IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT W. JACKSON, III,	:	Civil Action No. 06-cv-300
Plaintiff,	:	Chief Judge Sue L. Robinson
vs.	:	**Emergency Action**
STANLEY W. TAYLOR, JR., Commissioner, Delaware Department of Correction; THOMAS L. CARROLL, Warden, Delaware Correctional Center; PAUL HOWARD, Bureau Chief, Bureau of Prisons; and OTHER UNKNOWN STATE ACTORS RESPONSIBLE FOR AND PARTICIPATING IN THE CARRYING OUT OF PLAINTIFF'S EXECUTION, All in their Individual and Official Capacities,	:	**Execution Scheduled for Midnight May 19, 2006**
Defendants.	:	Electronically Filed

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND CONSOLIDATED MEMORANDUM OF LAW

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Dated: Wilmington, Delaware
May 8, 2006

NOTICE OF MOTION FOR PRELIMINARY RELIEF

Plaintiff Robert W. Jackson, III is currently under a sentence of death. His execution by lethal injection is scheduled to take place at midnight on May 19, 2006. Mr. Jackson has filed a civil rights Complaint alleging that the protocol to be used by the Defendants to carry out his execution by lethal injection constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because it creates a substantial risk that Mr. Jackson will be fully conscious and in agonizing pain during the execution process.[1]

Because it is unlikely that his Complaint can be fully adjudicated prior to his execution, he moves for preliminary injunctive relief to prevent defendants from executing him in an unconstitutional manner.

This application for a preliminary injunction is made pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65. Mr. Jackson will sustain irreparable harm if injunctive relief is not granted to prevent defendants from conducting Mr. Jackson's execution in accordance with the DOC's current protocol for lethal injection. Mr. Jackson is likely to prevail on the merits of the underlying action, and the balance of hardships weighs decidedly in his favor. This application is based on the Complaint, the following memorandum and points of authorities, and exhibits, including the declaration of Plaintiff's primary expert, Dr. Mark Heath.

Pursuant to Federal Rule of Civil Procedure 65(b), the Complaint has been provided to opposing counsel. Mr. Jackson requests that the Court issue an order to show cause and establish

[1]As alleged in the Complaint, Defendants have refused to provide undersigned counsel with any information regarding the specific protocol that will be used in Plaintiff's execution. Accordingly, Plaintiff's allegations are based on past executions, past protocols and a smattering of public information.

a briefing schedule, so that a hearing on this motion for preliminary relief can be conducted prior to the scheduled execution.

I. INTRODUCTION.

Plaintiff, Robert W. Jackson III, a death row prisoner incarcerated at Delaware Correctional Center, will soon be executed by lethal injection. A growing body of medical evidence, eyewitness observations, and veterinary studies, persuasively demonstrate that the manner in which the Defendants administer lethal injections creates a significant risk that the condemned person fails to receive adequate anaesthesia and will therefore be conscious for the bulk of the duration of the execution. Without adequate anesthesia, the condemned first would experience slow suffocation and paralysis as a result of the administration of pancuronium bromide, then would experience the extraordinarily painful activation of the sensory nerve fibers in the walls of his veins as a result of the administration of potassium chloride. Given the significant risk of horrific pain and suffering posed by the protocol that will likely be followed, Mr. Jackson seeks to prevent the Defendants from executing him in a manner that is likely to subject him to this excruciating pain.

In the 18 executions by lethal injection the DOC has conducted, it has used three drugs, presumably in succession: first, sodium pentothal, a fast-acting, short-lasting barbiturate that, under ideal circumstances, will cause a condemned prisoner to lose consciousness; pancuronium bromide, a neuromuscular blocking agent that paralyzes the muscles and has no apparent purpose other than to make the execution appear peaceful and humane to witnesses; and, finally, potassium chloride, which induces cardiac arrest. The best available information about these executions indicates that the conditions under which executions are carried out have been consistent over the years. These conditions – remote administration of the drugs, untrained and improperly credentialed personnel

involved in the procedure, and no monitoring of the prisoner's condition throughout the execution process – create a substantial risk that the drugs, particularly sodium pentothal, will not be administered properly. Such an error could result – and has resulted – in prisoners remaining conscious during the painful portions of their executions. However, the likely protocol does not contain any procedures for preventing or reacting to the obvious risks. The protocol does not explain how execution personnel should detect and react to problems with administration of the chemicals; how to insure proper levels of anesthesia or explain how to suspend the execution, should it become clear that the condemned is still conscious.

Mr. Jackson alleges that the significant risk of a botched execution is a foreseeable consequence of the conditions imposed by the DOC's internal protocol for carrying out executions by lethal injection. It is surely unconstitutional for the Defendants to institute an execution protocol that creates a significant risk of inflicting excruciating pain and then to consciously disregard that risk. Plaintiff therefore requests that the Court enjoin Defendants from executing him by means of lethal injection in a manner that all but insures he will suffer torturous and unnecessary pain and suffering.

II. FACTUAL BACKGROUND.

Robert W. Jackson, III, was arrested on April 9th, 1992, and subsequently indicted in the New Castle County Superior Court for two counts of First Degree Murder (intentional murder and felony murder), Burglary Second Degree, Conspiracy Second Degree, Robbery First Degree, and three counts of Possession of a Deadly Weapon During the Commission of a Felony. Following a jury trial, Jackson was convicted of all indicted counts on March 30th, 1993, and, following a penalty hearing, sentenced to death by lethal injection. Presiding over the Superior Court Trial was the

Honorable Vincent A. Bifferato.

Following his first direct appeal to the Delaware Supreme Court, Jackson's convictions were affirmed; however, the Delaware Supreme Court vacated his death sentence, remanding the matter for a new penalty hearing. See Jackson v. Carroll, 643 A.2d 1360 (Del. 1994), cert. denied Delaware v. Jackson, 513 U.S. 1136 (1995).

The second penalty hearing was held in September 1995. Although the jury was not unanimous in recommending a death sentence, Judge Bifferato again imposed a sentence of death on October 26, 1995. Jackson's counsel at his second penalty hearing were Kevin J. O'Connell, Esquire, and Thomas A. Foley, Esquire. Jackson's death sentence was affirmed on appeal to the Delaware Supreme Court. See Jackson v. State, 684 A.2d 745 (Del. 1996).

Following a representation hearing on June 12, 1997, Judge Bifferato appointed Mr. Foley as post-conviction counsel for Jackson. Jackson's State Petition for Post Conviction Relief was filed on August 21, 1997. On August 25, 1999, the Court issued a Memorandum Opinion, denying Jackson's Motion for Postconviction Relief. State v. Jackson, Del. Super., ID# 92003717DI, Bifferato, J. (Aug. 25, 1999). Subsequently, Jackson appealed to the Delaware Supreme Court, which affirmed the Trial Court's denial of his Rule 61 Motion for Postconviction Relief. Jackson v. State, 770 A.2d 506 (Del. 2001).

In August 2001, Jackson filed a Petition for Writ of Habeas Corpus in the U. S. District Court, District of Delaware. An Amended Petition was filed on August 14, 2002. This Court denied Jackson's Petition for Writ of Habeas Corpus. Jackson v. State, 2004 WL 1192650 (D. Del. May 20, 2004) (No. Civ. 01-552-SLR).

Jackson filed a timely appeal in the Third Circuit Court of Appeals, which denied relief on

Jackson's appeal on December 20th, 2005. That decision, and the earlier ruling of the District Court, will be the subject of Plaintiff's Petition for Writ of Certiorari, which is being filed in the United States Supreme Court on this date (May 8, 2006).

On January 18, 2006, the Superior Court of the state of Delaware, New Castle County, held an office conference regarding Plaintiff's case. At that time, Plaintiff's then-counsel (Thomas Foley, Esq.) believed that there would be no further litigation, and counsel so informed the court. Counsel erred. As a result of that conference and the erroneous information from Mr. Foley, the Superior Court, on January 23, 2006, issued an Order setting May 19, 2006 as Mr. Jackson's execution date. See Jackson v. Carroll, No. 04-9012 (3d Cir. May 2, 2006), slip op. at 2 (explaining that after the setting of the May 19 execution date "the office of the Federal Community Defender has entered an appearance" and "Jackson explains that the only reason why the execution date was set as early as May 19, 2006 is that after we denied his request for a certificate of appealability, counsel – Thomas M. Foley, Esq. – erroneously represented in state court that Jackson would not pursue further litigation.").

Undersigned counsel are new to Mr. Jackson's case. See id. Pursuant to authorization received from the Administrative Office of the United States Courts, the Federal Community Defender Office for the Eastern District of Pennsylvania ("Community Defender") has been asked to render assistance to capital defense counsel in Delaware federal habeas corpus proceedings. Undersigned counsel (Michael Wiseman) met with this Court on March 13, 2006, along with Penny Marshall, Federal Public Defender for the District of Delaware, Joseph Miller, First Assistant Federal Defender for the Community Defender, Kevin O'Connell, Assistant State Public Defender, and the Honorable Jan R. Jurden, Judge of the Superior Court of Delaware. At that time, this Court

was advised of the Administrative Office's request that the Community Defender lend such assistance to the Delaware Bar, and the Community Defender sought the approval of this Court for this endeavor. Subsequently, the Community Defender was authorized to render such assistance, and its staff began work on a number of Delaware capital post-conviction cases, including this one.

On March 31, 2006, Billy H. Nolas, an Assistant Federal Defender employed by the Community Defender, entered his appearance as counsel for Mr. Jackson in the United States Supreme Court. Prior to that day, no attorney from the Community Defender had worked on Mr. Jackson's case.

On May 1, 2006, Plaintiff filed an inmate Grievance Report, requesting that his lethal injection not be carried out in a manner that would likely cause him unconstitutional levels of pain and suffering. Plaintiff's grievance was denied on May 4, 2006. Plaintiff was then informed by DOC, for the first time, that there was some type of appeal process. Plaintiff filed an appeal on May 5, 2006. These filings were all done *pro se*, as the DOC authorities would not permit representation by counsel.

Notwithstanding his filing of a grievance, Plaintiff is not required to exhaust administrative remedies before bringing this Complaint because modification of the lethal injection protocol is not possible through the grievance process, and exhaustion is futile. Thus, Plaintiff's grievance was filed in an abundance of caution, with due recognition that exhaustion is futile. Indeed, in a number of public statements, Defendants have made clear that they do not intend to revise their lethal injection protocol to bring it within constitutional standards. On May 2, 2006, Department of Corrections spokeswoman Gail Minor told the press that "a pending court case in California challenging the legality of lethal injections would not affect Jackson's scheduled execution." Joe Rogalsky, *Date*

set for execution; Ruling in California case won't have effect, DELAWARE STATE NEWS, May 2, 2006. Ms. Minor further stated that Department policy forbade her from releasing the chemical makeup of Delaware's injection, but said discussions with DOC "legal counsel" indicated Mr. Jackson's execution could proceed as scheduled. Id. No administrative challenge to the lethal injection protocol is possible here.

III. ARGUMENT

Mr. Jackson's civil rights Complaint alleges that the protocol that is likely to be used in his execution will result in unneccessary pain and suffering in violation of his right to be free from cruel and unusual punishment. Mr. Jackson seeks a permanent injunction to prevent his execution by use of the unconstitutional protocol. As described herein, Mr. Jackson is likely to succeed on the merits of his request for a permanent injunction. As also described herein, absent the Court's granting of the instant motion for a preliminary injunction, he will likely suffer irreparable harm because his constitutional claims may not be fully adjudicated prior to his execution date. It is also in the public interest to grant preliminary injunctive relief, because doing so will allow for the full adjudication of the important questions presented in the Complaint.

A. The Legal Standard Governing Preliminary Injunctive Relief.

Plaintiff easily meets the well-known and established standards governing motions for preliminary injunctive relief. "The standard for evaluating a motion for preliminary injunction is a four-part inquiry, requiring the moving party to show: (1) a reasonable probability of success on the merits; (2) irreparable injury if preliminary relief is not granted; (3) granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) preliminary relief will be in the public interest." United States v. Bell, 414 F.3d 474, 478 n.4 (3d Cir.2005).

"The burden lies with the plaintiff to establish every element in its favor, or the grant of a preliminary injunction is inappropriate." P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC, 428 F.3d 504, 508 (3d Cir.2005). However, the necessary showing of likelihood of success diminishes in proportion to the "relative hardship to the party seeking the preliminary injunction." Beardslee v. Woodford, 395 F.3d 1064, 1067-68 (9th Cir. 2005). Where the balance of hardships tips sharply in favor of the plaintiff, he need demonstrate only the existence of serious questions going to the merits. Id.

Plaintiff will not demonstrate that he meets each of the four criteria.

B. Plaintiff Is Likely To Succeed On The Merits.

The Complaint filed in this case alleges significant and horrific facts relevant to the manner of execution that will be used against Plaintiff. Plaintiff submits that he will prevail on the merit.

1. Plaintiff's Claim Is Cognizable under Section 1983.

First, Mr. Jackson's Complaint is properly brought as a civil rights action. Section 1983 provides statutory authorization for federal claims against individuals acting under color of state law. To bring this claim under Section 1983, Plaintiff must allege, first, a violation of a right protected by the Constitution or federal law, and, second, that this right will be or is being violated by an individual acting under color of state law. 42 U.S.C. § 1983.

He does not challenge the legality of his conviction or sentence, nor does he seek to prevent the State form executing him by lethal injection **in a constitutional manner**, i.e. in a manner that will prevent him from experiencing the unnecessary and wanton infliction of pain and suffering. Rather, Mr. Jackson's challenge is a "method of execution" claim that is cognizable under 42 U.S.C. § 1983. See Nelson v. Campbell, 541 U.S. 637, 647 (2004) (focusing on whether the petitioner's

challenge "would necessarily prevent" the State from carrying out the execution).

Here, Plaintiff seeks review of the method by which his execution by lethal injection will be carried out. Plaintiff asserts that Defendants, while acting under color of state law, will violate his Eighth Amendment rights while carrying out the DOC's lethal injection protocol, thereby subjecting him to pain and suffering that would not occur if the execution were carried out with due care.

2. Delaware's Lethal Injection Protocol Violates the Eighth Amendment.

The Eighth Amendment, applicable to the states through the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishments. U.S. Const. Amend. VIII. The prohibition includes the "infliction of unnecessary pain in the execution of the death sentence." Louisiana ex re. Francis v. Resweber, 329 U.S. 459, 463 (1947); see also Gregg v. Georgia, 428 U.S. 153, 173 (1976) (holding Eighth Amendment prohibits "unnecessary and wanton infliction of pain"). Because the question of "unnecessary pain" is inherently relativistic, the Eighth Amendment inquiry takes account of "evolving standards of decency" and "contemporary values concerning the infliction of a challenged sanction." Gregg, 428 U.S. at 173. For example, a method of execution that was initially regarded as more humane than its alternatives could, over time, come to offend contemporary values as a result of scientific advancements and experiences with the method that demonstrate that it is not as humane as initially believed. See Fierro v. Gomez, 77 F.3d 301, 303 n.1 (9th Cir. 1996) (noting that last previous challenge to execution by lethal gas had been considered by state supreme court in 1953 and that scientific knowledge had advanced in intervening years); Cf Atkins v. Virginia, 536 U.S. 304, 314-16 (2002) (tracing development of state laws forbidding execution of mentally retarded offenders since 1989 and concluding, "The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."); Roper

v. Simmons, 543 U.S. 551, 564-65 (2005) (tracing development of state laws forbidding execution of minors since 1989 and finding the change "significant").

In determining whether a particular method of execution offends contemporary standards of decency by inflicting unnecessary pain, courts examine the "objective evidence of the pain involved in the challenged method." Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994). Such evidence can include expert testimony regarding the effect of the method on both humans and animals; the execution records of prisoners executed using the same method; and scientific studies and other evidence analyzing the effects on humans and animals. See Fierro, 77 F.3d at 307 (listing types of evidence considered by district court in analyzing effects of exposure to cyanide gas); Campbell, 18 F.3d at 683-87 (discussing expert testimony, scientific literature, and experiments on death by hanging considered by district court). Furthermore, evidence that other prisoners have suffered unnecessary pain, evidence of other prisoner's voluntary and involuntary movement, expressions, and apparent consciousness during his execution, are all relevant to the determining whether Plaintiff will suffer. See Fierro, 77 F.3d at 307-08 (relying on eyewitness accounts of executions by lethal gas); Campbell, 18 F.3d at 685 (relying on physician's observations during an execution by hanging).

Of course it is impossible to determine with certainty before the fact whether a particular person will suffer unnecessary pain during his execution. "For any individual challenging a death sentence, evidence of botched executions can only be put in terms of probability." J.D. Mortenson, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099, 1118-20 (2003). For this reason, the question of whether the particular administration of a method of execution will inflict unnecessary pain on an individual is an inquiry as to whether the method of execution subjects the person to an

unacceptable risk of unconstitutional pain or suffering. Fierro, 77 F.3d at 307 ("Campbell also made clear that the method of execution must be considered in terms of the risk of pain.") (emphasis in original); Campbell, 18 F.3d at 687.

Because any medical procedure inherently carries a risk that a mistake or accident might cause unforeseeable pain, the Eighth Amendment does not require executioners to eliminate all possible risk of pain or accident from their execution protocols. See Campbell, 18 F.3d at 687. A risk of pain becomes unnecessary and constitutionally intolerable, however, when experience with an execution procedure demonstrates that there are foreseeable problems that could arise that would result in the condemned's suffering intense pain, and the procedure fails to minimize or at least account for those risks. Conversely, when the risk of pain is significantly diminished by alterations to an execution procedure, the Eighth Amendment can be satisfied. As set forth in the Complaint, Defendants have unnecessarily increased the likelihood of a mishap and the unconstitutional infliction of pain by the drugs they use, the drugs they do not use, and as a result of the lack of credentials of those carrying out the execution.

Considering the risk of Plaintiff suffering unconstitutional pain and suffering, the Delaware lethal injection protocol that will be used by Defendants to execute Plaintiff, is clearly unconstitutional because it creates a significant, substantial **and unnecessary** risk that the Plaintiff will experience a prolonged and agonizing death. Although a properly carried out execution by lethal injection may not involve unnecessary pain and suffering, the Delaware protocol creates a procedure that is rife with potential problems and opportunities for untrained personnel to commit grave errors, all of which can lead to an excruciatingly painful death. Because the protocol fails to account for these potential problems, which are inherent in allowing untrained personnel to perform

executions by remote control, executions performed in accordance with the protocol carry a significant and unconstitutional risk of unnecessary pain.

a. The lethal injection protocol creates an actionable risk of unnecessary pain during executions by imposing conditions conducive to errors and by failing to compensate or prepare for these conditions.

The best available evidence indicates that Delaware's lethal injection protocol provides that executions shall be carried out by remote control – that is by means of an IV line(s) inserted into a vein(s) and monitored and controlled from a room outside the execution chamber.[2] The executioner(s) causes two grams of sodium pentothal, an ultrashort-acting barbiturate anesthetic, to be administered through the IV. Next, a syringe of normal saline is administered through the IV. Then, 100 milligrams of pancuronium bromide, which completely paralyzes both the prisoner's voluntary muscles and his diaphragm, is administered. Again, a syringe of normal saline is administered through the IV. Finally, the prisoner is given 100 milliequivalents of potassium chloride, which eventually causes cardiac arrest. See Heath Decl. ¶ 11 (attached as an Exhibit to this Motion).[3]

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[2]Plaintiff refers to the lethal injection protocol throughout this motion and brief, but Plaintiff points out that Defendants have not produced the current protocol for carrying out executions by lethal injection, despite Plaintiff's formal requests. In referring to the procedure for lethal injection, Plaintiff relies of four sources: (1) the Delaware Department of Correction Policies and Procedures, Number 750, "Execution Procedures (Confidential)," made public record in the appendix in State v. Deputy, 644 A.2d 411 (Sup. Ct. Del. 1994); (2) an internal Department of Correction document entitled "Injection Team," also made public in the Deputy case; (3) public information made available at the website of the Delaware Department of Correction, http://www.state.de.us/correct/default.shtml, and pages within the site; and (4) media accounts of past executions.

[3]Mark Heath M.D. is a nationally recognized expert on lethal injection. He is an anaesthesiologist, who has studied lethal injection methods and procedures around the country. He has consulted with various correctional systems and state legislatures to assist in bringing their

Although the doses of sodium pentothal and pancuronium bromide each would, if given alone, eventually cause death by stopping breathing, neither drug has sufficient time to cause death before the potassium chloride is administered. Id., at ¶ 13. Thus, medical evidence suggests that Plaintiff will be alive at the time that the intended fatal chemical, potassium chloride, is injected. Id. at ¶¶ 13-16. Potassium chloride, when given in doses sufficient to cause death, is known to be excruciatingly painful, because it activates the nerves in the prisoner's veins before it causes the heart to stop, thus burning its way to the prisoner's heart. Id. at ¶ 19. It is therefore imperative – to avoid torturous levels of pain – that prisoners be adequately anesthetized before the potassium chloride is administered. Id. ¶ 20.

Administering the lethal drugs in the manner dictated by the lethal injection protocol creates the risk that the sodium pentothal will not be administered properly and the prisoner will not be rendered fully unconscious by the time that the other two drugs are administered. Because the protocol fails to ensure the proper administration of sodium pentothal, the risk of consciousness cannot be mitigated by the fact that the dose of sodium pentothal may be excessive in comparison to the dose that would be used in a surgical setting. Although the full dose of sodium pentothal, if it reached the condemned, should be sufficient to induce unconsciousness id., at ¶ 17, that fact is irrelevant in light of the substantial danger that the full dose of sodium pentothal simply will not reach the prisoner. See id. at ¶¶ 35-48.

The risk that prisoners will be conscious during their executions is in part inherent in the use of sodium pentothal itself; the DOC has chosen to use an ultrashort-acting anesthetic that is

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systems for lethal injection into Eighth Amendment compliance. His *curriculum vitae* is attached to his Declaration.

extremely sensitive to errors in administration. In medical situations, sodium pentothal is used only for specific, expeditious tasks, and only by personnel who have considerable expertise in anesthesia. Heath Decl. ¶¶ 32, 49-52. Monitoring the effects of sodium pentothal, like those of other ultrashort-acting anesthetics, requires considerable expertise in anesthesia. Id. ¶¶ 32, 33. Moreover, because sodium pentothal is extremely unstable, it must be carefully and properly mixed so that it does not precipitate, a technical task that requires significant training in pharmaceutical calculations. Id. ¶¶ 36, 46. Thus, sodium pentothal's instability increases the likelihood of it being administered incorrectly, and its fast-acting properties heighten the risk that improper administration will result in ineffective anesthesia and consciousness, with resulting pain and suffering.

The danger of improper administration of sodium pentothal is exacerbated by the fact that the lethal injection protocol does not require medically trained personnel to supervise, or assist in the medical tasks necessary to prepare for the execution. These tasks include mixing the sodium pentothal solution, Heath Decl. ¶ 36; setting up the IV line and associated equipment, including the "Y" injection site, in order to ensure that fluids do not leak and are not misdirected, id. at ¶¶ 39-40; and finding a usable vein, properly inserting the IV line in the proper direction, and verifying that the drugs are flowing into the prisoner's vein rather than into surrounding tissue, id. at ¶¶ 41-45. All of these tasks require a high degree of specialized training. See id. at ¶ 65.

The risk of inadequate anesthesia is compounded by the fact that the protocol requires that no execution personnel be present in the execution chamber when any of the drugs are administered. The protocol thus prevents personnel from obtaining any visual or other verification that the drugs are actually being administered to the prisoner, or that the sodium pentothal anesthetic has taken and remains in effect. Proper monitoring of the flow of fluids into the vein requires a clear view of the

IV site, and also tactile examination of the skin surrounding the IV site to verify skin firmness and temperature. Id. at ¶¶ 39, 40, 54.

Proper monitoring of the prisoner would also necessitate that a person trained specifically in assessing anesthetic depth closely observe the prisoner at all times after the sodium pentothal is administered. Only persons trained in anesthesia are able to assess properly whether the prisoner has attained the degree of unconsciousness necessary to render him insensitive to pain. Id. at ¶ ¶ 18, 33, 55, 65. For this reason, even the American Veterinary Medical Association (AVMA) requires that persons euthanizing animals be "competent in assessing depth [of anesthesia] appropriate for administration of potassium chloride." 2000 Report of the AVMA Panel of Euthenasia, 218 J. Am. Veterinary Med. Ass'n 669, 681 (March 1, 2001) ("AVMA Report"). Similarly, Delaware law requires that administration of euthanasia for animals "be by a licensed veterinarian or by a person certified as proficient in the injection of sodium pentobarbital by a licensed veterinarian after passing both a written and practical examination." 3 Del. C. § 8002 (b)(2). See Heath Decl. At ¶ ¶ 56-57. No such certification or licensing requirement exists with regard to Delaware executions.

Thus, the lethal injection protocol, by requiring that non-medical personnel remotely inject an unstable drug into prisoners without proper monitoring, creates conditions that are highly conducive to serious errors that could cause the sodium pentothal to be administered improperly. In the face of this danger, the protocol fails to take even the most rudimentary steps towards minimizing the obvious potential problems. Indeed, the protocol is stunning in its complete failure to acknowledge any risk or potential problem other than tampering with the lethal drugs in the days leading up to the execution.

Examples of the protocol's failure to account for the very risks that it creates are numerous.

Despite the fact that the injection team personnel are not doctors or nurses who are capable of exercising competent medical judgment based on the situation at hand, the protocol contains no specific instructions for inserting the angiocath into the vein; what size should be used; what to do if there is trouble finding an adequate vein; or how to compensate if any equipment malfunctions. Similarly, the protocol does not attempt to account for the foreseeable issues that may arise when a prisoner requires special consideration for any reason. There is no provision for individualized dosage calculation or medical care or prisoners on medications that may interfere with the anesthetic. Nor is there any indication of how personnel should go about exercising their discretion should these types of issues arise, or who bears responsibility for making medical decisions on the scene. Indeed, the protocol does not specify whether the injection team is in any way prepared to handle the contingencies that might occur during the course of an execution, or provide that training should encompass foreseeable contingencies.

The protocol does not anticipate and provide for the problems that could arise as a result of having no personnel in the execution chamber with the condemned. There is no procedure for testing or verifying the efficacy of the extended IV tubing, or even any instruction on precisely how to set up the tubing. Nor is there a procedure for entering the chamber during the execution should any of the equipment malfunction or the prisoner somehow indicate that something has gone awry.

Finally, and most disturbingly, the protocol apparently does not require execution personnel to verify in any manner, even through the windows of the execution chamber, that the prisoner has been rendered unconscious by the sodium pentothal. Thus, despite the foreseeable risks created by the protocol and described above, the protocol simply does not acknowledge, much less provide for, the possibility that the dose of sodium pentothal will fail to render the prisoner unconscious.

b. The use of pancuronium bromide in combination with sodium pentothal creates a significant risk that the condemned will be conscious, but unable to communicate that he is conscious, during their executions.

In light of the fact that sodium pentothal is an ultra-short-acting anesthetic, and that Delaware's lethal injection protocol creates the risk that the dose will not be properly administered, it is particularly important that the prisoner have the opportunity to alert execution personnel should he regain – or never lose – consciousness, and that the execution personnel have the ability to ascertain whether the prisoner is properly anesthetized. Yet the use of pancuronium bromide in combination with sodium pentothal effectively prevents any post-administration correction of problems with the sodium pentothal. It also serves no purpose within the lethal injection process, raising questions about its use.

Pancuronium bromide is a neuromuscular blocking agent that blocks nerve cells from interacting with muscle tissue, therefore paralyzing the prisoner's muscles, including those of the chest and diaphragm. Heath Decl. ¶ 13. A patient given pancuronium bromide alone would slowly suffocate to death; thus, the unanesthetized experience of the effects of pancuronium bromide would in itself involve extraordinary suffering, as the condemned struggled to breathe. Id. at ¶ 22. Because the drug does not affect the brain or nerves themselves, however, an unanesthetized prisoner would remain completely conscious, but due to the paralysis would be completely unable to communicate either verbally or by movement the fact that he is conscious.

Pancuronium bromide also prevents observers from determining whether the condemned is conscious. Id. at ¶ ¶ 24, 25. Thus, even if the lethal injection protocol provided some mechanism by which personnel could monitor the prisoner's consciousness, which it does not, the use of

pancuronium bromide all but ensures that it will be impossible to determine visually whether the prisoner is still feeling pain. Should a prisoner retain consciousness after the sodium pentothal is administered, the prisoner would suffer slow suffocation as well as the excruciating pain of the potassium chloride, all while being completely paralyzed and unable to communicate. Id. at ¶ ¶ 13, 22, 27. This period would last at least a minute, until the condemned loses consciousness from suffocation or is killed by the potassium chloride. Id. at ¶ 13.

It is precisely this risk of the combination of ineffective anesthesia and paralysis that has led at least nineteen states to prohibit the use of a sedative in conjunction with a neuromuscular blocking agent like pancuronium bromide to euthanize animals. See Beardslee, 395 F.3d at 1073 & n.9 (listing relevant state laws and noting the evidence is "somewhat significant"). The AVMA, moreover, prohibits the use of neuromuscular blocking agents alone, stating that because the drugs cause "respiratory arrest before loss of consciousness, . . . the animal may perceive pain and distress after it is immobilized." AVMA Report at 696 app. 4. The fact that so many states and the nation's leading veterinary association have condemned as inhumane the use of anesthetics and neuromuscular blocking agents in tandem in the euthanasia of animals is – to say the least – persuasive evidence that this combination of drugs is not consistent with evolving standards of decency when administered to humans. The Eighth Amendment must prohibit the infliction of the same unnecessary pain that the laws of 19 states seek to avoid visiting upon household pets – the veterinary avoidance of this method of euthanasia is compelling indeed.

Despite the evidence that employing pancuronium bromide is not consistent with basic standards of care for animals, and the fact that the use of pancuronium bromide increases the risk that a prisoner will suffer unnecessary pain, Defendants will use it to execute Mr. Jackson.

Pancuronium bromide serves no legitimate purpose in the execution procedure while greatly increasing the risk of an prisoner's suffering undetected agony.

c. The deficiencies in Defendants' lethal injection protocol are the result of conscious choices.

The multiple flaws in Defendants' lethal injection protocol exist as the result of choices made by Defendants. Delaware's capital sentencing statute, 11 Del. C. § 4209,[4] gives Defendant Taylor almost total discretion over the means by which prisoners are executed: he is responsible for determining and supervising the execution procedure, including choosing the drugs used to accomplish the execution, developing the procedures by which the drugs are administered, and determining what training and qualifications, if any, are required for the execution team. Defendants have chosen to exercise this discretion in a manner that creates an unacceptable risk that prisoners will suffer excruciating pain before their deaths.

Defendants have chosen to use drugs that are extremely sensitive to error, in that sodium pentothal can wear off quickly if not administered correctly, and pancuronium bromide will mask the prisoner's resulting consciousness. For precisely this reason, the AVMA has chosen to use pentobarbital, a longer-acting anesthetic, in animal euthanasia. AVMA Report at 680-81. Thus, it is clear that other means of causing death by injecting lethal chemicals are available, and that considerations of good medical practice and preventing pain and consciousness are not incompatible with the aim of causing death.

d. Conclusion.

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[4]"Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction." 11 De. C. § 4209.

Delaware's lethal injection protocol creates a significant risk that a prisoner will experience excruciating pain for several minutes. This risk is inherent in the design of the protocol, with its insistence on remote administration and its choice of drugs, and is aggravated by the lethal injection protocol's failure to account for the problems that could arise as a result, and its failure to require adequate training, credentialing and licensing of those responsible for carrying it out.

The risk of unnecessary pain is clearly more substantial than the slight or negligible risk that may be characterized as an accident or anomaly. Available information from Delaware executions and those performed in other states with similar protocols, indicates the strong possibility that at least some of these prisoners were not properly anesthetized during their executions. While it is impossible to quantify precisely the risk of pain that an individual prisoner like Mr. Jackson faces when he enters the execution chamber, the nature of the risk renders it more substantial than might otherwise be the case. Because the potential problems are caused by the lethal injection protocol, every condemned prisoner faces the risk of unnecessary pain during his execution. The risk is not dependent on unforeseeable contingencies, such as an uncontrollable electrical problem, see Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947), but simply increases if a prisoner's individual characteristics make him less receptive to anesthesia. Mr. Jackson deserves to have his challenge considered on a full record after discovery.

Balanced against these foreseeable risks is the plain fact that Defendants can remediate these problems with no adverse impact on any legitimate concerns, such as the efficacy of the execution, prison security or cost.

C. Mr. Jackson Will Suffer Irreparable Harm If Injunctive Relief Is Not Granted.

If the Defendants are not enjoined from executing Mr. Jackson in accordance with its lethal

injection protocol, Mr. Jackson will suffer irreparable harm. The excruciating pain that Mr. Jackson will suffer during his execution clearly constitutes irreparable harm. See Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) (holding that continued pain and suffering resulting from deliberate medical indifference is irreparable harm). Moreover, he will have no meaningful retrospective remedy or remedy at law, as he will no longer be alive. Indeed, the Defendant's violation of Mr. Jackson's Eighth Amendment rights in itself warrants a presumption of irreparable harm, as federal courts have found that "an alleged constitutional infringement will often alone constitute irreparable harm." Association for Fairness in Business, Inc. v. New Jersey, 82 F.Supp.2d 353 (D. N.J. 2000) (internal quotation marks omitted).

D. The Balance of Hardships Favor Mr. Jackson.

The balance of hardships tips sharply in Mr. Jackson's favor. In requesting preliminary injunctive relief, Mr. Jackson seeks simply to vindicate his right to be free from cruel and unusual punishment in the time left before his execution. Without this preliminary relief, Mr. Jackson will be unable to vindicate these rights. Defendants, in contrast, will suffer little to no harm if Mr. Jackson's execution is carried out in a humane manner. See Gomez v. U.S. Dist. Ct. for Northern Dist. of Cal., 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.").

E. Granting Injunctive Relief Is In The Public Interest.

Mr. Jackson's claim that Delaware's lethal injection protocol causes unconstitutional wanton pain and suffering implicates the public interest. Because Mr. Jackson alleges that the State of Delaware will violate his Eighth Amendment rights by executing him in accordance with its lethal injection protocol, it is paramount to the public interest that Mr. Jackson's claims be resolved on the merits. The issues are significant enough that the United States Supreme Court has taken *certiorari* to consider them, see Nelson v. Campbell, 541 U.S. 637 (2004) (holding plaintiff's civil rights complaint pursuant to §1983 was appropriate vehicle for challenge to "cut-down" procedure, and plaintiff's request for preliminary injunction did not transform § 1983 claim into a challenge to validity of his death sentence sounding in habeas), and the Court continues to consider them on *certiorari* review this term, see Hill v. Crosby, 126 S.Ct. 1189 (2006) (granting *certiorari*). Surely the issues are worthy of this Court's consideration. Full and fair review is in the public interest.

Lethal injection has become the predominant method of execution because it is widely believed by officials to be, and is perceived by the general public as, the most humane form of execution. See Atul Gawande, *When Law and Ethics Collide – Why Physicians Participate in Executions*, 354 NEJM 1221-1229 (2006) ("Lethal injection now appears to be the sole method of execution accepted by courts as humane enough to satisfy Eighth Amendment requirements — largely because it medicalizes the process. . . . Officials liked this method. Because it borrowed from established anesthesia techniques, it made execution like familiar medical procedures rather than the grisly, backlash-inducing spectacle it had become."). In choosing lethal injection on the assumption that it is painless, the Delaware state legislature has concluded that employing the most humane method of execution possible is in the public interest. There is now compelling evidence,

as described herein and in the Complaint, that lethal injection protocols like the one used in Delaware create a significant and unacceptable risk of inflicting unnecessary pain. Definitively resolving the important and pressing question of the constitutionality of the lethal injection protocol is entirely in the public interest, and therefore granting temporary relief so that Mr. Jackson may remain alive while the parties conduct discovery into this issue also furthers the public interest.

There are no countervailing considerations suggesting that granting temporary relief would hurt the public interest. Mr. Jackson has not engaged in abusive delay, nor is this suit an attempt simply to put off his execution. Where an prisoner presents a meritorious claim of constitutional dimension, it cannot possibly be in the public interest to allow the State to execute him using the very method that he challenges.

IV. CONCLUSION

Mr. Jackson is not attempting to prevent the State from executing him. He simply is demanding the constitutional protection to which he is entitled, by requesting that this Court ensure that he is not executed in an unconstitutional manner. To avoid the risk that Mr. Jackson's execution will be performed in such a manner as to cause him to suffer minutes of torture immediately preceding his death, Mr. Jackson is entitled to relief under 42 U.S.C. § 1983.

Accordingly, Mr. Jackson requests that the Court grant to him a hearing on this motion for preliminary relief; discovery requested in the accompanying Motion; and a preliminary injunction preventing Defendants from executing him by means of lethal injection under the protocol currently in effect in the State of Delaware.

Respectfully Submitted,

/s/ Michael Wiseman

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Dated: Wilmington, Delaware
May 8, 2006

Certificate of Service

I, Michael Wiseman, hereby certify that on this 8th day of May, 2006 I served the within upon the following person by United States Mail, postage prepaid, by electronic filing and by e-mail:

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