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MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT

Mr. Oken seeks relief under 42 U.S.C. §1983 from violations by state actors of rights secured by the United States Constitution. Section 1983 provides, in pertinent part, for the protection of “any rights, privileges, or immunities secured by the Constitution and laws” against infringement by the states. When these rights are violated, §1983 creates an action for damages and injunctive relief for the benefit of “any citizen of the United States” against the state actor responsible for the violation. In accordance with the remedial nature of the statute, the coverage of 1983 must be “liberally and beneficently construed.” *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (*quoting, Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 684 (1978)). The United States Supreme Court has, therefore, “given full effect to [the statute’s] broad language” by recognizing that §1983 provides a remedy “against all forms of official violation of federally protected rights.” *Id.* at 444. More recently, the Supreme Court of the United States has recognized that a section 1983 action is an appropriate vehicle for seeking to enjoin a particular means of effectuating a sentence of death. *Nelson v. Campbell*, 2004 WL 1144374 (May 24, 2004).

II. SUMMARY OF ARGUMENT

Defendants intend to execute Mr. Oken during the week of June 14-18, 2004, in direct violation of federal and Maryland law and in a manner that likely will cause extreme pain and suffering. Executions by lethal injection in Maryland are governed by Md Code Ann., Correctional Services § 3-905, which requires the continuous administration of an ultra-short acting barbiturate in combination with a chemical paralytic agent. Maryland’s “Execution Procedures” (administrative regulations for carrying out executions that will be followed in carrying out Plaintiff’s execution) expressly do not utilize a continuous administration of a barbiturate. Moreover, the “Execution

Procedures” use three chemicals rather than two as permitted by the statute; one of these chemicals (potassium chloride) is not the type of chemical the statute permits.

Aside from the statutory violations, the current manner for carrying out lethal injections in Maryland violates the cruel and unusual punishment clause of the Eighth and Fourteenth Amendments to the United States Constitution. These provisions are violated when a punishment constitutes a lingering death as characterized by the unnecessary infliction of pain beyond that which is necessary to inflict death, when such risk exceeds that permitted by the Eighth Amendment, or when the punishment no longer conforms with the evolving standards of decency. Maryland’s “Execution Procedures” for lethal injection violates all each of these prongs.

The two chemicals authorized under Maryland’s execution statute are likely to cause an extremely painful death for Mr. Oken. Sodium pentothal or thiopental (the barbiturate that acts as a sedative) begins to wear off almost immediately increasing the likelihood that Plaintiff will be conscious during his execution. The second chemical, pavulon, paralyzes the body and causes extreme pain in a conscious individual. For this reason, the American Veterinary Association along with 19 states including Maryland have recently banned its usage in the euthanasia of animals; a statistic proving that the usage of pavulon violates evolving standards of decency.

The risk that these two chemicals will cause conscious pain and suffering is increased in Maryland due to the documented botched execution of the late Tyrone X. Gilliam. During this execution, the last execution conducted in Maryland, unknown executioners fabricated a primary IV line which leaked immediately at the start of the execution and continued to drip lethal chemicals throughout the execution while unknown executioners stood by and did nothing. Defendants’ deliberate indifference to Plaintiff’s legitimate medical needs during the execution and/or the

conditions of his confinement are amply reflected by the statement of an execution team member who believed leaks from the IV were “normal.” This speaks volumes about the lack of adequate preparation and training of the “execution team” members and unknown executioners.

The problems with these chemicals utilized in Maryland lethal injections is that it causes unnecessary pain and suffering during an execution and will deny Mr. Oken the basic constitutional right to death with the “dignity of man.” Thus, Mr. Oken is entitled to equitable relief in the form of a temporary injunction barring his execution until Defendants can bring their “Execution Procedures” into conformity with constitutional principles, and as explained in the next to last section of the argument, section 1983 is the appropriate vehicle to remedy these violations and issue the requested equitable relief.

Finally, Defendants refusal to disclose the “Execution Procedures,” claims that the procedures have recently been changed without providing Mr. Oken with a copy of the procedures or at least a list of the changes that have been made, and the fact that these changes were made after Mr. Oken expressed concerns that Defendants’ “Execution Procedures” violated the Eighth Amendment, not only is an attempt to manipulate the system, but the state courts failure to require their disclosure and other relevant documents which Defendants continue to withhold demonstrate the proceedings before the state courts were neither full or fair and accordingly do not operate as res judicata to this instant action.¹

¹ On June 12, 2004, Defendants provided Mr. Oken with a revised “Execution Operations Manual.” It bears pointing out that this document is missing nine pages and provides different concentrations of chemicals depending on which part of the document a person reads.

III. ARGUMENT

A. Overview of Relevant Legal Principles

1. Statutory Violations

“The delegation doctrine, prohibiting a legislative body from delegating its law making function to any other branch of government or entity is a corollary of the separation of powers doctrine which underlies both the Maryland and Federal Constitutions.” *Dep’t Transp., et. al, v. Armacost*, 311 Md. 64, 76-77, 532 A.2d 1056, 1062 (Md. 1987). Under this principle, regulations promulgated by an administrative agency must be consistent with the letter and spirit of the law in which the agency acts. Accordingly, it is “axiomatic that an administrative regulation must be consistent with the letter and policy of the statute under which the administrative agency acts” for a

legislatively delegated power to make rules and regulations is administrative in nature, and it is not and cannot be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, impairs, limits, or restricts the act being administered.

Insurance Com’r of State of Md. v. Bankers, 326 Md. 617, 623-24, 606 A.2d 1072, 1075 (Md.1992).²

² Plaintiff herein does not submit this violation of Maryland law as substantive grounds for relief but rather, as concrete evidence of the Defendants’ deliberate indifference to the Plaintiff’s health and safety and right to be free of an unnecessarily cruel and unusual punishment. *See Odom v. South Carolina Dept. of Corrections*, 349 F.3d 765, 770 (4th Cir. 2003); *see also Wilson v. Seiter*, 501 U.S. 294, 302 (1991) (“[W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate conditions of confinement.”).

2. Cruel and Unusual Punishment under the Eighth Amendment.

An inquiry into whether an execution procedure violates the Eighth Amendment focuses on:

1) the physical pain inflicted during an execution; 2) the risk of pain during an execution; and 3) whether evolving standards of decency condemn the method of execution.

First, a punishment is cruel when it involves “something more than the mere extinguishment of life,” such as “torture or a lingering death.” *In re Kemmler*, 136 U.S. 436, 447 (1890). This definition, however, “proscribes more than physically barbarous punishments.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It “forbids the infliction of unnecessary pain in the execution of the death sentence.” *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); accord *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the Eighth Amendment prohibits punishments that “involve the unnecessary and wanton infliction of pain”). Among the ‘unnecessary and wanton’ inflictions of pain are those that are “nothing more than the purposeless and needless imposition of pain and suffering,” *Francis*, 329 U.S. at 463, and those that are “totally without penological justifications.” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (*quoting Gregg*, 428 U.S. at 183; *citing Gamble*, 429 U.S. at 103). Thus, in determining whether a punishment constitutes unnecessary pain, a court must judge the cruelty of the method of execution in light of currently available alternatives. *Furman v. Georgia*, 408 U.S. 238, 430 (1970) (Powell, J., dissenting) (“[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.”).

Second, lurking in the background of whether a punishment is cruel and unusual is the risk of error that the Eighth Amendment tolerates. In capital cases, as in other cases, the teaching of the Supreme Court’s cases is that Eighth Amendment adjudication cannot proceed just by correcting

ugly but isolated instances of deviation from generally acceptable standards of procedure. Rather, it must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks of inflicting inhumane punishments. *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (acknowledging that the focus of the inquiry is whether there exists an “objectively intolerable risk of harm”); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that the “Eighth Amendment analysis “requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency”); *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (holding that an Eighth Amendment challenge to a method of execution must be considered in terms of the risk of pain).

Finally, the cruel and unusual punishment clause has an “expansive and vital character,” *Weems v. United States*, 217 U.S. 349, 373 (1909), that has been interpreted “in a flexible and dynamic manner.” *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989). Consistent with this expansive and flexible reading, the cruel and unusual punishment clause “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,” *Trop*, 356 U.S. at 101; accord *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), as evaluated “in light of contemporary human knowledge.” *Robinson v. California*, 370 U.S. 660, 666 (1962). “Although the Constitution contemplates . . . that the Court’s judgment will be brought to bear . . . , to the maximum extent possible, [these] ‘evolving standards should be informed by objective factors,’” *Atkins v. Virginia*, 536 U.S. 304, 312 (quoting *Penry*, 492 U.S. at 331, *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)),³ which include historical evidence, the consensus of the international community, and

³ See also *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (invalidating the death penalty for fifteen-year olds, noting that all eighteen states to consider a minimum age for imposing the death penalty require a defendant to be at least sixteen years of age); *Enmund v. Florida*, 458

legislative developments within the states. *Atkins*, 536 U.S. at 312-16; *see also Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (recognizing that international law is a legitimate factor for this Court to consider as an objective indicator of contemporary standards). According to the Court, “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the countries legislatures.” *Id.* at 312 (*quoting Penry*, 492 U.S. at 331). But, the number of states enacting legislation is not as important as the “consistency of the direction of change.” *Atkins*, 536 U.S. at 315.

3. Standards for granting injunctive relief.

Injunctive relief and declaratory judgment are equitable remedies that are granted in the discretion of the court. The factors that must be applied in determining whether to grant injunctive relief are: 1) the likelihood of irreparable harm to the Plaintiff if the preliminary injunction is denied; 2) the likelihood of harm to the Defendant if the injunction is granted; 3) the likelihood that the Plaintiff will succeed on the merits; and, 4) the public interest. *Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189, 194-96 (4th Cir. 1977). These factors are not of equal weight; the first two factors are the most important. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 2001). “If the hardship balance tilts sharply in the plaintiff’s favor, the required proof of likelihood of success is substantially reduced.” *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 817 (4th Cir. 1992). These four factors also govern the issuance of equitable relief in actions predicated on 42 U.S.C. section 1983. *Mitchum v. Foster*, 407 U.S. 225,

U.S. 782, 786-88 (1982) (invalidating the death penalty for felony murder, emphasizing that only eight of thirty-six jurisdictions authorized similar punishments); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that it was cruel and unusual punishment to impose a death sentence for rape, where only three states permitted such a sentence).

242-43 (1972); *Eisenberg ex rel. Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 127 (4th Cir. 1999); *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 51-52 (4th Cir. 1989); *Jones v. Board of Governors of University of North Carolina*, 704 F.2d 713, 715 (4th Cir. 1983).

B. The Department of Corrections has no Authority to Carry Out Plaintiff's Execution under its "Execution Procedures" Because the Procedures Violate the "Methods of Execution" Adopted by the State Legislature

The relevant Maryland statute proscribing the manner of execution in Maryland, Md. Code Ann., Corr. Serv., §3-905, provides that:

The manner of inflicting the punishment of death shall be the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical practice.

Thus, the Legislature has required that (a) executions be carried out by the use of an (i) ultrashort-acting barbiturate or other similar drug in combination with (ii) a chemical paralytic agent; and (b) that the administration of the ultrashort-acting barbiturate be **continuous**. Notwithstanding these very specific codified rules, Defendants have enacted an execution protocol that they intend to use to kill Mr. Oken that: (a) uses a third chemical not prescribed by the statute, potassium chloride, and (b) does not call for the "*continuous* intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug."

The Legislature in this case enacted a statute that is plain in language and specific in its requirement. Notwithstanding this specific prescription, Defendants have ignored the statute and have enacted protocols that add a third chemical to the execution process, potassium chloride, and also fail to require the continuous administration of the barbiturate. These execution protocols are "inconsistent or out of harmony with" and "alters, add to, extend or enlarge . . . the act being

administered.” Thus, the Department of Corrections has no authority to carry out Plaintiff’s execution under the “Execution Procedures,” and, by doing so, they would be allowed to create legislation; thereby, violating the separation of powers doctrine. *See Insurance Com’r of State of Md. v. Bankers*, 326 Md. 617, 623-24, 606 A.2d 1072, 1075 (Md.1992).

C. Lethal Injection as it is Currently Carried Out in Maryland Violates the Eighth Amendment Cruel and Unusual Punishment Clause.

Maryland’s current lethal injection process under the “Method of Execution” statute and the Department of Corrections’ “Executions Procedures” violates the Eighth Amendment because it constitutes the unnecessary infliction of pain, creates an unacceptable risk of pain during the execution, and violates evolving standards of decency.

1. The combination of chemicals used to execute inmates in Maryland creates a strong probability of unnecessary suffering and torture

Defendants intends to execute Mr. Oken by poisoning him with a lethal combination of three chemical substances: Sodium Thiopental, or Sodium Pentothal (an ultrashort-acting barbiturate that begins to wear off almost immediately); Pancuronium Bromide, or Pavulon (a curare-derived agent which paralyzes all skeletal or voluntary muscles, but which has no effect whatsoever on awareness, cognition or sensation); and potassium chloride (an extraordinarily painful chemical which activates the nerve fibers lining the inmate’s veins and which can interfere with the rhythmic contractions of the heart and cause cardiac arrest). The execution protocols enacted by the Division of Correction state as much:

- a. Pentothal (Thiopental) 2 grams (G)⁴
- b. Pavulon (Pancurium Bromide) 50 milligrams (MG)
- c. Potassium Chloride/150 milliequivalents (MEQ)

State of Maryland Department of Public Safety and Correctional Services Division of Correction, Division of Correction Manual 110-2 Execution Procedures (Exhibit 9 (Vol. I), Appendix A).⁵

The chemicals used by Defendants are identical to those used by other states which use lethal injection as a method of execution. *See* Exhibit 9 (Vol. I), Appendix A (Affidavit of Dr. Mark Heath, M.D.) *see also* Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 106, n. 303 (2002) [hereinafter Denno, *Lethal Injection*]. While there are concerns about whether any of these chemicals should be used in the execution process, it is clear that combining these chemicals violates constitutional protections. Far from producing a rapid and sustained loss of

⁴ After Mr. Oken filed in the Maryland courts asserting that 2 grams of Thiopental was exceedingly low vis-a-vis the protocols of other states and the federal government, *see* Affidavit of Mark Heath at ¶ 15, Defendants suddenly increased the level to 4.5 grams. *See* 2004 Execution Operations Manual Execution Checklist Contents of Syringes (May 26, 2004); *see also*, *Hill v. Ozmint*, characterizing 2 grams of thiopental as low compared to the rest of the states.

⁵ At other points, the “Execution Procedures” are internally inconsistent and specify different quantities of pavulon and potassium chloride. The “Lethal Injection Procedures Check Sheet,” appendix 13-A of the “Execution Procedures,” refers to 100 mg of pavulon in each of two syringes dissolved in 60 cc rather than 50 mg dissolved in 50 cc. It also refers to 100 meq of potassium chloride in each of two syringes dissolved in 60 cc rather than 50 meq in each of two syringes dissolved in 50 cc. The 2004 Execution Operations Manual likewise contains inconsistent and erroneous quantities. These protocols specify the administration of “10 mEq.[milliequivalents for each syringe]” this is erroneous. Instead of 10 mEq it should be 10mg (micrograms) of Pavulon. Likewise, the specified quantity of thiopental fluctuates. *Compare* Contents of Syringe [specifying 4.5 grams] “#1 Color Coded Red”; *with id.* “Total Injection” specifying 3.0 grams.

consciousness and humane death, the particular combination of chemicals utilized in Maryland often causes the inmate to consciously suffer an excruciatingly painful and protracted death; the sequence of the administration of the chemicals and failure to provide professional medical monitoring of the effects of the drugs, virtually assures that the objectionable character of the execution will go undetected.

a. Sodium pentothal

Sodium thiopental, or sodium pentothal, which is commonly used during surgery as an introductory anesthetic, is an ultra short-acting barbiturate that renders the patient unconscious for only a few minutes. Thus, the patient may re-awaken and breathe on his or her own power if any complications arise in inserting a breathing tube pre-surgery. Sodium thiopental begins to wear off immediately and will “dissipate after five to seven minutes.” *State v. Webb*, 750 A.2d 448, 451-52 (Conn. 2000); accord, *Drug Companies and Their Role in Aiding Executions*, available at, www.ncadp.org/html/report.htm, quoting, Dr. Lawrence Egbert, Visiting Assistant Professor of Anesthesiology, Johns Hopkins Medical School (stating that sodium pentothal “begins to wear off almost immediately, rendering the person conscious within minutes”), attached as Exhibit 9 (Vol. I), Appendix C. Because of sodium pentothal’s brief duration, Maryland’s failure to provide a continuous administration of sodium pentothal, the likelihood that the pentothal would not reach the inmate’s bloodstream, and the low quantity administered, sodium pentothal may not provide a sedative effect throughout the entire execution process --which lasts more than seven minutes.

According to Dr. Mark Heath, Assistant Professor of Clinical Anesthesia at Columbia University, “the use of a continuous administration of the ultrashort-acting barbiturate is essential to ensure continued and sustained unconsciousness during the administration of pancurium and

potassium chloride.” As Dr. Dennis Geiser, the chairman of the Department of Large Animal Clinical Sciences at the College of Veterinary Medicine at the University of Tennessee, recently explained:

Sodium thiopental is not a proper anesthetic for use in lethal injection. Indeed, the American Veterinary Medical Association standards for euthanasia indicate that the ideal barbituric acid derivative for animal euthanasia should be potent, long acting, stable in solution, and inexpensive. Sodium pentobarbital (not sodium thiopental) best fits these criteria. Sodium thiopental is a potent barbituric acid derivative but very short acting with one therapeutic dose.

Exhibit 9 (Vol. I), Appendix D (Affidavit of Dr. Dennis Geiser, in the case of *Texas v. Jesus Flores*, No. 877,994A).

As noted, Defendants have ignored the General Assembly’s instruction to administer Thiopental continuously which would significantly reduce the substantial harm which the Plaintiff now faces. Defendants’ attempts at the eleventh hour to increase the Thiopental administration to 4.5 grams fails to remedy the excessive risk to Plaintiff’s Eighth Amendment rights being violated, as discussed below. Maryland’s “Execution Procedures” creates a high risk that the sodium thiopental will not reach the inmate’s bloodstream, rendering the inmate conscious throughout the execution.

Due to the chemical combination used in the Maryland execution process, there is also a probability that the sedative effect of the sodium pentothal is neutralized by the second chemical, pavulon. As Dr. Heath states:

Sodium Thiopental is not used to maintain a patient in a surgical plane of anesthesia for purposes of performing surgical procedures. It is unnecessary, and risky, to use a short-acting anesthesia in the execution procedure. If the solution of sodium thiopental comes into contact with another chemical, such as pancurium bromide, the mixture of the two will cause the sodium thiopental immediately to crystallize. These factors are significant in the risk of the inmate not being properly anesthetized, especially since no-one checks that the inmate is unconscious before the second drug is administered.

Exhibit 9 (Vol. I), Appendix B (Affidavit of Dr. Heath).

These concerns with the usage of sodium thiopental are heightened by the lack of medical personnel,⁶ the lack of proper monitoring of the inmate during the process, and the lack of inmate-specific dosage of the barbiturate. According to Dr. Geiser:

[T]he dosage of thiopental sodium must be measured with some degree of precision, and the administration of the proper amount of the dosage will depend on the concentration of the drug and the size and condition of the subject. Additionally, the drug must be administered properly so that the full amount of the dosage will directly enter the subject's blood stream at the proper rate. If the dosage is not correct, or if the drug is not properly administered, then *it will not adequately anaesthetize the subject, and the subject may experience the untoward effects of the neuromuscular blocking agent.* . . .

Exhibit 9 (Vol. I), Appendix D, Affidavit of Dr. Dennis Geiser, in the case of *Abu-Ali Abdur' Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000) (emphasis supplied). Thus, "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." *Heckler v. Cheney*, 718 F.2d 1174, 1191 (D.C. Cir. 1983).

⁶ The shelf life of sodium pentothal is extremely short meaning that an improper conversion of the solid form into the liquid form or letting the chemical sit for too long will prevent the chemical from having its normal effect of rendering the inmate unconscious. See Exhibit 9 (Vol. I), Appendix B (Affidavit of Dr. Heath).

“In order to determine the proper concentration of lethal injection chemicals, chemicals should be designated in two ways: 1) by weight . . . and 2) by volume. The volume of diluent for chemicals should be 1) at least large enough so that all the chemicals will be dissolved, and 2) sufficiently dilute so that it will not irritate the inmate’s vein and cause the inmate pain” or clog the veins. Denno, *Lethal Injection*, at 119. Furthermore, because people differ in physiological composition “as well as their drug tolerance . . . some prisoners may need a far higher dosage of sodium thiopental than others ‘before losing consciousness and sensation.’” *Id.* at 108, *citing*, Affidavit of Brunner, *infra*; *see also*, *Webb*, 750 A.2d at 452 (noting that “the effect of thiopental sodium varies from person to person”). By administering the same quantity of sodium pentothal to all inmates subject to execution while not specifying the volume or concentration of the chemical, Maryland’s usage of sodium pentothal during lethal injection creates a high probability that the inmate will not be rendered unconscious before the other drugs are administered.

Not only is there a high probability that sodium pentothal will not serve its only purpose during lethal injection, to render the inmate unconscious, but it also creates a high probability that the inmate will suffer a painful and excruciating death. Drug manufacturers warn that without careful medical supervision of dosage and administration, sedatives including sodium pentothal can cause “paradoxical excitement” and can heighten sensitivity to pain. *See* Physicians Desk Reference, 56th Ed. (2002) at 485-87, 877. Exhibit 9 (Vol. I), Appendix E. For this reason, manufacturers warn against administration by intravenous injection unless a patient is unconscious or out of control. *Id.* Moreover, sodium pentothal is likely to cause a person to choke or gag and aspirate stomach contents when administered within eight hours of consuming any food or beverage. *See* Denno, *Lethal*

Injection, at 123, *citing*, Affidavit of Edward A. Brunner, M.D., Ph.D., Exhibit B of Verified Complaint in Chancery, *Gacy v. Peters*, No. 94 CH (Ill. April 1994).

As demonstrated above, it is predictable that sodium pentothal will either fail to render the inmate unconscious causing the inmate to suffer excruciating pain from the other chemicals administered including the pain of suffocation or will cause unnecessary pain in and of itself. In fact, this has repeatedly been the case in both North and South Carolina (both states administer the same quantity of sodium thiopental as Maryland), where, unlike Maryland, autopsies are conducted after an execution, and where Dr. Dershwitz appeared as an expert for the government.

1. District of South Carolina's findings concerning Dr. Dershwitz.

A little more than two months ago the United States District Court for the District of South Carolina, a jurisdiction not typically known for judicial activism, not only found that Dr. Heath's sworn averments with respect to the manner of lethal injection as conducted in that state made out a *prima facie* Eighth Amendment violation, but that Dr. Dershwitz's (the Defendants' expert) averments failed to address those concerns:

First and foremost, the affidavits before the court raise issues concerning the procedures used in South Carolina and whether it is adequate to safeguard against the wanton infliction of pain. The affidavits indicate that the first drug administered in the execution process is two grams of thiopental (Pentothal Sodium) diluted in a total volume of 80 ml. The apparent purpose of this drug is to render the subject unconscious, and defendants expert Dr. Mark Dershwitz, avers that this dosage is at least five time the dosage used to anesthetize a patient for surgery (Affidavit ¶ 17), and would render him unconscious for two hours (Affidavit ¶ 13). Further, he avers to varying degrees of probability whether a subject would be conscious after varying periods of time. (Affidavit ¶¶ 9,10, 11, 12). He attaches a chart to his affidavit entitled, "Blood Concentration After 2 Grams of Thiopental Sodium in the Average Man within 20 Minutes." However the chart and the probabilities are clearly for a blood concentration in the neighborhood of 300 to 400 mcg/ML, that is, for a patient in surgery. If the affidavit is taken at face value and adjustments made for the varying calculations, then it is highly supportive of defendant's position.

However the affidavit from Dr. Mark Heath, plaintiff's expert, raises issues not mentioned or considered by Dr. Dershwitz or reflected in the South Carolina Execution Procedures (South Carolina Department of Corrections SK-22.03 dated May 1, 2002 attached to defendant's brief). These include the lack of safeguards to protect against errors, including, among other things, errors in the injection process, such as mistakes in the dilution and administration of the thiopental. Dr. Heath also notes that despite Dr. Dershwitz's assurances that the two gram dilution of thiopental is more than adequate, other states using lethal injection as a means of execution, including apparently the federal government have adopted a protocol for five grams of thiopental.

While the importance of the thiopental in preventing the wanton infliction of pain is recognized by all of the parties, plaintiff's concerns do not end there and include issues such as "cut-down" procedures to access an appropriate vein, the training and supervision of those carrying out the execution, and the lack of involvement by a supervising medical professional. Clearly these are serious issues going to the merits, so as to make them fair grounds for litigation and thus more deliberate investigation.

Hill v. Ozmint, C/A No. 2:04-0489-BAJ (D.C.S.C. March 4, 2004) at 5 (footnotes omitted)

(Appendix 12 to Complaint).⁷

⁷ To the extent that Defendants may allege that they have changed the procedures or increased the dosage of sodium thiopental (after Mr. Oken raised concerns about the execution procedure), they have failed to address or adequately resolve the constitutional issues presently before this Court. Defendants' submissions with respect to sodium thiopental are purely theoretical. That is to say, the State of Maryland is not going to execute Mr. Oken inside Dr. Dershwitz's computer. Instead, Mr. Oken will be executed in the real world at the Death Chamber in Baltimore. Although superficially appealing, the flaw in the Defendants' argument, and Dr. Dershwitz's projections, is that neither of them makes any exception for realistic and potential problems. For example, Defendants assume that both the Department of Corrections' supply of thiopental has been stored in a manner which retains its potency, and that members of the execution team correctly mix and prepare the thiopental so that the syringe marked *RED* [thiopental] in the execution chamber in fact contains 4.5 grams of injectable thiopental. Defendants (and Dr. Dershwitz) also assume that the full 4.5 grams in the syringe enters the inmate's blood stream. Both Defendants and Dr. Dershwitz make these assumptions. Having failed to take real world factors into account prior to loading the thiopental into the syringes, no real world factors into account during the thiopental's administration. In other words, all of the Defendants' arguments regarding thiopental take place in a pristine theoretical vacuum.

The heart of the matter is reached in Dr. Dershwitz's Table D through which he generates dizzying statistical probabilities regarding Mr. Oken's likelihood of being unconscious at eighty

2. North Carolina toxicology results.

By extrapolating Dr. Dershwitz's theoretical model and applying it to inmates executed in North Carolina for whom blood levels of thiopental are available, as measured by the North Carolina Office of the Chief Medical Examiner, it becomes quite clear that Dr. Dershwitz's theoretical model bears little or no relationship to the real world. For example, when North Carolina executed Desmond Keith Carter, the Medical Examiner ascertained that Mr. Carter's blood contained only "trace" amounts of thiopental. *See* Exhibit 17 (Vol. I), Appendix K (Toxicology Report of Desmond Keith Carter). Assigning 2.6 mg/L for "trace amounts" and plotting this value on Table D produces a probability of consciousness for Mr. Carter of 100%. *See* Exhibit 17 (Vol. I), Appendix L (Toxicology Report of Desmond Keith Carter's Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Table D). In the same fashion, plotting the 2.6 mg/L of thiopental found in Mr. Arthur Martin Boyd's blood, Exhibit 17 (Vol. I), Appendix M (Toxicology Report of Arthur Martin Boyd), likewise, produces a 100% probability of consciousness. *See* Exhibit 17 (Vol. I), Appendix N (Toxicology Report of Arthur Martin Boyd's Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Table D). Plotting Michael Earl Sexton's thiopental blood value of 3.7 mg/L, Exhibit 17 (Vol. I), Appendix O (Toxicology Report of Michael Earl Sexton), produces a 100% probability that he was conscious. *See* Exhibit 17 (Vol. I) Appendix P (Toxicology Report of Michael Earl Sexton's Postmortem Blood

seconds, *id.* at ¶ 8 (99.99999 %), at five minutes, *id.* at ¶ 9 (0.00006 %), and at ten minutes, *id.* at ¶ 10 (0.003 %). At bottom, this modeling as defendants (and their expert) assumes that 4.5 grams of thiopental in the syringe equates with 4.5 grams of thiopental in the blood stream. Dr. Dershwitz's modeling does not accurately predict the quantity of thiopental in the blood stream. When real world thiopental blood levels are plotted on Dr. Dershwitz's Table D, those levels demonstrate a probability of consciousness as high as 100%.

Concentration of Thiopental as Plotted on Dr. Dershwitz's Table D). Plotting Ronald Wayne Frye's thiopental blood value of 8.2 mg/L, Exhibit 17 (Vol. I) Appendix Q (Toxicology Report of Ronald Wayne Frye), produces a 40% probability that he was conscious. *See* Exhibit 17 (Vol. I) Appendix R (Toxicology Report of Ronald Wayne Frye's Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Table D).

3. South Carolina toxicology results.

Eerily similar results have also occurred in South Carolina. Based on Dr. Dershwitz's modeling, at the trial of this case, Petitioners' expert would be forced to concede that there was a 50% probability that Messrs. Larry Gilbert (thiopental blood level 7.1 mg/L), Louis Truesdale (thiopental blood level 7.5 mg/L), and Richard Johnson (thiopental blood level 7.8 mg/L) were conscious when Petitioner Unknown Executioners injected them with Pancurium Bromide and Potassium Chloride, while there was a 90% probability that Ronald Howard (thiopental level "detected"), Kevin Dean Young (thiopental blood level 3.4 mg/L), and Michael Passaro (thiopental blood level 6.1 mg/L), were conscious during their executions. In short, approximately, one quarter of all individuals subjected to lethal injection in South Carolina were conscious while they were chemically suffocating from Pancurium Bromide (banned in this state for the euthanasia of animals), and suffering the agony of a potassium chloride induced heart attack.

Indeed, by plotting Mr. Howard's Sodium Thiopental blood levels onto Dr. Dershwitz's Exhibit D,⁸ it becomes quite clear that Dr. Dershwitz's chart reveals a 100% probability that Mr.

⁸ As Dr. Dershwitz explains, Exhibit D was created from his pharmacodynamic analysis which shows the "probability that an average man will be conscious as a function of the blood concentration of thiopental. In other words, the concentrations of thiopental." Affidavit of Dr. Dershwitz at ¶7.

Howard was conscious throughout his execution (Toxicology Report of Ronald Howard as Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D) (Exhibit 17 (Vol. I), Appendix T). Similarly, Mr. Young's thiopental level establishes a 100% probability that he too was conscious throughout his execution. (Toxicology Report of Kevin Dean Young Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D) (Exhibit 17 (Vol. I), Appendix V). Moreover, there is a 90% probability that Mr. Michael Passaro was conscious throughout his execution. (Toxicology Report of Michael Passaro Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D) (Exhibit 17 (Vol. I), Appendix X)); *see also*, (Toxicology Report of Larry Gilbert Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D)(Exhibit 17 (Vol. I), Appendix Z)); Toxicology Report of Louis Truesdale Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D)(Exhibit 17 (Vol. I), Appendix BB).

4. Reliability of the North Carolina and South Carolina toxicology results.

Defendants may assert, as has been done in other states, that post mortem blood levels from North and South Carolina are not reliable as the blood samples were "inconsistent and probably improper." Although Dr. Dershwitz has asserted that it is "imperative" that the blood be drawn from the heart, he will not go so far to say the samples from South Carolina were not obtained from the heart. His criticism with respect to the North Carolina samples is even more tepid. Affidavit of Dr. Dershwitz at ¶ 22. Of course, such restrained criticism is not surprising as he well knows it is unclear whether these samples were in fact obtained from the heart. Moreover, when Dr. Dershwitz opines with respect to matters of pathology he has left his area of expertise which is the

“pharmacodynamics and pharmacokinetics of drugs in the living,” not the measurement of drugs post-mortem.

Contrary to Dr. Dershwitz’s statements, sodium thiopental levels drawn from the heart are misleading because it includes thiopental concentrations that have seeped in from the liver; thereby, making the concentration higher than that which actually reached the brain - - which controls consciousness. Nonetheless, the location where the blood is drawn fails to explain the discrepancies that have been seen with some of the thiopental levels in South Carolina. Although many of the thiopental levels show that the inmate is conscious during the execution, a few of the thiopental levels are high. This discrepancy demonstrates that a problem is occurring during lethal injections in that while some inmates are receiving a sufficient dosage of thiopental to cause unconsciousness, many are not. This problem is greatly exacerbated in Maryland because the last execution conducted in the state involved a leaking IV line, which despite Defendants’ claim that this is normal, clearly proves that the full dosage of thiopental did not reach the inmate. Thus greatly increasing the risk, beyond that of any other state, that the thiopental will not cause unconsciousness or that a sufficient amount of thiopental will not reach the inmate; a risk that is more than the Eighth Amendment will tolerate.

b. Pavulon⁹

The second chemical involved in the lethal injection process, pavulon is a derivative of curare that acts as a neuromuscular blocking agent. In other words, pavulon paralyzes the body and

⁹ As evidenced by both the Defendants’ disregard for the legislative grant of authority and the Maryland Court of Appeals’ opinion, a finding that Pavulon’s use violates the evolving standards of decency does not require new legislation but, rather, merely an order instructing the Defendants to cease its administration.

collapses the organs causing suffocation. If the sedative effect of the sodium pentothal is ineffective or neutralized, as is probable in the Maryland execution process particularly since Maryland has a history of leaking IV lines during an execution and a belief that such leakage is normal, the pavulon would serve only to mask the excruciating pain of the condemned inmate while he or she suffocates to death.¹⁰

In the lethal injection process, Pancuronium bromide makes the prisoner appear serene because of its paralytic effect on the muscles. The facial muscles cannot move or contract to show pain and suffering, and become relaxed and thereby generate an impression of tranquility. Pancuronium therefore confers a >chemical veil= to the procedure. Because pancuronium bromide is an invisible chemical veil and not a physical veil like a blanket or hood that is easily identifiable, the use of this chemical in lethal injection deceives observers into believing they have witnessed a humane event. Pancuronium obscures the fact that there is a disguise over the process. Thus, visual monitoring by citizen witnesses, counsel for the inmate, medical and prison personnel is rendered meaningless, as these individuals are unable to make any determination as to whether the procedure is humane.

Exhibit 9 (Vol. I), Appendix B (Affidavit of Dr. Heath).

In *Abdur' Rahman v. Bell*, Dr. Geiser asserted that while Pavulon paralyzes skeletal muscles, including the diaphragm, it has *no effect on consciousness or the perception of pain or suffering*. Administration of Pavulon is ***like being tied to a tree, having darts thrown at you, and feeling the pain without any ability to respond***. Exhibit 9 (Vol. I), Appendix D (Affidavit of Dr. Dennis Geiser in the case of *Abu-Ali Abdur' Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. granted* on other grounds, 122 S.Ct. 1463 (U.S. April 8, 2002) (No. 01-9094) (emphasis added)). This assertion is corroborated by the experience of eye surgery patient, Carol Weihrer. During Ms. Weihrer's surgery,

¹⁰ In this situation, the inmate would suffer an extremely painful and lengthy death by suffocation, which has been held unconstitutional by the Ninth Circuit. *See Fierro v. Gomez*, 77 F.3d 301, 308 (9th Cir. 1996) (holding that execution by lethal gas violated the Eighth Amendment because the inmate is likely to be conscious for fifteen seconds to one minute, and, during this period, the inmate is likely to suffer the intense physical pain of suffocation).

the sedative she received was ineffectual meaning that Ms. Weihrer was conscious of the entire surgery. Due to the administration of a neuromuscular blocking agent like pancuronium bromide, however, she was unable to indicate her consciousness to doctors:

I therefore experienced what has come to be known as Anesthesia Awareness, in which I was able to think lucidly, hear, perceive and feel everything that was going on during the surgery, but I was unable to move. It burnt like the fires of hell. It was the most terrifying, torturous experience you can imagine. The experience was worse than death.

Exhibit 9 (Vol. I), Appendix F (Affidavit of Carol Weihrer at ¶ 1 in the case of *Texas v. Jesus Flores*, No. 877,994A). Thus, the combination of these kinds of chemical resulted in the horrifying experience in which a person who appeared sedated to trained medical personnel closely monitoring the operation actually was fully sensitive to the horrifying agony of having her eyeball removed, but was disabled from displaying her agony. "Intraoperative awareness" is a well-recognized complication of general anesthesia, and discussed at length in the professional literature. Also, significant professional medical research and training are directed at decreasing the incidence of these events.

Pavulon, not only is likely to cause severe pain, but is arbitrarily used because it serves no legitimate purpose in an execution. Pavulon was originally intended to cause death, but with the advent of potassium chloride to serve this purpose, Pavulon is unnecessary in the execution process. The current usage of Pavulon only serves to guarantee that the condemned inmate will be forced into a state of "chemical entombment" while the inmate consciously experiences the potassium chloride ravaging his internal organs. Persons viewing the lethal injection procedure and the public will never realize that a cruel fraud is being perpetrated upon them; instead of witnessing an inmate quiet and

motionless while being “put to sleep,” they witness the cover-up of a deliberate act of excruciating torture during which the inmate may be fully conscious.

In sum, the usage of pavulon in an execution violates the Eighth Amendment both because it serves no legitimate purpose and because it causes excruciating pain, which is concealed from observers.

c. Potassium Chloride

The third chemical used, potassium chloride, also raises important Eighth Amendment concerns because it causes an extreme burning sensation. Therefore, if an inmate is not properly anaesthetized, the inmate will suffer an excruciatingly painful death while the burning of the potassium chloride ravages his organs. Denno, *Lethal Injection, supra*; *Drug Companies and Their Role in Aiding Executions, supra*. Exhibit 9 (Vol. I), Appendix G.

2. The danger that Lethal Injection will create unnecessary suffering and torture is greatly increased by the lack of physician involvement in the execution process

The risk of inflicting severe and unnecessary pain and suffering upon Mr. Oken during the lethal injection process is particularly grave in Maryland because the meager procedures and protocols designed by the Maryland Division of Correction fail to include safeguards regarding the manner in which the execution is to be carried out, fail to establish the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure, and fail to establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures.

Furthermore, there are no available directions or standards for the necessary training, education, or expertise of the personnel who will be exercising this critical discretion and performing

these tasks and duties and the most recent disclosures by the Defendants does nothing to address the Plaintiff's significant concerns and likelihood Defendants will not botch execution as well. The Maryland execution protocols completely fail to articulate the criteria or standards that such personnel must rely upon in exercising this discretion. The consequences of this failure will likely result in the unnecessary and wanton infliction of severe pain and suffering.

Perhaps most importantly, there are no apparent answers to critical questions governing a number of crucial tasks and procedures in the lethal injection procedure such as:

- (a) the minimum qualifications and expertise required for the different personnel performing the tasks involved in the lethal injection procedure after the catheter is inserted;
- (b) the manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;
- (c) the manner in which the IV catheters shall be inserted into the condemned prisoner, the professional training of the individual(s) who is given the responsibility and discretion to decide when efforts at inserting the IV catheters should be abandoned and the cut down procedure begun, and the criteria that shall be used in exercising this discretion;¹¹

¹¹ See Denno, *Lethal Injection*, at 106, n. 303 (citing Thomas O. Finks, *Lethal Injection: An Uneasy Alliance of Law and Medicine*, 4 J. Legal Med. 383, 397 (1983) (explaining that "[l]ethal injections may not work effectively on diabetics, drug users, and people with heavily pigmented skins"); Harold L. Hirsh, *Physicians as Executioners*, Legal Aspects of Med. Prac., Mar. 1984, at 1 (noting that "if a person is nervous or fearful, his veins become constricted"); *On Lethal Injections and the Death Penalty*, 12 Hastings Center Rep. 2, 2 (Oct. 1982) (explaining that lethal injections are particularly difficult to administer "to people with heavily pigmented skins . . . and to diabetics and drug users"); Jacob Weisberg, *This is Your Death: Capital Punishment: What Really Happens*, New Republic, July 1, 1991, at 23 (describing the 45 minutes required for technicians to find a serviceable vein in a former heroin addict); Another U.S. Execution Amid Criticism Abroad, N.Y. Times Apr. 24, 1992, at B7 (reporting that the difficulty in executing Billy Wayne White was due to his history as a heroin user).

- (d) the manner in which the condition of the condemned prisoner will be monitored to confirm that proceeding to the next procedure would not inflict severe and unnecessary pain and suffering on the condemned prisoner;
- (e) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to order the staff to divert from the established protocols if necessary to avoid inflicting severe and unnecessary pain and suffering on the condemned prisoner, and the criteria that shall be used in exercising this discretion; and,
- (f) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to insure that appropriate procedures are followed in response to unanticipated problems or events arising during the lethal injection procedure, and the criteria that shall be used in exercising this discretion.

Maryland, unfortunately, has not been immune to these types of botched lethal injections. As the affidavit of Jerome H. Nickerson, Esq., notes, Defendants botched the last lethal injection they conducted. During the execution of Tyrone X. Gilliam, fluid continuously dripped from the IV causing puddles of fluid. Affidavit of Jerome H. Nickerson Jr. Esq. Exhibit 9 (Vol. I), Appendix J. As Dr. Heath's affidavit notes, there can be little question that either the Defendants are incompetent to conduct lethal injections or simply do not care whether the drugs specified by the legislature ever reach the condemned inmates. As Dr. Heath notes, it is essential that all of the two grams of thiopental actually be delivered to the condemned inmate's blood stream.

There can be no question that when IV fluid is dripping on the floor of the death chamber, it is not reaching the inmate's blood stream and there is nothing to suggest that Defendants will not likewise botch the execution of Mr. Oken in a similar fashion. They have no protocol in place to prevent this from happening again and no procedures in place for what to do when Mr. Oken's primary IV line begins leaking.

3. Euthanasia practices that include the use of a sedative in conjunction with a neuromuscular blocking agent violate evolving standards of decency

The manner of execution employed by the State of Maryland is, of course, subject to the evolving standards of decency that mark the progress of a maturing society. *See Trop v. Dulles*, 356 U.S. 86 (1958); *Stanford v. Kentucky*, 492 U.S. 361 (1989). The lethal injection procedure must conform to the contemporary norms and standards of American society. *See Weems v. United States*, 217 U.S. 349 (1910). Science has moved on since the late 1970s, and a greater knowledge is available of the drugs involved in lethal injection.

Recent research in, and subsequent legal changes regarding, pet euthanasia casts serious doubt as to whether the Maryland execution protocol passes constitutional muster. Specifically, the state intends to use paralyzing agents whose use on animals would violate veterinarians' ethical standards and Maryland law.

Since 1981, at least nineteen states, including Maryland, have passed laws that preclude the use of a sedative in conjunction with a neuromuscular blocking agent. Moreover, the leading professional association of veterinarians has promulgated guidelines for euthanasia that preclude the practice. *See Exhibit 9 (Vol. I), Appendix K (2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 *Journal of the American Veterinary Medical Association*, 669, 681 (2001)). A euthanasia practice widely considered unfit for a dog is certainly unfit for humans as well, especially in light of the fact that the State may easily accomplish the same result with a more humane combination of chemicals. Given the consistency in the statutory regulations of euthanasia, the method currently practiced by the State of Maryland is outside the bounds of evolving standards of decency. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

Many states, including Maryland in 2002, have passed legislation prohibiting inhumane methods of euthanizing animals, including the use of neuromuscular blocking agents such as pancurium bromide. *See* Florida, Fla. Stat. §§ 828.058 and 828.065 (enacted in 1984); Georgia, Ga. Code Ann. § 4-11-5.1 (enacted in 1990); Maine, Me.Rev.Stat. Ann. tit. 17, § 1044 (enacted in 1987); Maryland, Md.Code Ann., Criminal Law, § 10-611 (enacted in 2002); Massachusetts, Mass.Gen.Laws § 140:151A (enacted in 1985); New Jersey, N.J.S.A. 4:22-19.3 (enacted in 1987); New York, N.Y.Agric. & Mkts § 374 (enacted in 1987); Oklahoma, Okla. Stat., Tit. 4, § 501 (enacted in 1981); Tennessee, Tenn.Code Ann. § 44-17-303 (enacted in 2001); Texas, Tex. Health & Safety Code, § 821.052(a).

The American Veterinary Medical Association has now explicitly forbidden the combinatory use of a sedative with a neuromuscular blocking agent during euthanasia as well as stressed that

[i]t is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously. Administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli.

Exhibit 9 (Vol. I), Appendix K (*2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 *Journal of the American Veterinary Medical Association*, 669, 681 (2001)).

These recent alterations of euthanasia protocol for pets underscore the inhumanity of the execution practice in Maryland. It can hardly be disputed that if certain euthanasia techniques are banned as overly cruel to animals, those same practices must violate our current standards of decency regarding the execution of humans.

D. Plaintiff is Entitled to Injunctive Relief Barring Defendants from carrying out his execution by utilizing a tri-chemical cocktail and deficient “Execution Procedures.”

As previously discussed, the following four factors are determinative as to whether to grant an injunction: 1) the likelihood of irreparable harm to the Plaintiff if the preliminary injunction is denied; 2) the likelihood of harm to the Defendant if the injunction is granted; 3) the likelihood that the Plaintiff will succeed on the merits; and, 4) the public interest. *Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189, 194-96 (4th Cir. 1977)

Each of these four conditions manifestly favors Plaintiff. First, as demonstrated earlier, the Plaintiff’s constitutional claim is weighty, and therefore, there is a substantial likelihood that he will prevail on the merits. Thus, it “would be odd to deny a temporary injunction to an inmate who will suffer loss of life under possibly cruel and unusual circumstances.” *Hill v. Ozmint, et al.*, NO. 2:04-0489-18AJ (D. S.C. March 4, 2004) (Exhibit 9 (Vol. I), Appendix L). Second, the injunction will do no harm to the defendants because “there is no fear here of the state’s judgment being avoided or denied; in fact, plaintiff does not seek such relief. All he seeks is a death in “accord with the dignity of man, which is the basic concept underlying the Eighth Amendment.” *Id.* (quoting, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Third, if the injunction is not granted, the Plaintiff will suffer irreparable injury, because he will be executed before the merits of his cogent claim is addressed. *See Wainwright v. Booker*, 473 U.S. 935 n. 1 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted). Fourth, the public interest will be served, rather than disserved, by providing “reasonable assurance that [Plaintiff’s execution] will be carried out humanely.” *Hill v. Ozmint, et al.*, NO. 2:04-0489-18AJ (D. S.C. March 4, 2004) (Exhibit 9 (Vol. I), Appendix L).

E. Mr. Oken's suit challenging the particular means that Defendants intend to employ in effectuating his execution by lethal injection is cognizable under 42 U.S.C. section 1983.

Mr. Oken's ability to maintain a section 1983 suit turns upon whether his claims "necessarily imply the invalidity of [his] conviction[s] or sentence[s]" *Heck v. Humphrey*, 512 U.S. 475, 487 (1994). The "requirement to resort to state litigation and federal habeas before section 1983 is not, however, implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence." *Muhammad v. Close*, 124 S.Ct. 1303 (Feb. 25, 2004). In *Muhammad*, a prisoner filed a section 1983 suit against a prison official alleging that he had been charged with an institutional infraction which subjected him to mandatory pre-hearing lockup. *Id.* The Court held that "these administrative determinations do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of the time to be served that is not necessarily so." *Id.* Accordingly, the Court held that the suit was properly filed under section 1983.

Like *Muhammad*, Mr. Oken's section 1983 suit cannot be "construed as seeking judgment at odds with his conviction [or sentence]." 123 S.Ct. at 1305. Mr. Oken does not challenge his death sentence or even the constitutionality of lethal injection *per se*. His complaint, memorandum of law, and motion for a temporary injunction are clear on this. He only seeks a temporary restraining order and a preliminary injunction barring Defendants from executing him in the manner they currently intend (the usage of chemicals that violate the Eighth Amendment Cruel and Unusual Punishment Clause, and procedures that increase the likelihood that Mr. Oken will suffer an excruciatingly painful death). Accordingly, under *Muhammad*, Mr. Oken's suit must be allowed to proceed under section 1983. *See Nelson v. Campbell*, 2004 WL 1144374 (U.S. May 24, 2004).

Any potential doubt about the meaning of *Muhammad* and its implications for Mr. Oken were clarified less than three weeks ago in *Nelson v. Campbell*, 2004 WL 1144374 (May 24, 2004), where the Court cited *Muhammad* for the proposition that its holding is “consistent with [its] approach to civil rights damages actions.” *Id.* In *Nelson*, the Court addressed the issue of “whether section 1983 is an appropriate vehicle for petitioner’s Eighth Amendment claim seeking a temporary stay and permanent injunctive relief” on the grounds that the particular means for effectuating petitioner’s death sentence by lethal injection violated the Eighth Amendment Cruel and Unusual Punishment Clause. *Id.*

In addressing this issue, the Court noted that “a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself.” *Id.* On the other hand, the Court held that “[a] suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the ‘fact’ or ‘validity’ of the sentence itself” because “by altering its method of execution, the State can go forward with the sentence.” *Id.* Moreover, “merely labeling something as part of an execution procedure is insufficient to insulate it from a section 1983 attack.” *Id.* In applying these principles to Nelson’s challenge to a particular aspect of the lethal injection procedure, the Court held that his claim was properly filed under section 1983 because the allegation “that venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary.” *Id.*

Nelson, is not limited to “just a cut down.” This contention is unmasked by reference to the questions present by Nelson. The first question asked:

Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. §1983, which does not attack a conviction or sentence, is - simply because the person is under a sentence of death - to be treated as a habeas corpus case subject to the restriction on successive petition which categorically precludes review of any constitutional violation not related to innocence (as the Fourth, Fifth and Eleventh Circuits hold), or can be maintained as §1983 action (as the Sixth, Eighth and Ninth Circuits and several lower courts hold)?

The second question asked:

Whether a cut-down procedure which involves pain and mutilation, conducted prior to an execution by lethal injection, violates the Eighth Amendment to the United States Constitution?

See Nelson v. Campbell, Motion for Leave to File Brief and Brief of Amici Curiae in Support of Petitioner, 2003 WL 22720983, at *3 (U.S. Nov. 10, 2003) (listing two questions presented in Nelson's certiorari petition. Although the United States Supreme Court granted certiorari, the Court expressly limited the issue for consideration to the first question presented. *Nelson v. Campbell* 124 S.Ct. 835 (2003). Therefore, any suggestion that Nelson is limited to a “cut-down” procedure is inaccurate. Clearly, *Nelson's* reach is not circumscribed to merely a cut down procedure. If it was, then the Court would have granted review on the second question and would thereby have prevented any inmate, other than those exposed to lethal injection with poor venous access from bringing an allegation of violation of the Eighth Amendment after completing one round of federal habeas review.

Nelson does not speak merely to a cut down rather, it establishes a federal district court retains subject matter jurisdiction to hear § 1983 claims filed by a prisoner under a state sentence provided that the claim does not imperil execution of the sentence, *Nelson*, 2004 WL 1144374, at *5, and provided such a claim asserts that cruel and unusual punishment will be inflicted as a result of a state actors “deliberate indifference” to conditions of which the state actors are aware. *Id.* at *

3 (citing Nelson’s complaint), *id.* (citing Dr. Heath’s affidavit in *Nelson* that given the execution procedures which were disclosed to Nelson there “is no comprehensible reason [to use those procedures] unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be.”), *id.* at *5 (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).¹²

Clearly, by recognizing §1983 as a proper vehicle to bring such claims, the Court could not have believed that only cut down cases are cognizable by § 1983. Rather, Justice O’Connor’s opinion contemplates that other “method-of-execution claims” will be brought but that “it need not reach the difficult question of how to categorize method-of-execution claims generally.” *Nelson*, 2004 WL 1144374, at *5. The State of Alabama clearly recognized as much:

Respondents argue that a decision to reverse the judgment of the Eleventh Circuit would open the floodgates to all manner of method-of-execution challenges, as well as last minute stay requests. But, because we do not here resolve the question of how to treat method-of-execution claims generally, our holding is extremely limited.

Nelson, supra at *8

These aspects of the Court’s opinion do not support the conclusion that the universe of method-of-execution claims are limited exclusively to “cut down cases.” Rather these aspects of *Nelson*

¹² The *Nelson* Court’s reliance on *Gamble*, which required deliberate indifference on the part of the Department of Corrections is likewise not circumscribed to the condition of Mr. Nelson’s veins. Fifteen years later in *Wilson v. Seiter*, 501 U.S. 294, 303 (1991), the Court found that deliberate indifference governs both medical needs suits and conditions suits.

suggest the Court is well aware that there will be other manner of method-of-executions suits in the future and will reserve ruling on those cases for another day.¹³

In short, if *Nelson* extends only to lethal injection cut down cases the Court certainly would have closed “the floodgates” by granting certiorari on merely the second question. This it did not do. Instead it recognized a procedural mechanism § 1983 and a federal district court’s subject matter jurisdiction over those claims when brought by death sentenced prisoners. Such action by an appellate court clearly “opens” the courthouse door to more than death sentenced inmates with bad veins.

F. Fundamental notions of fairness and due process along with the Eighth Amendment prohibition of cruel and unusual punishment mandate a temporary stay of execution to allow Mr. Oken to review the Maryland Department of Corrections Executions Procedures, to which, despite diligent efforts to obtain this information, Defendants have repeatedly denied him access.

“Because death is a different kind of punishment from any other which may be imposed in this country.” *Gardner v. Florida*, 430 U.S. 349, 357 (1977), the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment Cruel and Unusual Punishment Clause prevent a defendant from being executed based on secret information (information that he was unaware of and unable to obtain to no fault of his own), *id.*, or information for which he was not given an opportunity to rebut. *Simmons v. South Carolina*, 512 U.S. 154 (1994). Here, to no avail, Mr. Oken

¹³ Indeed, the *Nelson* Courts reference to electrocution as a possible future manner-of-death challenge which may one day reach that Court is fairly concrete evidence *Nelson* speaks to more than just “cut down” lethal injection cases. *Nelson supra.* at *5 (“We have not yet had the occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution –e.g., lethal injection or electrocution–fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the condition of a condemned inmate’s death sentence.”) Under the State’s interpretation of *Nelson* an inmate could never bring a § 1983 action to enjoin his execution by electrocution. *But see Brian v. Moore*, 528 U.S. 1133 (2000) (granting certiorari on whether death by electrocution is cruel and unusual punishment).

has repeatedly sought copies of the Maryland Department of Corrections' "Execution Procedures" and any other document relevant to execution by lethal injection. Defendants have repeatedly refused to disclose the requested information claiming that it is secret confidential information.

On May 26, 2004, less than three weeks before Mr. Oken's scheduled execution, and in the wake of complaints by Mr. Oken that the "Execution Procedures" violate the Eighth Amendment, Defendants claim to have amended the "Execution Procedures." They assert that these "new" procedures will be used to execute Mr. Oken, and that these procedures correct any potential problems raised by Mr. Oken. Although Mr. Oken has proven that the one change disclosed by Defendants (thiopental concentration increase) does not alleviate the high risk that he will suffer an excruciatingly painful death by lethal injection, due process mandates that Defendants disclose the new "Execution Procedures" in its entirety. Due process and the Eighth Amendment also entitle Mr. Oken to a temporary injunction in order to review the "Execution Procedures" and to give his experts adequate time to review the document and make their findings as to whether any new protocols violate the Eighth Amendment.

In changing the "Execution Procedures" less than three weeks before Mr. Oken's scheduled execution and in the wake of allegations that the procedures would cause a lingering death, Defendants appear to have lost sight of the fundamental principle retained by all Americans; the right to a death with the "dignity of man." That is all Mr. Oken asks for. At the least, he is entitled to adequate time to review the new procedures that Defendants adopted at the last minute in an attempt to manipulate the system so that he can be guaranteed the dignified death that all people deserve.

G. Principles of *Res Judicata* Do Not Prevent This Court from Exercising Jurisdiction

There is no estoppel where the losing party in the first decision did not have a full and fair opportunity to litigate the claim or issue. *Allen v. McCurry*, 449 U.S. 90 (1980). In the instant case, the Maryland Court of Appeals ruled on the merits of the Eighth Amendment claim despite a lack of any discovery or no evidentiary resolution. Exhibit 9 (Vol. II). The lack of a full and fair proceeding is not only demonstrated by the summary nature of those proceedings, but by the last minute disclosure of the lethal injection protocols. Exhibit xx. The protocols were first requested under the Maryland Public Information Act in the first week of May and were not received until the afternoon of June 10, 2004 – just hours before the filing of this pleading and just three days before the start of the execution window. The documents which were disclosed tonight demonstrate the defendants have known all along they botched the execution of Tyron X. Gilliam and have done nothing in the six years since to address the substantial risk created by Defendants Unknown Executioners. Plaintiff was denied the ability to discover information from defendant, thus burdening plaintiff's ability to prepare his case. See, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). The inability to properly prepare for the state court case necessarily means that plaintiff could not have had a full and fair chance to litigate his case.

Here, “there is reason to doubt the quality, extensiveness, or fairness of procedures following in prior litigation”. *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979), accord, *Townsend v. Sain*, 372 U.S. 293, 316 (1963) (holding that where a hearing is “seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew), *Weidner v. Thieret*, 932 F.2d 626, 633 (7th Cir. 1991) (dicta) (A de novo habeas corpus hearing would be necessary “Where state trial judges fail to adequately develop the relevant

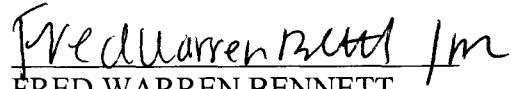
facts so that not even implicit findings can be gleaned from the record”), *O’Neal v. Smith*, 413 F.2d 269, 270 (5th Cir. 1969) (holding that where the judge used “assumed” facts in a brief hearing instead of hearing evidence petitioner was due a habeas corpus hearing).

Accordingly, this Court should reject any assertion of *res judicata* by the Defendants.

IV. CONCLUSION.

The enforcement and punishment of criminal acts is undisputedly an important and legitimate public concern. These goals, however, must be achieved in a manner consistent with the state statutes, protections and procedures derived from the Constitution. The execution methods employed by the State of Maryland fail to pass constitutional muster. Not only are the “Execution Procedures” in direct violation of the Maryland “Method of Execution” statute, but also far from producing a rapid and sustained loss of consciousness and humane death, lethal injection likely will cause Mr. Oken to consciously suffer an excruciatingly painful and protracted death; a risk that is increased and likely to go undetected because of the failure to provide professional medical monitoring of the effects of the drugs, and the Maryland Department of Corrections’ shocking belief that a leaking IV line is “normal.” Because of the constitutionally intolerable risk that Mr. Oken’s execution will result in needless suffering and pain, Mr. Oken is entitled to a temporary restraining order and a preliminary injunction barring Defendants from utilizing the tri-chemical cocktail and deficient “Execution Procedures” that they plan to use in effectuating Mr. Oken’s death. This relief and only this relief is necessary to ensure that what seems lost in the criminal justice system today is fulfilled; the notion of integrity and fairness that would allow Mr. Oken to maintain his fundamental right to a death with the “dignity of man.”

Respectfully submitted,



FRED WARREN BENNETT

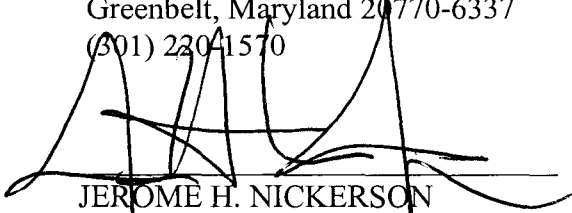
MICHAEL E. LAWLOR

Bennett & Lawlor, LLP

6301 Ivy Lane, Suite 419

Greenbelt, Maryland 20770-6337

(301) 220-1570


JEROME H. NICKERSON

1104 William Street

Baltimore, Maryland 21201

(410) 539-4729



DAVID M. BARRON¹⁴

1502 Main St. #209

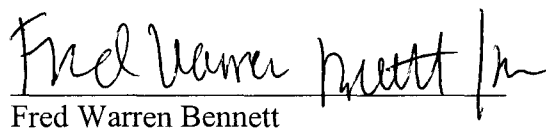
Columbia, South Carolina 29201

(646) 279-6902

¹⁴ Admitted in South Carolina.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2004, the foregoing Memorandum of Law (without the attached exhibits) was emailed, faxed, delivered by hand, and/or mailed to Scott S. Oakley, Esquire, Assistant Attorney General, Office of the Attorney General; Department of Public Safety and Correctional Services, 6776 Reiserstown Road, Baltimore, Maryland 21215, S. Ann Brobst, Esquire, Assistant State's Attorney for Baltimore County, 401 Bosley Avenue, County Courts Building, 5th Floor, Towson, Maryland 21204, and to Ann N. Bosse, Esquire, Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Place, Baltimore, Maryland 21202.


Fred Warren Bennett