
4. At least one hour prior to the execution, the Executioner shall enter the Execution Chamber and re-inventory the supplies and equipment to ensure that all is in readiness, and if necessary, immediately obtain replacement items from the Prison Infirmary.

TM 01/05.09 Acquisition and Storage of Drugs for Lethal Injection

A. Purchase

1. Fourteen days prior to the scheduled execution, the Warden shall provide to the designated pharmaceutical company for their official records a memorandum specifying:
 - a. the drugs which must be obtained;
 - b. a copy of the judgment of death; and
 - c. a copy of the state statute. (MCA 46-19-103)
2. Seven days prior to the execution, the designated pharmaceutical company will deliver the drugs to the Montana State Prison Infirmary. Upon taking custody of the drugs the Health Service Bureau Chief:
 - a. shall check seals and expiration dates on the drugs prior to receiving them from the vendor;

- b. the Health Service Bureau Chief will deliver all the drugs to the Deputy Warden.
- c. The Deputy Warden shall secure the drugs in a locking cabinet in Warden's cabinet area and maintain personal custody and security of the drugs until such time as they are turned over to the Warden;
- d. The Deputy Warden shall verify the quantity, seals and expiration dates with the Warden; and
- e. shall place the drugs in a vault in the Department of Correction Investigations Unit, witnessed by the Warden.

B. Storage and Handling of Drugs

- 1. Six to eight hours prior to the execution the Deputy Warden shall pick up the drugs from their storage location.
- 2. The Deputy Warden will ensure that all of the drugs will be secured from the Investigation's unit and delivered to the designated site for syringe preparation by the Pharmacist. The Deputy Warden shall witness the preparation of the syringes.
- 3. The pharmacist shall, at that time, prepare all syringes except for the sodium pentothal.
- 4. The sodium pentothal syringes shall be prepared at the direction of the Warden when it appears that the execution shall be carried out, but not sooner than two hours prior to the execution.
- 5. The drug boxes containing the syringes shall then be surrendered to the Deputy Warden.
- 6. The Deputy Warden shall retain the drug boxes until he gives them to the Setup Officer.

MONTANA STATE PRISON

Equipment and Material Checklist: Execution by Injection

QUAN	ITEM	CODE
9	Sodium Pentothal, 1 gm kit,(50 mg/ml)	A
30	Pancuronium Bromide; 10 mg/5ml vial	A
6	Potassium Chloride, syringe containing 70 mEq, (2mEq/ml)	A
3	Diazepam (Valium), 2 ml Dossette Syringes	A
20	Syringe, 60 cc Lur Lock	B
10	Syringe, 10 cc Lur Lock	B
10	Syringe, 5 cc, Lur Lock	B
40	18 Ga., 1 1/2" needles	B
20	25 Ga., 1 1/2" needles	B
50	14 Ga., 1 1/4" angiocath	B
50	16 Ga., 1 1/4" angiocath	B
18	18 Ga., 1 1/4" angiocath	B
8	Normal Saline, IV Bag, 1000cc	B
8	Solution Injections set; 106" long with Y Sites	B
16	Extension set, 35" long	B
2	Stethoscopes	B
2	Boxes of alcohol preps	B
24	Rolls of Kling	B
4	1" adhesive tape	B
4	2" adhesive tape	B
3 pr	Bandage Scissors	B
12	IV start kits (gauze, dressing, CloraPrep, tape, tourniquet)	B
3 pr	Surgical gloves, size 7 1/2 (sterile)	B
3 pr	Surgical Gloves, size 8 (sterile)	B
1	Box gloves, 100 large (non-sterile)	
12	Surgical Masks	B
3 pr	Hemostats	B
6	3" ace wraps	B
100	Gauze pads (sterile)	B
1	Clean up kit	B
1	Flashlight, with batteries	B
6	Batteries (flashlight spares)	B

Inventoried by: _____ Date: _____

EXHIBIT D

**IN THE SUPREME COURT
OF THE STATE OF MONTANA**

FILE NUMBER OP 06-0492

**MONTANA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, et al,**

Plaintiff,

v.

**STATE OF MONTANA;
DEPARTMENT OF CORRECTIONS, et
al,**

Defendants.

**DECLARATION OF
MARK DERSHWITZ, M.D., Ph.D.**

I, Mark Dershwitz, M.D., Ph.D., hereby declare as follows:

1. I am Dr. Mark Dershwitz, an M.D. with a Ph.D. in pharmacology. A true and accurate copy of my curriculum vitae is attached as Exhibit A. I am licensed to practice medicine in the States of Massachusetts and Maine. I am currently an anesthesiologist at the University of Massachusetts and I am certified by the American Board of Anesthesiology. I am currently a Professor of Anesthesiology and Biochemistry and Molecular Pharmacology at the University of Massachusetts.

2. I have done extensive research and written numerous review articles and research papers on the use of anesthetics and I regularly practice medicine in that capacity. My research includes the study of the pharmacodynamics and the pharmacokinetics of drugs. Pharmacokinetics is the study of the time course of a drug, while pharmacodynamics refers to the effects of a drug.

3. Prior to my current appointment at the University of Massachusetts, I have been an

Instructor, Assistant Professor and Associate Professor at Harvard Medical School. I have testified as an expert witness concerning the pharmacokinetics and/or pharmacodynamics of anesthetic medications and other medications. I have testified in court as an expert witness on thirteen occasions. I have given twenty-two depositions as an expert witness.

4. I previously provided opinions on lethal injection, either in writing or testimony, in cases in Alabama, Arkansas, California, Kentucky, Maryland, Missouri, North Carolina, Ohio, South Carolina, Virginia, and for the federal government.

5. I have been requested by the Attorney General's Office of the State of Montana to render an expert opinion concerning the effects of administering thiopental sodium, pancuronium bromide, and potassium chloride with respect to the procedures employed in Montana for executing prisoners by lethal injection. While Montana's execution protocol references "Sodium Pentothal," it is the same substance as thiopental sodium. Similarly, while Montana's execution protocol references "Pavulon," it is the same substance as pancuronium bromide. Accordingly, all discussion in my Declaration relating to thiopental sodium references the anesthetic drug being used in Montana in its execution protocol, and all discussion in my Declaration relating to pancuronium bromide references the paralytic drug being used in Montana in its execution protocol.

6. Death is caused by the sequential injection of thiopental sodium 3 g, pancuronium bromide 100 mg, and potassium chloride 140 mEq. The intravenous tubing is flushed with saline solution following the administration of thiopental sodium and pancuronium bromide.

7. I have performed a detailed pharmacokinetic and pharmacodynamic analysis of the effects of a 3-g dose of thiopental sodium given to an average man with a mass of 80 kilograms

or about 176 pounds. It is my opinion, to a reasonable degree of medical certainty, that a condemned inmate who is administered a 3-g dose of thiopental sodium will be rendered unconscious, and not experience pain, for the time period necessary to complete the execution. The following discussion will quantitate the minuscule probability that the person could be conscious during the period of time that elapses between the administration of the thiopental sodium and the person's death. Even in persons of greater size or with inherent drug tolerance (due, for example, to the prior administration of therapeutic medications), the listed probabilities would not be altered in a meaningful way.

8. From my pharmacokinetic analysis I have generated two graphs, attached as Exhibits B and C. These pharmacokinetic graphs show the predicted concentration of thiopental sodium in the blood in an average man as a function of time. In Exhibit B, the time course considered is two hundred minutes, while in Exhibit C it is twenty minutes. In both Exhibits B and C, the y-axis is the concentration of thiopental in blood measured in mcg/mL (micrograms, or millionths of gram). As shown in Exhibit B, after the administration of a 3-g dose of thiopental sodium, the blood concentration of thiopental would be about 63.0 mcg/mL about five minutes after drug administration, falling to about 33.3 mcg/mL after twenty minutes. It should be noted that twenty minutes is more than twice as long as the time required to complete an execution by lethal injection. Over the two hundred minute time course shown in Exhibit B, the blood concentration of thiopental would fall to about 8.1 mcg/mL. The blood concentration of thiopental at which 50% of people are conscious and 50% are unconscious is 7.0 mcg/mL; about 280 minutes must elapse until this point is reached.

9. From my pharmacodynamic analysis, I have generated a graph, attached as Exhibit D.

This pharmacodynamic graph shows the probability that an average man will be conscious as a function of the blood concentration of thiopental. In other words, the graph shows the likelihood of consciousness in the presence of varying blood concentrations of thiopental. The graph shows that it is extraordinarily unlikely that someone will remain conscious during the hour following the administration of a 3-g dose of thiopental sodium.

10. It is my opinion, to a reasonable degree of medical certainty, that the dose of thiopental sodium used by Montana would render most people unconscious within 60 seconds from the time of the start of administration. By the time the entire 3-g dose of thiopental sodium solution is injected, it is my further opinion, to a reasonable degree of medical certainty, that over 99.9999999 % of the population would be unconscious. Furthermore, this dose of thiopental sodium will cause virtually all persons to stop breathing within a minute of drug administration. Thus, although the subsequent administration of pancuronium bromide, a paralytic agent, would have the effect of paralyzing the person and preventing him from being able to breathe, virtually every person given a 3-g dose of thiopental sodium will have stopped breathing prior to the administration of the pancuronium bromide. Thus, even in the absence of the administration of pancuronium bromide and potassium chloride, the administration of a 3-g dose of thiopental sodium by itself would be lethal in almost everyone.

11. It is my opinion, to a reasonable degree of medical certainty, that there is approximately a 0.000003 % probability that a condemned inmate given a 3-g dose of thiopental sodium would be conscious, and able to experience pain, after a period of five minutes.

12. It is my opinion, to a reasonable degree of medical certainty, that there is approximately a 0.00012 % probability that a condemned inmate given a 3-g dose of thiopental

approximately a 0.00012 % probability that a condemned inmate given a 3-g dose of thiopental sodium would be conscious, and able to experience pain, after a period of ten minutes.

13. It is my opinion, to a reasonable degree of medical certainty, that there is approximately a 0.0014 % probability that a condemned inmate given a 3-g dose of thiopental sodium would be conscious, and able to experience pain, after a period of thirty minutes.

14. It is my opinion, to a reasonable degree of medical certainty, that there is approximately a 0.029 % probability that a condemned inmate given a 3-g dose of thiopental sodium would be conscious, and able to experience pain, after a period of sixty minutes.

15. Finally, it is my opinion, based upon a reasonable degree of medical certainty, the administration of a 3-g dose of thiopental sodium would render most people unconscious for a period of approximately 4.7 hours, assuming that they continued to breathe.

16. Therefore, it is my opinion to a reasonable degree of medical certainty that there is an exceedingly small risk that a condemned inmate under the circumstances of Montana's execution protocol would experience any pain associated with the administration of lethal doses of pancuronium bromide and potassium chloride.

17. I have reviewed the protocols for lethal injection as used in Alabama, Arkansas, California, Delaware, Kentucky, Maryland, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and by the federal government. All of these states use the same three medications in lethal injections. While the protocols in these states differ in terms of the doses of the three medications used, each of these protocols will render the inmate unconscious quickly and cause the inmate's rapid and painless death.

18. I have reviewed the petition for injunctive relief filed by the plaintiffs in this Court in

a lethal injection, and the corresponding risk for excessive pain, is alarming.” The petitioners quote an article by Koniaris, et al., published in the medical journal, *The Lancet*, in which the authors cited postmortem blood concentrations of thiopental obtained at autopsy that allegedly demonstrated that a significant fraction of executed inmates were conscious at the time the pancuronium bromide and potassium chloride were administered. The authors of the article in *The Lancet*, none of whom was a pharmacologist or toxicologist, misinterpreted the postmortem toxicology results. It is crucial that if a blood sample is to be obtained for toxicological analysis of thiopental following an execution, it must be obtained within a short time of the inmate’s death.

19. On 13 May 2005, the State of Connecticut executed Michael Ross. Dr. Carver, the State Medical Examiner, obtained a sample of femoral venous blood from Ross twenty minutes after the time of death and a similar sample of femoral venous blood at the time he performed Ross’ autopsy seven hours later. The sample taken shortly after the time of death had a concentration of thiopental of 29.6 mg/mL, and the sample taken at the autopsy had a concentration of 9.7 mg/mL. These results strongly support the conclusion that post-mortem redistribution occurs with thiopental, and it occurs in the opposite direction from many of medications previously reported. Conversely, these results tend to refute any conclusions that low concentrations of thiopental from samples taken during autopsies, such as those cited in the article in *The Lancet*, were the result of improperly performed execution processes.

20. Properly obtained toxicological blood samples have been obtained following recent executions in Connecticut, Maryland, and North Carolina, and every one of these has been consistent with a very high probability of unconsciousness at the time of the inmate’s death.

21. Well-known death penalty opponents have criticized the authors' conclusions in the article described in the paragraph 18 above. Dr. Mark Heath, whose declaration in a death penalty case in California is subsequently referenced by the plaintiffs, wrote a letter to the editor of *The Lancet* in which he stated, "Koniaris and colleagues do not present scientifically convincing data to justify their conclusion that so large a proportion of inmates have experienced awareness during lethal injection. Indeed, published and unpublished data, and clinical experience, contradict their conclusions. It is widely accepted that concentrations of a drug in post-mortem blood might not reflect the concentrations present at the time of death because of post-mortem drug redistribution—ie, site-dependent and time-dependent changes in drug concentration that occur after death."

22. On page 13, the petitioners argue that Montana's lethal injection protocol is not acceptable by the American Veterinary Medical Association (AVMA) for the euthanasia of animals. This argument has been made in many states and it prompted the AVMA to issue a press release that stated, "The *2000 Report of the AVMA Panel on Euthanasia* has been widely misinterpreted in the media, particularly how it relates to capital punishment. Capital punishment opponents and the media have attempted to use the AVMA report to infer that the AVMA deems this procedure an inhumane method of nonhuman euthanasia. When referring to the *2000 Report of the AVMA Panel on Euthanasia*, reporters are strongly encouraged to contact the AVMA to ensure the association's position is stated correctly."

23. The petitioners cite the declaration of Dr. Mark Heath submitted in the case of *Morales v Hickman, et al.*, in California. In paragraph 16 of his declaration, Dr. Heath concedes, "When successfully delivered into the circulation in sufficient quantities, sodium thiopental causes sufficient depression of the nervous system to permit excruciatingly painful procedures to

be performed without causing discomfort or distress.” Thus, the petitioners base the entirety of their argument on the probability that Montana’s lethal injection protocol will not be implemented as written, for if it is, there is essentially no possibility that the inmate would experience any pain or suffering whatsoever.

24. In paragraph 22 of his declaration, Dr. Heath describes several possible errors that could occur during the lethal injection process. He provides no evidence whatsoever on the frequency of these errors in past executions or the likelihood that such errors may occur in a future execution. In fact, the recent data derived from post-mortem blood sampling of executed inmates described above suggests that in the states that performed such blood sampling, there were no errors in the preparation or delivery of thiopental sodium that could have contributed to the inmate being awake following such administration.

25. In paragraph 37, Dr. Heath argues that the inclusion of pancuronium bromide in the protocol “serves no rational or legitimate purpose.” I disagree. The administration of a large dose of potassium chloride will, in addition to stopping the heart, cause widespread stimulation of nerve and muscle tissue throughout the body. This may lead to generalized contraction of skeletal muscles that would be manifested as involuntary jerking movements. Such movements, which may be misperceived by lay witnesses as consistent with suffering on the part of the inmate, will be substantially mitigated by the prior administration of pancuronium bromide.

26. In paragraph 48, Dr. Heath misinterprets the *2000 Report of the AVMA Panel on Euthanasia* as described above by the press release issued by the AVMA.

27. In paragraphs 52-53, Dr. Heath criticizes my pharmacokinetic and pharmacodynamic predictions that I have described in this affidavit and elsewhere. He states that, “None of his

27. In paragraphs 52-53, Dr. Heath criticizes my pharmacokinetic and pharmacodynamic predictions that I have described in this affidavit and elsewhere. He states that, "None of his affidavits address the probability of error in the administration of sodium thiopental during the execution process..." In fact, I contend that the recently acquired data in several states suggest that there is no evidence of any executions in which errors were made in preparing or administering an adequate dose of thiopental sodium.

28. In summary, it is my opinion, to a reasonable degree of medical certainty, that the application of Montana's protocol for execution by lethal injection will result in the rapid and painless death of the condemned inmate.

Executed under penalty of perjury under the laws of the United States, on this 21st day of July, 2006, at Sherborn, Massachusetts.

Dated: July 21, 2006



MARK DERSHWITZ, M.D., Ph.D.

EXHIBIT A
CURRICULUM VITAE
(prepared 20 November 2005)

NAME: Mark Dershwitz

ADDRESS: 33 Wildwood Drive
Sherborn, MA 01770
Telephone (508) 651-1120

PLACE OF BIRTH: Dearborn, MI

EDUCATION:

1974 B.A. cum laude
Chemistry, with Departmental Honors
Oakland University, Rochester, MI 48063

1982 Ph.D. (Pharmacology)
Northwestern University, Evanston, IL 60201

1982 M.D. Northwestern University, Chicago, IL 60611

POSTDOCTORAL TRAINING:

INTERNSHIPS AND RESIDENCIES:

1983 Transitional Resident
Carney Hospital, Boston, MA 02124

1984-1986 Resident in Anesthesia
Massachusetts General Hospital, Boston, MA 02114

RESEARCH FELLOWSHIPS:

1986-1988 Department of Anesthesia
Massachusetts General Hospital, Boston, MA 02114

LICENSURE AND CERTIFICATION:

1984 Massachusetts
1987 American Board of Anesthesiology
1990 Maine
2005 American Board of Anesthesiology, Maintenance of Certification
in Anesthesiology

ACADEMIC APPOINTMENTS:

1977-1979	Lecturer in Pharmacology, Illinois College of Podiatric Medicine
1979-1982	Lecturer in Pharmacology, Illinois College of Optometry
1984-1987	Clinical Fellow in Anæsthesia, Harvard Medical School
1987-1990	Instructor in Anæsthesia, Harvard Medical School
1990-1997	Assistant Professor of Anæsthesia, Harvard Medical School
1997-2000	Associate Professor of Anæsthesia, Harvard Medical School
2000-	Professor and Academic Vice Chair of Anesthesiology Professor of Biochemistry & Molecular Pharmacology University of Massachusetts Medical School

HOSPITAL APPOINTMENTS:

1986-1990	Assistant in Anesthesia, Massachusetts General Hospital
1990-1996	Assistant Anesthetist, Massachusetts General Hospital
1996-2000	Associate Anesthetist, Massachusetts General Hospital
2000-2002	Clinical Associate in Anesthesia, Massachusetts General Hospital
2000-	Anesthesiologist, UMass Memorial Medical Center

AWARDS AND HONORS:

1972	Michigan Higher Education Association Scholarship
1972-1974	Oakland University Competitive Scholarship
1973-1974	National Merit Scholarship
1979	American Society for Pharmacology and Experimental Therapeutics Travel Award
1981	Biophysical Society Samuel A. Talbot Award
1982	Alpha Omega Alpha Research Award
1986-1988	NIH National Research Service Award
2001	Distinguished Alumnus Award Oakland University Department of Chemistry
2002	Outstanding Teacher Award University of Massachusetts Department of Anesthesiology
2003	Outstanding Medical Educator Award University of Massachusetts Medical School
2003	Outstanding Teacher Award University of Massachusetts Department of Anesthesiology
2004-	Listed in Who's Who in America
2005	Teaching Recognition Award, Honorable Mention International Anesthesia Research Society

MEMBERSHIPS IN PROFESSIONAL SOCIETIES:

Association of University Anesthesiologists
American Society of Anesthesiologists
American Society for Pharmacology and Experimental Therapeutics
American Society for Clinical Pharmacology and Therapeutics
International Anesthesia Research Society
Biophysical Society
International Society for Anesthetic Pharmacology
Massachusetts Medical Society
Anesthesia History Association

RESEARCH INTERESTS:

Intravenous anesthetics
Antiemetics
Monitoring depth of anesthesia
Malignant hyperthermia

RESEARCH FUNDING:

1986-1988	National Institutes of Health GM11656 (PI) The role of glutathione in malignant hyperthermia
1988-1989	Anaquest, Inc. (PI) Comparison of the sedative effects of midazolam and butorphanol
1989-1990	Glaxo, Inc. (Co-I) A randomized, double-blind comparison of intravenous ondansetron and placebo in the prevention of postoperative nausea and vomiting in female patients undergoing abdominal gynecological surgical procedures
1990-1991	Glaxo, Inc. (Co-I) A randomized, double-blind, placebo-controlled study of the effects of two dose levels of intravenous ondansetron on respiratory depression induced by alfentanil in healthy male volunteers
1991-1992	Glaxo, Inc. (Co-I) A dose finding and comparative trial of GI87084B and alfentanil for anesthesia maintenance
1992-1993	Glaxo, Inc. (Co-I) Pharmacokinetics and pharmacodynamics of GI87084B in subjects with hepatic impairment compared to subjects with normal hepatic function

1993-1994	Marion Merrell Dow, Inc. (PI) A randomized, double-blind, placebo-controlled, dose response trial to assess single dose intravenous dolasetron mesylate in patients experiencing postoperative nausea and vomiting
1993-1994	Marion Merrell Dow, Inc. (PI) A randomized, double-blind, placebo-controlled, dose response trial to assess single dose intravenous dolasetron mesylate in preventing postoperative nausea and vomiting
1993-1994	Glaxo, Inc. (Co-I) Pharmacokinetics and pharmacodynamics of GI87084B in subjects with renal impairment compared to subjects with normal renal function
1995-1996	Glaxo, Inc. (PI) A randomized, double-blind, dose-response study of ondansetron in the prevention of postoperative nausea and vomiting in inpatients
1996-1997	Aradigm Corporation (Co-I) Comparison of the pharmacokinetics and pharmacodynamics of inhaled versus intravenous morphine sulfate in healthy volunteers
1999-2000	Searle, Inc. Clinical Protocol for a Double-blind, Placebo-Controlled, Randomized Study of the Efficacy of Parecoxib 20 mg IV and Parecoxib 40 mg IV Given Postoperatively to Determine Narcotic-Sparing Effectiveness in a Post-General Surgery Pain Model

CLINICAL RESPONSIBILITIES:

1986-1988	Attending Anesthesiologist (20% clinical responsibility) Massachusetts General Hospital
1988-2000	Attending Anesthesiologist (50% clinical responsibility) Massachusetts General Hospital
1994-1997	Team Leader, East-West Anesthesia Service Massachusetts General Hospital
1997-2000	Team Leader, General Surgery Anesthesia Service Massachusetts General Hospital
2000-	Attending Anesthesiologist (45% clinical responsibility)

UMass Memorial Medical Center

TEACHING EXPERIENCE:

1976-1980	Dental Hygiene Pharmacology Northwestern University Dental School 5 hours and Course Director
1977-1979	Medical Pharmacology Illinois College of Podiatric Medicine 22 hours and Course Director
1978-1981	Dental Pharmacology Northwestern University Dental School 3 hours
1979-1982	General Pharmacology Illinois College of Optometry 20 hours and Course Director
1979-1982	Ocular Pharmacology Illinois College of Optometry 10 hours and Course Director
1980-1981	Nursing Pharmacology, Northwestern University 5 hours
1994-	HST 150 Introduction to Pharmacology Harvard-MIT Program in Health, Science and Technology 4 hours
1996-	Harvard Anesthesia Review and Update 1-2 hrs
2001-	Medical Pharmacology University of Massachusetts Medical School 11-14 hrs

VISITING PROFESSORSHIPS:

April 6-7, 1994:	University of Pennsylvania
May 17-18, 1994:	University of North Carolina at Chapel Hill
Sept. 20-22, 1994:	State University of New York at Stony Brook
April 5-6, 1995:	Albany Medical College
May 8-10, 1997:	University of Texas Southwestern Medical Center
Dec. 8-9, 1998	Temple University

Dec. 16-17, 1998 University of Pittsburgh
COMMITTEE MEMBERSHIPS:

LOCAL:

- 2000 - Pharmacy and Therapeutics Committee
 UMass Memorial Medical Center
- 2001 - Physician Health and Well-Being Committee
 UMass Memorial Medical Center

NATIONAL:

- 1999 -2002 Subcommittee on Anesthetic Action and Biochemistry
 American Society of Anesthesiologists
- 2001 - Subcommittee on Drug Disposition
 American Society of Anesthesiologists

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Exhibit B

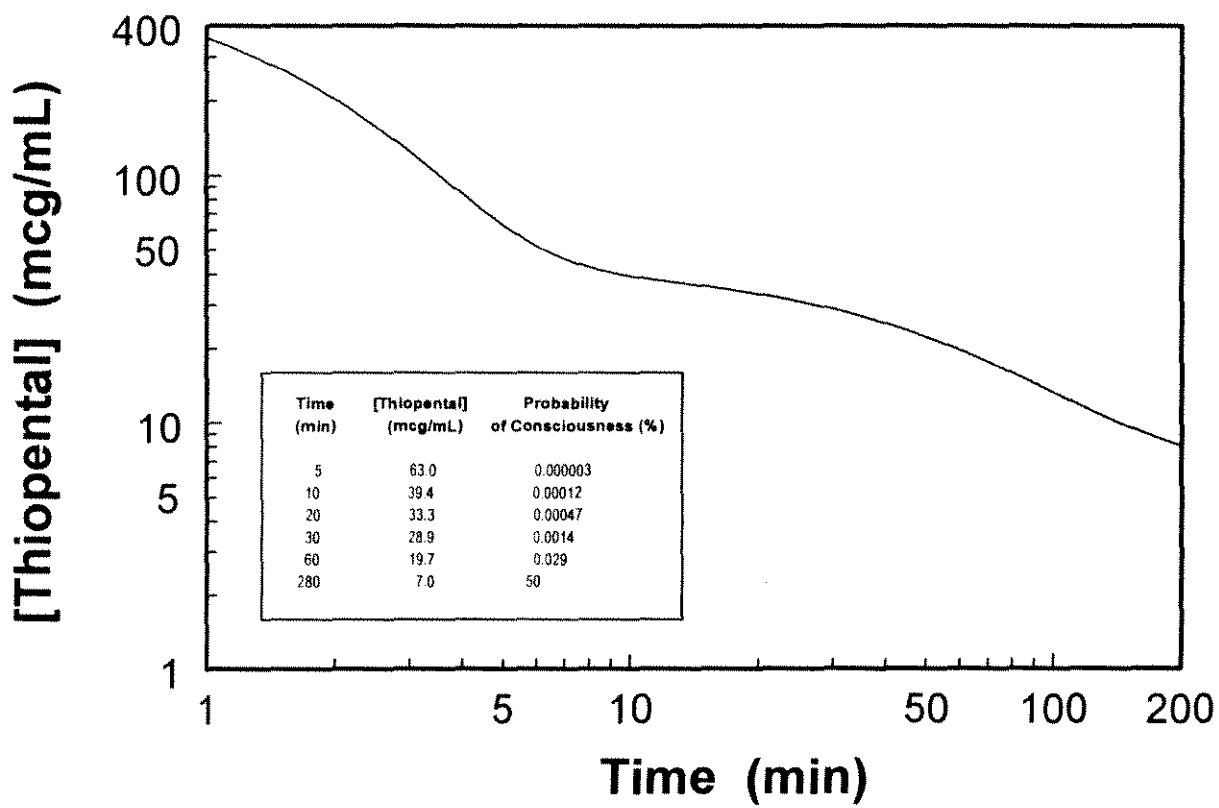


Exhibit C

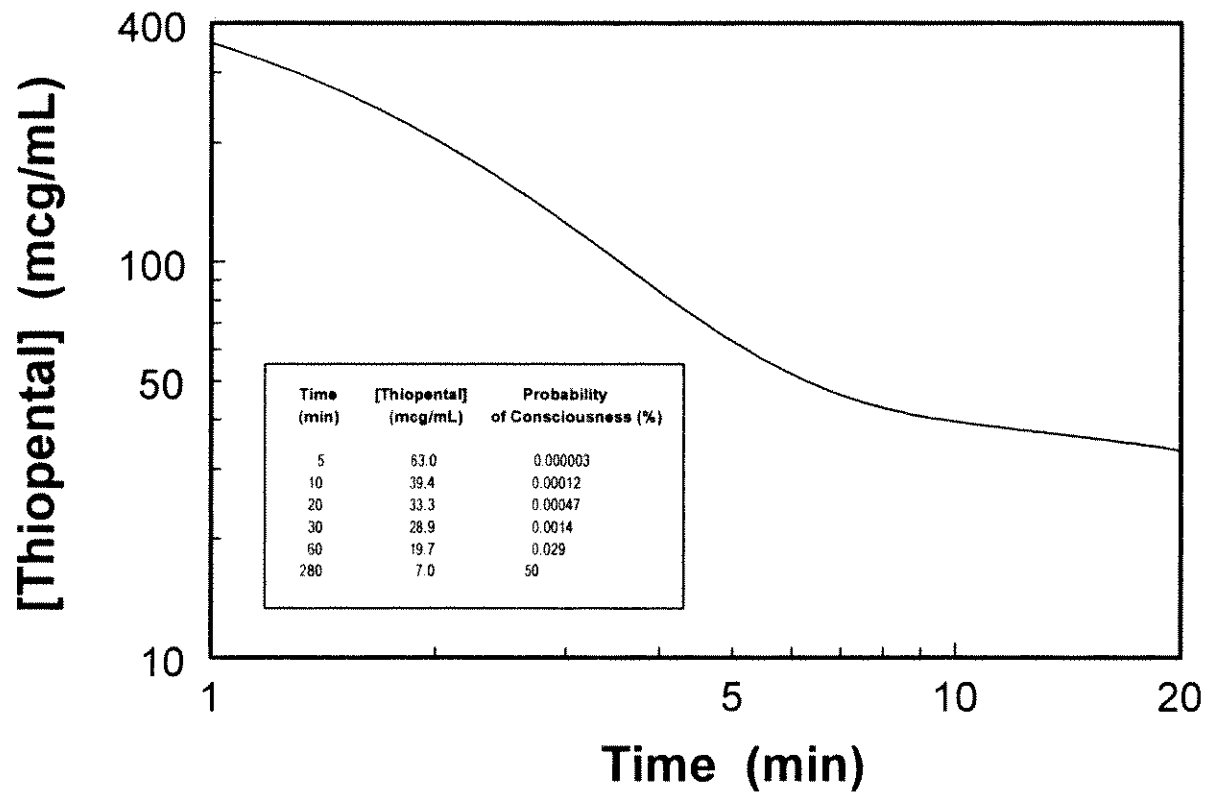


Exhibit D

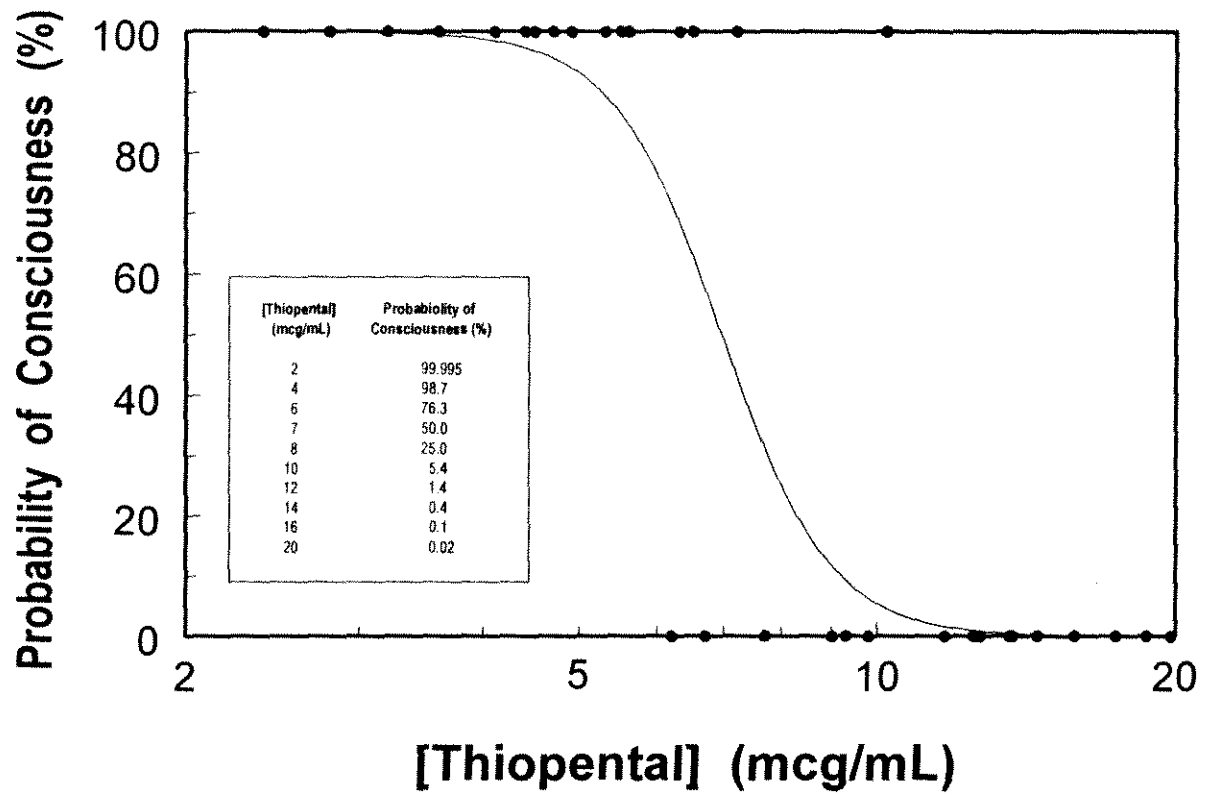


EXHIBIT E

1 IN THE SUPREME COURT OF THE STATE OF MONTANA

2 No. OP 06-0492

3 MONTANA ASSOCIATION OF CRIMINAL
4 DEFENSE LAWYERS; AMERICAL CIVIL LIBERTIES
5 UNION OF MONTANA; MONTANA ASSOCIATION
6 OF CHURCHES; MONTANA CATHOLIC CONFERENCE;
7 GORDON BENNETT; JOHN C. SHEEHY; SENATORS
8 BRENT CROMLEY, STEVE GALLUS, DAN HARRINGTON,
9 DON RYAN AND DAN WEINBERG; REPRESENTATIVES
10 NORMA BIXBY, PAUL CLARK, GAIL GUTSCHE, JOEY
11 JAYNE, AND JEANNE WINDHAM; MARIETTA JAEGER
12 LANE; EVE MALO,

13 Petitioners,

14 v.

15 STATE OF MONTANA; DEPARTMENT OF CORRECTIONS;
16 DIRECTOR MIKE FERRITER; WARDEN MIKE MAHONEY;
17 ATTORNEY GENERAL MIKE McGRATH; JOHN DOES 1-10,

18 Respondents.

19 **AFFIDAVIT OF CHERYL COUGHLIN BOLTON**

20 STATE OF MONTANA)
21 : ss.
22 County of Lewis and Clark)

23 I, Cheryl Coughlin Bolton, being first duly sworn upon my oath,
24 depose and state as follows:

25 1. This Affidavit is made in support of the Respondents in the
26 above-entitled action.

27 2. This Affidavit is made of my own personal knowledge except
where stated on information and belief, as to those matters, I believe them to
be true. If called as a witness, I would competently testify thereto.

3. I am an Administrative Officer for Montana Department of
Corrections at Montana State Prison (MSP). I have served in that capacity for

1 12 1/2 years. Before that, I served as an Administrative Assistant at MSP
2 for 2 1/2 years, between 1991 and 1993.

3 4. Among many other responsibilities, the Administrative Officer
4 acts as the custodian of the prison's execution logs, which are the written
5 descriptions of what transpired during prior executions.

6 5. Under the direction of the MSP Warden, I was the principle and
7 official log-keeper of the judicial executions by lethal injection of inmates
8 Duncan McKenzie Jr., on May 10, 1995, and Terry Allen Langford, on
9 February 24, 1998. I hand wrote entries of execution events
10 contemporaneously as I personally observed them.

11 6. I personally typed the hand-written execution logs of the
12 McKenzie and Langford executions. I have carefully reviewed my typed logs
13 and compared them to the original handwritten entries and checked for any
14 errors or omissions. To my best information and belief, I attest that the typed
15 excerpts of the logs provided below in this Affidavit, at ¶¶ 7-8, are true,
16 accurate and complete re-recordings of the handwritten logs, with the
17 following exceptions. I have made redactions ("blackened out") I believe are
18 necessary to protect the privacy of execution personnel. Where necessary, I
19 have inserted such phrases as "medically trained person" or "pharmacist" in
20 brackets next to the redactions to identify the person's role.

21 7. For the McKenzie execution, I stood in the witness section of the
22 execution chamber about 5 feet from the gurney upon which inmate
23 McKenzie lay. No obstructions impeded my view of the inmate's entire face
24 and body. The following is an excerpt from the official execution log of
25 Duncan McKenzie, showing the entire last 24 hours ending on May 10, 1995:

	Date	Time		Entered By
1	05-09-95	1612	Reviewed time frames and sequence of events with escorts and tie down teams. Also medical set up.	Cheryl Coughlin
2				
3			Duncan McKenzie will be told what they are doing as the evening progresses to decrease his anxiety.	
4	05-09-95	1750	Carl Nelson: Curtain installed construction site cleared at 1545 locks on construction gate changed at 1530	
5	05-09-95	1751	Should an incident arise at MSP the Command Post will establish and maintain the Incident Command Center during the times the execution is in progress. Captain Malcolm and Lt. Hess notified by Security Major Leonard Mihelich.	
6				
7	05-09-95	1806	Tie Down Teams, Escort Officers, Medical set up Carl Nelson, Major Mihelich, Cheryl Coughlin into chamber for final rehearsal.	Cheryl Coughlin
8	05-09-95	1910	Security Manager and Cheryl out of Max, rehearsal complete.	Myron Beeson
9	05-09-95	1915	Pharmacist arrived from HPI	
10	05-09-95	1920	Dave Ohler—McKenzie's attorney filed Writ of Cert for state of execution with Supreme Court.	
11	05-09-95	1931	Dennis Taylor from A-G's office called to tell Rick Day that Writ of Cert for stay of execution was verified at A-G's end.	
12	05-09-95	1931	Trailer secured after practice section.	
13	05-09-95	1940	Bureau Warden II Mike Mahoney, assumed possession of lethal injection medications from [REDACTED], HPI Pharmacist.	
14	05-09-95	1944	Medications signed over to Bureau Warden II, Mike Mahoney.	
15	05-09-95	2059	Unit Manager Perry notified to authorize move for McKenzie to 105 room.	
16	05-09-95	2115	McKenzie moved to 105 room	
17	05-09-95	2116	Ron Waterman notified of seating arrangement and denial of request to review phone check. Became highly upset and was advised that decisions are final and if he fails to conduct himself in a professional manner he will be removed from prison property.	
18	05-09-95	2126	Legal phone hooked up and placed in 105 room.	
19	05-09-95	2129	Maint Unit Manager Carl Nelson on site trailer opened.	M Beeson
20	05-09-95	2150	Call from AG in Gov office relative to Mr. Waterman's call to the Gov about the seating arrangement in the chamber seating arrangements stand as arranged.	Cheryl Coughlin
21	05-09-95	2150	The US Supreme Court is in session per the AG's office	
22		2207	Telephone check with Attorney General's & Governor's office by Rick Day. Rick notified them that the lethal injection drugs were being prepared. No new developments or news from the US Supreme Court.	
23		2215	The trailer area is secure, Max windows have been covered, and Carl Nelson is awaiting arrival of medical set up.	
24		2222	Lethal injection medication setup complete.	
25		2229	Greg Budd called from max bldg, attorney Waterman wished to notify Rick Day that he would hold him accountable if Mr. Waterman does not have a direct line of view.	
26		2233	Medical set up on site in Max.	
27		2251	Leonard Mihelich, Mike Mahoney, Cheryl Coughlin, in route to trailer.	
		2259	Arrived in Max trailer—M. Mahoney, L Mihelich, C Coughlin	Cheryl Coughlin
	05-09-95	2307	Coroner and [REDACTED] [medically trained person] on site in Max Compound.	Cheryl Coughlin

1		2305	AG's - verbal stay denied by US Supreme Court--Awaiting fax document from Attorney General's office (per phone call from Myron Beeson)		
2		2321	Rick Day and Bureau Warden Beeson in route to Max trailer.		
3		2328	E-1 instructed to proceed according to established time table but be advised there may be a short delay (Greg Budd advised E-1)		
4		2340	Duncan McKenzie into the trailer and placed on the gurney by tie down team.		
5		2342	E-1 prepared to move to location		
		2345	E-1 Beginning movement		
6		2345	Duncan McKenzie secured on gurney medical set up started		
		2346	Myron Beeson into trailer.		
7		2347	Myron Beeson placed headset with tape on Duncan McKenzie.		
8		2353	Rick Day and Mike Mahoney in the trailer. Rick Day confirmed communication with the Gov and Attorney General--next communication when execution complete.		
9	[05-10-95]	2400	Tie Down Team leaving trailer.		
		2401	Medical set up complete.		
10		2402	Media witnesses in with Linda Moodry and A. Malcolm		
		2404	State/Victim witnesses in with escorts Pagent & Wagner.		
11		2406	Condemned witnesses in and seated.		
		2406	Rick Day to ask Duncan if he has a final statement - denied.		
12		2407	Rick Day gave execution chamber order to proceed with execution by order of the court.		
13		2408	Pt making snoring sounds-2 or 3 then quiet.		
14		2410	Duncan McKenzie making no movement abdomen cannot be observed to rise and fall.		
15		2414	Clock stopped on north side of gurney by execution chamber to signal end of injection.		
16		2417	[REDACTED] [Medically trained person] in place for initial check of vitals.		
17	05-10-95 <sic>	2418	[REDACTED] [Medically trained person] returned to seat after check vitals per policy we are required to wait an additional 5 minutes and recheck vitals.		
18		2422	Pronounced death by [REDACTED] [medically trained person].		
		2423	Call to Gov by Rick Day - notification of death.		
19		2423	Condemned witnesses out of trailer - to debriefing.		
		2424	State/Victim witnesses leaving trailer - to debriefing.		
20		2424	Call to AG's office by Rick - notification of death.		
		2425	Media witnesses out of trailer - to debriefing.		
21		2426	Coroner begins preparing for transport to state medical examiner.		
22		2427	[REDACTED] [Medically trained person] -drawing blood for transport with body to State Crime Lab.		
23		2434	Executioner out of chamber - all staff instructed to remain in position to protect the identity of the executioner.		
		2436	Max Compound clear.		
24		2438	Tie Down Team returned to trailer to assist coroner with removal of body.		
25		2444	Debriefing complete for witnesses.		
		2447	Body out of trailer		Cheryl Coughlin
26		2449	Coroner's vehicle out of compound.		Cheryl Coughlin
27					

	2451	Physician and medical set up out of compound.		
	2452	Death Watch Log turned over to Major Mihelic. Death Watch post ordered to stand down.		
	2454	Tie Down Team, Rick Day, Myron Beeson, Mike Mahoney, Greg Budd, Cheryl Coughlin out of Max Compound.		
	0029	Tie Down equipment and escort officer equipment checked in.		
05-10-95	0200	Debriefing conducted for staff by Sandy Heaton and Jon Berg offered further assistance if anyone felt the need to talk further, encouraged staff to talk to each other, listen to each other, be supportive, and be observant of signs that someone is having troubles. Next debriefing as a follow up is scheduled for Thursday May 11, 1995 at 1300 in the RAC.		
	0233	Debriefing conducted for inner and outer perimeter security teams by Drew Schoening in the Armory. Handout and assistance, encouragement provided as above.	Cheryl Coughlin	

8. For the Langford execution, I stood in the witness section of the execution chamber about 5 feet from the gurney upon which inmate Langford lay. No obstructions impeded my view of the inmate's entire face and body. The following is an excerpt from the official execution log of Terry Langford, showing the entire last 24 hours ending on February 24, 1998:

Date	Time		Entered By
02-23-98	0800	Death Watch - change of officers.	Cheryl Coughlin
	1300	Phone Test complete - acceptable.	
	1339	Chambers secured by Carl Nelson.	
	1315	Check Point II in place.	
	1420	Check Point I - bottom of airpoint <sic> [airport] hill in place per Major Wood	
	1425	KOFI Reporter Wendi O. Price not admitted on MSP property after Check Point I discovered alcohol and firearm in her vehicle. She will not be replaced as a media witness. Warden Mahoney and Director Day notified. Andy Malcom notified by PIO Linda Moodry.	
	1530	Governor Racicot notified of above incident by Director Day.	
	1750	Wendi O. Price called for Linda Moodry PIO requesting reconsideration of decision from earlier today to withhold her as witness.	
	1756	Wendi O. Price called again for Linda Moodry	
	1845	Warden notified by Max Unit Manager that Attorney Donahoe in to Max to see his client. Spoke with his client.	
	1850	Attorney Donahoe out of Max with Capt Geach.	
	1851	Wendi O. Price will not be allowed to re-instate her position as a witness. No exceptions allowed per Director Day and Warden Mahoney.	
	1853	Capt Geach to the Wardens office after escorting Attorney Donahoe back from Max. Donahoe did not discuss his conversation with Inmate Langford with him. Warden had requested info from Geach	

1		relative to the staging of the attorney with his client. Attorney Donahoe did indicate that he had placed a call to Judy Browning in the Gov office and had requested she return the call here at MSP. Donahoe is going to stage at the sheriff's office and requests we pass that number onto her.		
2				
3	1856	Capt Geach called Warden's office to report that Donahoe indicated upon being escorted from the prison, that Inmate Langford gave him "limited authority".		
4				
5	1900	After discussion by Director Day, Major Wood and PIO's Linda Moodry and Mike Cronin a media lottery will be held at 2030 to replace the witness slot vacated by Wendy Price. CJIN clearance will need to be made.		
6				
7	1921	Gov Racicot called Warden Mahoney for briefing on conversation between Mr. Donahoe and Inmate Langford. He indicated he will contact Attorney Donahoe at 406-846-2711 (PCSO) and then report back to Warden Mahoney.		
8				
9	1930	Beth Baker AG's office for briefing on decision to turn away media witness Wendy O. Price. Decision explained. Exception cannot be made in these critical areas in this type of incident.		
10	1935	Wendy O. Price called Warden Mahoney to once again request the decision made earlier today be reversed. Request denied.		
11	1947	Rick Day called Gov. Racicot to brief him on media witness situation.		
12	02-23-98	1957 UM Bill Perry last meal delivered to Inmate Langford by Joe Mihelic, Food Service.	Cheryl Coughlin	
13	02-03-98	1957 Rick Day spoke with George Ostrum (Wendy O. Price's father) in attempt to explain decision reached earlier today to remove as a witness. Mr. Ostrum indicated he plans to sue the state.	Cheryl Coughlin	
14	Late entry	1947 Gov. Racicot: No application officially presented to him at this time (issue of respite) this conversation was a briefing of conversation between Gov. and attorney Donahoe.		
15				
16	02-23-98	2038 Dave Ohler called from DOC-ICC briefed by Warden Mahoney and Director Day on the witness-media situation.		
17		2044 John Connor in place at Joe Mazurek's desk.		
18		2049 UM Perry Called to report they (Greg Budd and himself) talked to Inmate Langford and explained procedures for rest of evening. 2005 hours.		
19		2052 Winnie Ore called to inform us DOC-ICC is in operation.	Cheryl Coughlin	
20		2058 Sheriff Dupont called to discuss Wendy O. Price being denied access to MSP property	Dana Eldridge	
21		2110 Warden notified from Ranch I Training Center that Kyle Gillette from Silver State Post was chosen as media witness replacement.		
22		2115 [REDACTED] [Pharmacist] on-site with medications (de) pharmaceutical.		
23		2116 Dist. Judge Lympus called regarding Wendy O. Price being denied access to MSP property.		
24		2138 Langford declined a sedative offered by Max staff	Dana Eldridge	
25		2210 Attorney General Joe Macurek called to check in with Mark Fowler.	Cheryl Coughlin	
26	2201	Error		
27	2210	Medication set up begins. Completed at 2229. Prepared by [REDACTED], Pharmacist-HPI. Witnessed by Warden Mahoney, Deputy Warden Mihelich, DOC Investigators Mike Micu, Dept of Texas Consultants. Two boxes: Primary contains primary and secondary syringes of all three medications. Second box contains backup syringes for Sodium Pentathol and Potassium Chloride.		

1		2257	Dept. Warden Mihelich, Cheryl Coughlin enroute to Max with medication		
2	02-23-98	2304	Dept Warden Mihelich & Cheryl Coughlin arrived at trailer with medications Carl Nelson and Major Wood Present in trailer.		
3		2311	Medical set up consultants accompanied by Deputy Warden Redfern into trailer.		
4		2316	Coroner vehicle into compound.		
5		2326	Warden Mahoney and Director Day enroute to Max staging area per Deputy Warden Beeson.		
6		2330	Major Wood notified they are beginning strip process of Inmate Langford.		
7		2335	Tie Down Team with Inmate Langford into trailer: [Redacted] [Tie Down Team member] into trailer [Redacted], [Redacted] [Tie Down Team member]—Tie Down		
8		2338	Inmate Langford secured on guernsey. Quiet, cooperative		
9		2338	Set up of IV's begin		
10		2341	Left arm complete		
11		2341	Set up of IV continues		
12		2344	Right arm complete. Set up indicates left		
13		2344	Arm best IV set up		
14		2345	Tie Down Team exits trailer.		
15	02-23-98	2345	Inmate Langford requests pillow be removed from under his head.	Cheryl Coughlin	
16	02-23-98	2346	Set up Team to rear of trailer-staging area	Cheryl Coughlin	
17		2349	Warden Mahoney, Director Day, Physician, Coroner into trailer		
18		2350	Warden's office notified by Rick Day of arrival		
19		2350	AG's office notified of arrival in trailer		
20		2350	Gov notified of arrival in trailer		
21		2351	DOC-ICC notified of arrival in trailer.		
22		2352	IPS escort press witnesses into trailer (media) Andy Malcom, Linda Moodry into trailer.		
23		2354	State witnesses into trailer escorted by IPS [Redacted] [security member]. All witnesses seated in execution trailer.		
24		2355	Condemned witnesses into trailer and escorted by IPS [Redacted] [security member]		
25		2356	Victim witnesses into trailer		
26		2356	All witnesses seated in trailer		
27		2357	IPS [Redacted] [security member] and IPS [Redacted] [security member] in place, Major Wood, Greg Budd in place		
	02-24-98	2400	Warden Mahoney to front of trailer-instructs Inmate to make final statement-does not wish to make final statement order given to proceed.		
		2401	Director Day gives order to proceed to executioner.		
		2402	Snoring heard from Inmate Langford		
		2404	Clock on right has stopped, no movement from Langford.		
		2406	Physician checks for heart sounds, respirations, pupil reaction		
		2407	Warden Mahoney announces Terry Allen Langford expired.		
		2407	Victim out of trailer (witnesses)		
		2407	Gov notified		
		0007	AG's office notified		
		0008	Condemned witnesses out of trailer		
		0008	Deputy Warden Beeson notified in Wardens office. Order of the court has been carried out.		

1	0009	DOC ICC notified. All notification complete.		
2	2410	State witnesses out of trailer		
3	2411	Media witnesses out of trailer. Linda Moodry & Andy Malcom out of trailer		
4	0013	Pictures of deceased taken by coroner.		
5	0013	Investigator Micu into trailer-pictures taken of deceased.		
6	0020	Executioner out of trailer. Deputy Warden Redfern, Set up Team consultants out of trailer and enroute to admin bldg by Cushman		
7	0022	Rick Day gave ok to release Medical Response Team staged in Max area.		
8	0022	Executioner cleared compound.		
9	0023	Tie Down Team into trailer to help prepare condemned body for removal from trailer.		
10	0025	Body removed from trailer		
11	0026	Director Day notified Dept Beeson DOC-ICC, Gov's. Office body out of trailer. No answer at AG's office.		
12	02-24-98	0030 Trailer clear-Maintenance begins cleanup.	Cheryl Coughlin	

10. Further your affiant sayeth not.

I hereby affirm under penalty of perjury that the assertions of this Affidavit are true to the best of my knowledge.

DATED this 21st day of July, 2006

By:

Cheryl C. Bolton
CHERYL C. BOLTON

SUBSCRIBED and SWORN to before me this 21st day of July, 2006.

Janet E. Myers
JANET E. MYERS

Notary Public for the State of Montana

Residing at Helena, Montana

My Commission expires June 12, 2008