UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

TERRICK TERRELL NOONER, et al., **Plaintiffs,**

v. **Civil Action No. 5:06-cv-00110-SWW**

LARRY NORRIS, et al., **Defendants.**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS'MOTION FOR SUMMARY JUDGMENT

Come now Plaintiffs, Terrick Terrell Nooner, Don William Davis and Jack Harold Jones, by and through counsel, and respectfully submit their Response in Opposition to Defendants' Motion for Summary Judgment.

I. INTRODUCTION

"[S]ummary judgments should be cautiously invoked so that no person will be improperly deprived a trial of disputed factual issues." *Arkansas Right to Life v. Butler*, 983 F. Supp. 1209, 1215 (W.D. Ark. 1997), *aff'd* 146 F.3d 558 (8th Cir.1998). It is "an extreme remedy which should be sparingly employed." *Giordano v. Lee*, 434 F.2d 1227, 1230 (8th Cir. 1970). "Summary judgment is a lethal weapon, and courts must . . . beware of overkill in its use." *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967).

A "series of Supreme Court decisions" indicate that "summary judgment may not be appropriate in complicated and important litigation." 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE CIVIL § 2732 (3d. ed. 2007). *See, e.g.*, *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 (1948) (warning against using

summary judgment "for deciding issues of farflung import"). In particular,

> [c]ases premised on alleged violations of the constitutional or civil rights of plaintiffs frequently are unsuitable for summary judgment. As is true with other cases involving important public issues, courts may refuse to grant summary judgment in these actions because it is felt that a fuller record is necessary in order to be able to decide properly the issues involved. Further, the very nature of the claims involved often presents factual issues that require summary judgment to be denied.

10B WRIGHT & MILLER, *supra*, at § 2732.2. *See, e.g.*, *Arkansas Right to Life*, 983 F. Supp. at 1215 (denying summary judgment in part because, "in cases premised on alleged violations of a person's constitutional rights, summary judgment may be inappropriate").

Whether or not a moving party meets its summary judgment burden, a court may always deny summary judgment in its discretion. *See McClain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979) ("[A] district court in passing on a Rule 56 motion performs what amounts to what may be called a negative discretionary function. The court has no discretion to Grant a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment the exercise of sound judicial discretion may dictate that the motion should be Denied, and the case fully developed."); *see generally* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 104 (2002) ("The majority of federal courts have held that judges have discretion to deny a motion for summary judgment, even if the parties' submissions would justify granting the motion. The First, Fourth, Fifth, Eighth, and Federal Circuits have each adopted this view.")

The general principles outlined above counsel denial of Defendants' Motion for Summary Judgment in this case. More specifically, the Defendants' Motion should be denied on two independent grounds. First, it is premature in that it is based upon facts that only came into existence 11 days ago and Plaintiffs have had no opportunity for discovery. Second, even on the

record as it currently stands, there are numerous genuine issues of material fact which preclude the entry of summary judgment.

II. PROCEDURAL HISTORY

Plaintiffs are Arkansas prisoners under sentence of death. On May 1, 2006, Plaintiff Terrick Terrell Nooner, by and through undersigned counsel, filed suit under 28 U.S.C. § 1983, complaining that Defendants' proposed means of executing him constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because it creates a substantial and unnecessary risk that Mr. Nooner will be fully conscious and suffer torturous pain for the duration of the execution process. [Doc. 1]. Mr. Nooner's Complaint seeks a declaratory judgment that the Defendants' lethal injection protocol is unconstitutional and also seeks to permanently enjoin them from carrying out their unconstitutional protocol. *Id.* at ¶¶ 57–61.

On May 4, 2006, Plaintiff Don William Davis moved to intervene in this action. This Court granted his Motion on May 26, 2006. Defendants moved to dismiss the action, and that Motion was denied by this Court on June 19, 2006. [Doc. 24.] Meanwhile, Mr. Davis sought, (Appl. Prelim. Inj.) [Doc. 21], and then on June 26 was granted, a preliminary injunction staying his imminent execution, (Order) [Doc. 29]. In its Order granting the stay of Mr. Davis's execution, this Court held that the evidence and arguments presented by Mr. Davis satisfied the requisites for a stay. Specifically, this Court found (1) that there was a threat of irreparable harm to Mr. Davis, (2) that the balance of the equities favored Mr. Davis, (3) that there was a probability that the Plaintiffs would succeed on the merits, and (4) that the public interest would be served by staying Mr. Davis's execution to permit deliberate litigation of his claims. *Id*. at

5–7. In addition, this Court held (5) that the State's proffered defense of inexcusable delay lacked merit. *Id*.

Defendants immediately moved to vacate the stay in the Eighth Circuit Court of Appeals. This was denied on July 13, 2006. *See Nooner v. Norris*, No. 06-2748 (8th Cir. July 13, 2006) (unpublished order). On July 20, 2006, Defendants informed the Eighth Circuit that they intended to take an appeal from this Court's stay of execution notwithstanding the Eighth Circuit's denial of their Motion to Vacate. Defendants filed their opening brief in the Eighth Circuit on September 25, 2006; Mr. Davis responded on January 2, 2007; and Defendants replied on January 17, 2007. Oral argument was held before the Eighth Circuit on March 15, 2007.

On July 9, 2007, a panel of the Eighth Circuit reversed Mr. Davis's stay of execution. (Op. at 9) [Doc. 65]. Notably, the Court of Appeals did not question this Court's holding that Mr. Davis had satisfied the ordinary requisites for a preliminary injunction and stay, i.e., irreparable harm, favorable equities, likelihood of success, and service of the public interest. Rather, the Eighth Circuit held—based upon the demonstrably flawed assumptions that Defendants' 1996 written lethal injection protocol was still in effect, and that Mr. Davis had long had notice of that protocol—only that the state's "unreasonable delay" defense to a stay of execution was valid as against Mr. Davis. While this case pended in the Eighth Circuit, the third Plaintiff, Jack Jones was granted leave to intervene. [Doc. 42.]

The day after this case returned from the Eighth Circuit to this Court, on July 10, 2007, Plaintiffs moved for expedited discovery so that this case could be resolved on the merits prior to Plaintiffs' execution. Plaintiffs served the Defendants with requests for production and with interrogatories on July 12 and July 13, respectively. Defendants purported to "agree that this

case should be expeditiously resolved," [Doc. 65], but nonetheless opposed Plaintiffs' request for expedited discovery. [Doc. 76.] On July 17, 2007, Defendants moved for summary judgment [Doc. 73], proffering "Attachment C - *Lethal Injection Procedure*" [Doc. 74, Ex.2] as the basis for their Motion. "Attachment C - *Lethal Injection Procedure*" is a new written lethal injection protocol that Defendants created on the day prior to filing for summary judgment. Notwithstanding the obvious exigencies in this case, Defendants have to date not produced any documents or answered any interrogatories in response to Plaintiffs' discovery requests, which Defendants have now had for eighteen days.

III. ARGUMENT

A. SUMMARY JUDGMENT SHOULD BE DENIED AS PREMATURE UNDER FED. R. CIV. P. 56(F) BECAUSE PLAINTIFFS REQUIRE ADDITIONAL TIME FOR INVESTIGATION AND RESEARCH INTO DEFENDANTS' BRAND NEW WRITTEN LETHAL INJECTION PROCEDURE.

Defendants cannot be permitted simultaneously to change suddenly many material facts involved in this complex litigation and to end the case summarily. Summary judgment should not be granted where it may be the result of unfair surprise. *See Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005); *Clorox v. Proctor & Gamble*, 228 F.3d 24, 31 (1st Cir. 2000); *Macklin v. Butler*, 553 F.2d 525, 529 (7th Cir. 1977). In considering a motion for summary judgment, courts have a duty to "ensure . . . that neither side in a dispute [has] unfairly surprise[d] the other with evidence that the other has not had time to consider." *Orsi v. Kirkwood*, 999 F.2d 86, 91 (4th Cir. 1993).

Granting summary judgment on the basis of evidence created and disclosed by the Defendants simultaneously with their Motion for Summary Judgment would constitute unfair

surprise. The Defendants surprise attack in this regard represents a valid reason justifying any failure of proof under Rule 56(f). To prevent the Defendants from gaining an unfair advantage by moving for summary judgment and springing a rewritten protocol upon Plaintiffs at the same time, Plaintiffs must be permitted more time to conduct investigation and research in light of "Attachment C - *Lethal Injection Procedure*." *Cf. Walters v. City of Ocean Springs*, 626 F.2d 1317, 1321 (5th Cir. 1980) ("Rule 56(f) may apply . . . where the opposing party has not been able to locate a witness, or having located him has been unable to secure an affidavit from him and has not had time to take his deposition . . . .")

As attested in the attached Affidavit of Julie Brain, Ex. 1, Plaintiffs need to conduct further research and investigation into "Attachment C - *Lethal Injection Procedure*," including consulting with multiple additional experts. Plaintiffs believe that such research and investigation will lead to additional genuine issues of material fact with respect to whether Defendants' execution procedure engenders unnecessary risks of inflicting pain and suffering.

While Plaintiffs firmly believe that further investigation and research would reveal the forgoing, they simply have not had time to obtain admissible evidence in this regard because they did not have access to "Attachment C - *Lethal Injection Procedure*" until eleven days ago. In sum, the Defendants' surprise creation and disclosure of a newly rewritten lethal injection protocol excuses any failure of proof that this Court may discern under Rule 56(f) and precludes the entry of summary judgment.

B. SUMMARY JUDGMENT SHOULD BE DENIED AS PREMATURE UNDER FED. R. CIV. P. 56(f) BECAUSE DISCOVERY HAS YET TO BE CONDUCTED

Defendants' Motion is premature and should be denied because the discovery process has

not even begun in this matter and consequently Plaintiffs have not had a reasonable opportunity to present all available facts in support of their Opposition. "As a general rule, summary judgment is proper 'only after the nonmovant has had adequate time for discovery.'" *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530, (8th Cir. 1999) (quoting *In re TMJ Litigation*, 113 F.3d 1484, 1490 (8th Cir. 1997)). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment appropriate when, "after adequate time for discovery," party fails to establish existence of essential element of party's case as to which he bears burden of proof); *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986) (plaintiff must present affirmative evidence to defeat proper motion for summary judgment "as long as the plaintiff has had a full opportunity to conduct discovery").

Indeed, the very text of Rule 56 presumes that a party will have had access to discovery before being forced to respond to a motion for summary judgment. Rule 56(c) states that the court should consider, *inter alia*, the "depositions, answers to interrogatories, and admissions on file" in assessing whether summary judgment is appropriate. *See also Boyd v. Wexler*, 275 F.3d 642, 647 (7th Cir. 2001) (criterion for summary judgment assumes that there will have been "evidence gathered in discovery").

Fed. R. Civ. P. 56(f) expressly provides for the denial of summary judgment motions if the nonmoving party has not had an opportunity to make full discovery. *Celotex*, 477 U.S. at 326.[1] The purpose of this Rule is to guard against the improvident dismissal of valid claims

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[1] Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be

pursuant to premature summary judgment motions, and thus it "'should be applied with a spirit of liberality.'" *United States v. Casino Magic Corp.*, 293 F.3d 419, 426 (8th Cir. 2002) (en banc) (quoting 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane*, Federal Practice and Procedure: Civil* 3d. § 2740 (1998)). Where the facts that the non-moving party needs in order to oppose the motion are in the sole possession of the movant, summary judgment is particularly inappropriate prior to the non-movant's opportunity to obtain discovery of those facts. *Costello, Porter, Hill, Heisterkamp & Bushnell v. Providers Fidelity Life Ins.*, 958 F.2d 836, 838-89 (8th Cir. 1992) ("it is not fair to tie the only hand a party has to defend itself"). Indeed, it has been said that, in such circumstances, summary judgment should be denied "almost as a matter of course." *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977).

The facts that Plaintiffs need in order to fully respond to Defendants' Motion for Summary Judgment are solely in the possession of the Defendants and Defendants have vigorously resisted all informal requests for disclosure of the information. *See,e.g.*, Ex. 2 (2005 Response to FOIA). As detailed in the accompanying Affidavit of Julie Brain, Ex. 1, the facts that Plaintiffs seek to discover concern Defendants' conduct of 26 lethal injection executions over the past 17 years, facts concerning the development of Defendants's procedures for conducting such executions, and the qualifications and background of the persons responsible responsible for those executions. Plaintiffs believe that such information will create additional genuine issues of material fact with respect to whether Defendants' execution procedure

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obtained or depositions to be taken or discovery to be had or may make such other order as is just.

engenders unnecessary risks of inflicting pain and suffering.

Defendants have developed their procedures and conducted these executions largely in secret, shielded from public access, and have taken the position that the information that Plaintiffs seek is exempt from disclosure under the State's Freedom of Information Act. *Id.* Accordingly, Defendants' request for summary judgment based upon their own version of the facts surrounding their conduct of executions, made without affording Plaintiffs an opportunity to formally discover evidence that may cast doubt on that version, is plainly premature and should be denied.

In a related filing, [Doc. 76] (Defendants' Response to Nooner's Motion for Expedited Discovery), Defendants criticize Plaintiffs for failing to propound discovery requests during the time in which the matter was before the Eighth Circuit Court of Appeals on Defendants' appeal of this Court's Order granting a stay of execution to allow consideration of the merits of the action. Plaintiffs note that they were not permitted to commence the discovery process until the parties conferred pursuant to Fed. R. Civ. P. 26(f), *see* Fed. R. Civ. P. 26(d), that by Local Rule the Rule 26(f) conference is scheduled by the issuance of an Initial Scheduling Order, Local Rule 16.1, and no such order ever issued in this case.

In any event, regardless of one's view in hindsight of how Plaintiffs should have proceeded, on July 17, 2007, Defendants issued a brand new written lethal injection procedure. *See* Doc. 74-3 ("Attachment C - *Lethal Injection Procedure* Rev. 7-16-2007). Only on that date, then, could Plaintiffs begin to discover the facts relevant to the procedure in accordance with which Defendants currently intend to put them to death. Indeed, if Plaintiffs had conducted discovery procedures prior to the issuance of the current document, a whole new round of

procedures would have been required following the change of written protocol. In no sense, then, can Plaintiffs be said to have had an adequate opportunity to discover all of the facts essential to their opposition to summary judgment.

Plaintiffs have complied with the technical requirements of Rule 56(f). As noted, accompanying this Response is the Affidavit of Julie Brain, counsel for Plaintiff Terrick Terrell Nooner. Ex. 1. The Affidavit details the information Plaintiffs need to respond adequately to Defendants' Motion for Summary Judgment, explains why that information is likely to produce a genuine issue of material fact to preclude summary judgment, and provides adequate reasons why such information cannot be presented at this time. *See* FED. R. CIV. P. 56(f). For the forgoing reasons, Defendants' Motion for Summary Judgement should be denied as premature.

B. EVEN ON THE EXISTING RECORD THERE ARE NUMEROUS GENUINE ISSUES OF MATERIAL FACT THAT DISENTITLE DEFENDANTS TO JUDGMENT AS A MATTER OF LAW.

1. There Are Numerous Genuine Issues of Material Fact

Even on the record as it stands, prior to any discovery being conducted, this case is replete with genuine issues of material fact that preclude the entry of summary judgment. Under Federal Rule of Civil Procedure 56(c), a moving party may prevail on a motion for summary judgment only if it "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" if it "might affect the outcome" of a case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute about that fact is "genuine," and summary judgment "will not lie," where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* At this stage, the issue need not be resolved in the party's favor; "all that is required is that sufficient evidence supporting the

claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id*. at 248–49.

In considering motions for summary judgment, courts must view the evidence in the light most favorable to the nonmoving party. *Carrington v. City of DeMoines, Iowa*, 481 F.3d 1046, 1050 (8th Cir. 2007). In other words, summary judgment should not be granted if there is "the slightest doubt" about the truth of moving party's version of any material fact. *Clausen & Sons v. Theo. Hamm Brewing*, 395 F.2d 388, 389 (8th Cir. 1968); *Armco Steel v. Realty Inv.*, 273 F.2d 483, 484 (8th Cir. 1960) ("A genuine issue of fact exists for the purpose of avoiding a summary judgment whenever there is the slightest doubt as to the facts."); *see Williams v. Thomson Corp.*, 383 F.3d 789, 791 (8th Cir. 2004) (holding that "the district court correctly applied the summary judgment standard by resolving all doubt in [the nonmoving plaintiff's] favor"). All inferences from the facts must also be drawn in favor of the nonmovant. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Telleconnect v. Ensrud*, 55 F.3d 357, 359 (8th Cir. 1995) (holding that the nonmoving party gets "the benefit of every doubt and every favorable inference").

In this case, it is plain that a reasonable jury could return a verdict for Plaintiffs based on the expert opinions of Mark J.S. Heath, M.D., alone. Accordingly, there is a genuine issue of material fact and summary judgment must be denied. The fundamental question of fact at issue in this lawsuit is whether the Defendants' lethal injection procedure subjects Plaintiffs to a substantial risk of unnecessary pain and suffering during the execution process. If, as Plaintiffs contend, the procedure does present such an unnecessary risk, the procedure violates the Eighth Amendment to the United States Constitution and Plaintiffs are entitled to the relief they seek.

See Taylor v. Crawford, 487 F.3d 1072, 1079 (8th Cir. 2007) (*Taylor* III) (holding that an execution procedure is unconstitutional where it "involves an unnecessary risk of causing the wanton infliction of pain"); *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) (lethal injection procedure violated the Constitution because there was "an undue and unnecessary risk that an inmate w[ould] suffer pain"); *Florida v. Lightbourne*, No. 42-1981-CF-170, 8 (Fla. 5th Cir. Ct. July 22, 2005) (bench op.) (lethal injection procedure was unconstitutional where there was some likelihood of unnecessary pain); *Baze v. Rees*, No. 04-CI-01094, 11 (Ky. Franklin Co. Cir. Ct. July 8, 2005) (portion of lethal injection protocol was unconstitutional where there was a "substantial risk of wanton and unnecessary infliction of pain, torture or lingering death").

Plaintiffs' highly qualified expert witness, Dr. Heath, unequivocally states in his Declaration his opinion, held to a reasonable degree of medical certainty, that the Defendants' chosen procedure for lethal injection executions indeed subjects Plaintiffs to a substantial and wholly unnecessary risk of enduring excruciating pain and suffering. *See* Plaintiffs' Rule 56.1 Stmt. ¶ 18. Defendants, of course, dispute the validity of Dr. Heath's conclusions. *See* Doc. 75 at 13-14 (averring that Arkansas' procedure "ensures that condemned inmates undergo rapid, painless, and humane deaths without experiencing any unnecessary pain or suffering). They also present the Declaration of their own expert witness, Dr. Dershwitz, in support of their position. [Doc. 74-4.] Nevertheless, "the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Anderson*, 477 U.S. at 257. Plaintiffs' presentation of the Declaration of Dr. Heath, without more, indubitably satisfies this standard.

Indeed, a case involving conflicting opinions of expert witnesses on the ultimate issue is

a quintessential example of a matter that is inappropriate for summary judgment. *See Pachl v. Seagren*, 453 F.3d 1064, 1072 (8th Cir. 2006) (district court erred in granting summary judgment in the face of conflicting expert opinions). *See also Triple Tee Golf v. Nike*, 485 F.3d 253, 264 (5th Cir. 2007) (expert report created genuine issue of material fact); *Phillips v. Cohen*, 400 F.3d 388, 399 (6th Cir. 2005) (holding that "competing expert opinions" present a "classic" case of when a trial of fact is required); *Harris v. Provident Life*, 310 F.3d 73, 79 (2d Cir. 2002) (district court erred in granting summary judgment where there were "conflicting expert reports presented"); *Chevron USA v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000) (expert affidavit created genuine issue of material fact); *Michaels v. Avitech*, 202 F.3d 746, 752 (5th Cir. 2000) (battle of the experts precludes summary judgment). Accordingly, there is a genuine issue of material fact concerning whether the procedures by which Defendants intend to execute the Plaintiffs involves a substantial risk of unnecessary pain, and so summary judgment must be denied.

Within this ultimate factual dispute, there are innumerable subsidiary genuine issues of material fact bound up in this case. As set forth in detail in the accompanying Plaintiffs' Rule 56.1 Statement of Material Facts as to Which a Genuine Issue Exists to be Tried, ("Plaintiffs' Rule 56.1 Stmt."), at issue in this case is not simply the bare terms of Defendants' new written document, "Attachment C - *Lethal Injection Procedure,*" but all aspects of the procedure by which they intend to execute Plaintiffs. The issue of whether that procedure engenders an unconstitutional risk of inflicting unnecessary pain and suffering cannot be resolved simply by determining what it is Defendants *say* they are going to do, the fact finder must also ascertain the likelihood that Defendants will *actually* be able to successfully perform executions humanely. *See Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) (framing the question as

concerning how a protocol is "actually administered in practice"). This requires consideration of all available evidence, such as the conduct of past executions, the qualifications, competency and fitness of the personnel responsible for those executions, the changes to the procedure that have been made in response to past problems and aspects of the procedure that have not been committed to writing such as the physical layout of the execution chamber. *See id*.

Plaintiffs contend that Defendants have demonstrated on multiple occasions in the past that they are unable or unwilling to reliably perform executions humanely and without inflicting unnecessary pain and suffering. For example, 3-5 minutes after administration of the lethal chemicals began during the execution of Steven Hill in 1992, when Mr. Hill should have already been unconscious, witnesses observed Mr. Hill struggling to breathe. *See* Plaintiffs' Rule 56.1 Stmt. ¶ 6. His chest was visibly heaving against the restraints that had been placed on his body and he appeared to be gasping for air. *Id.*

The death of Ronald Gene Simmons on June 25, 1990 is a dramatic example of an execution that went horribly wrong. For the first two minutes after the drugs began to be administered, Mr. Simmons appeared to witnesses to nod off into unconsciousness as expected. *Id*. But then, however, three minutes into the process, Mr. Simmons cried out: "Oh! Oh!" *Id.* He then began to cough sporadically, as though he was having difficulty breathing. *Id.* Over the next two minutes he coughed about 20 times, each cough causing his stomach to heave and the gurney to shake. *Id.* Mr. Simmons finally stopped moving 5 minutes after the injection of the lethal chemicals began. *Id.* He was apparently still not dead, however. Witnesses observed Defendant John Byus adjust the IV catheter in Mr. Simmons arm, fiddle with the tube hanging from the IV bag and then again touch the IV tube in Mr. Simmons' arm. *Id.* It was not until

9:18 pm, 16 minutes after the lethal drugs first began to flow, that the Coroner entered the chamber to pronounce Mr. Simmons dead. *Id.*

The execution of Rickey Ray Rector, on January 24, 1992, took a total of one hour and nine minutes to complete. *Id*. Not only was the IV access horribly and painfully botched, resulting in 10 separate puncture wounds and then a deep incision being cut into Mr. Rector's arm while Mr. Rector moaned in pain throughout, *id.*, but even after an IV infusion was established, things still did not go as they were supposed to. As with Ronald Gene Simmons, for the first two minutes after administration of the lethal drugs began, Mr. Rector appeared to go to sleep. *Id*. Thereafter, however, Mr. Rector spoke, stating that he was getting dizzy. 5 minutes into the execution, witnesses observed Mr. Rector's lips begin moving rapidly, as if he was drawing shallow breaths. *Id.* His lips continued moving that way for a minute. *Id.* Mr. Rector's heart did not stop beating until 19 minutes after the execution began. *Id.*

To be sure, the Constitution does not require that the risk of unforeseen accident be eliminated from the execution process. *Taylor,* 2007 WL 1583874 *7 (quoting *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994)). But when particular problems are entirely predictable based upon past occurrences, and those responsible fail to take readily available steps to modify their procedure in a way that would rectify and prevent those problems, that failure rises to the level of a constitutional violation. Plaintiffs contend that Defendants have utterly failed to learn the lessons of experience and promulgate a procedure that is adequate to prevent recurrence of the horribly botched executions that they have performed in the past.

Plaintiffs contend that Defendants have failed to ensure that any of the various members of the execution team have minimally sufficient qualifications, training and experience to be able

to perform their jobs competently and humanely. *See* Plaintiffs' Rule 56.1 Stmt. ¶¶ 6-8, 10. *See Morales*, 465 F. Supp. 2d at 979 (finding the implementation of California's protocol unconstitutional in part due to a lack of meaningful training and supervision). "Attachment C - *Lethal Injection Procedure"* requires no minimum qualifications of any team member, and Defendants have proven themselves unable or unwilling to recruit qualified, competent individuals in the past. Plaintiffs contend that Defendants continue to permit Defendant John Byus to lead the execution team as the designee of the Deputy Director, in spite of the fact that at least three of the executions over which he has presided have been botched. *See* Plaintiffs' Rule 56.1 Stmt. ¶ 6. There is no provision in "Attachment C - *Lethal Injection Procedure"* for systematic review of team members' continued fitness to participate in executions, or for screening potential team members for fitness at the time of their initial recruitment. *See id.* at ¶ 18.

Plaintiffs contend that Defendants have failed to institute a procedure for gaining IV access that is adequate to prevent a repeat of the horrific execution of Rickey Ray Rector. "Attachment C - *Lethal Injection Procedure*" places no limit upon the number of skin punctures that may be performed in the attempt to obtain subcutaneous IV access, paving the way for another inmate to endure the 10 separate wounds that were inflicted upon Mr. Rector. *See* Plaintiffs' Rule 56.1 Stmt. ¶¶ 6–8. Defendants have failed in this regard despite the fact that standard EMS protocols typically call for 2 or 3 attempts only. Even more disturbingly, "Attachment C - *Lethal Injection Procedure*" fails to prohibit the use of a cut-down procedure in the event that subcutanous IV access proves difficult. This is the procedure that was utilized on Mr. Rector after he had been punctured 10 separate times, and resulted in the deep incision into

the flesh of his arm. *See* Plaintiffs' Rule 56.1 Stmt. ¶¶ 6–8. There could never be any medical justification for using this method of securing IV access during an execution. *See id*.

"Attachment C - *Lethal Injection Procedure*" makes clear that Defendants contemplate using inserting central lines in cases in which peripheral IV access is not established. Indeed, Defendants have performed at least one such procedure in the past. *See id*. ¶ 8. The document does not, however, ensure that the person(s) who will perform this complex, risky, surgical procedure are minimally qualified and competent to do so, or that they have the necessary equipment on hand to not only perform the procedure but also to appropriately respond to common complications if they arise. *See id*.

Plaintiffs contend that the physical layout and conditions of the execution chamber, and the method of labeling the syringes of lethal chemicals, coupled with the use of untrained lay executioners to push the drugs into the inmate's system, is tantamount to a recipe for disaster and grossly and needlessly increases the risk that the inmate will not receive the benefit of a full dose of anesthetic prior to the administration of the excruciating painful drugs. Plaintiffs' Rule 56.1 Stmt. ¶ 10, 12. Plaintiffs further contend that Defendants' failure to incorporate any meaningful monitoring of the inmate's anesthetic depth prior to administering those painful drugs falls so far below the applicable standard of care as to be reckless. Plaintiffs' Rule 56.1 Stmt. ¶ 11. Defendants' failure to discern the difference between the required surgical plane of anesthesia and mere unconsciousness, together with their belief that anesthetic depth can be successfully monitored using techniques taught in CPR classes, evince their fundamental lack of understanding of what is at stake here. *Id.*

The provisions of "Attachment C - *Lethal Injection Procedure*" that pertain to situations

in which problems with the patency of the IV infusion site are suspected once the execution is underway are so inadequate and misguided that they invite the occurrence of the problems that plagued perhaps the most horrifying known lethal injection execution ever conducted, that of Angel Diaz by the State of Florida in 2006. The document fails to ensure meaningful monitoring of the IV insertion sites adequate to detect problems that may be developing, not only because of the lack of qualification of the individual charged with performing the monitoring, but also because of its failure to require constant surveillance or to ensure that the sites are in clear sight at all times. Plaintiffs' Rule 56.1 Stmt. ¶ 12.

Worse yet, "Attachment C - *Lethal Injection Procedure*" directs the execution team to respond to problems that are identified first by reducing the flow rate of the lethal chemicals, and thereafter by switching to the secondary site. The first of these actions is an utterly inadequate contingency plan, and the second is incredibly dangerous and potentially disastrous. *See id*. If a problem with the first infusion site prevents proper administration of the full dose of Sodium Pentothal, and the Pancuronium Bromide and Potassium Chloride are thereafter administered through a second, patent IV infusion site, the inmate will be insufficiently anesthetized and will suffer the agony of suffocation and the burning pain of the Potassium Chloride, while all the while paralyzed and unable to move or communicate distress. *See id*.

Plaintiffs further contend that Defendants' failure to institute a rigorous standardized training procedure for all execution personnel and strict performance criteria for each team member significantly and unnecessarily increases the risk of botched, inhumane executions. Even if personnel selected for the execution team were possessed of adequate professional medical qualifications, which Plaintiffs dispute, extensive training for the particular procedure of

killing a condemned inmate by lethal injection, not a part of any medical, nursing or EMT school curriculum, is still required. *See id*. ¶ 18. *See also Morales*, 465 F. Supp. 2d at 979. No such training is contemplated by "Attachment C - *Lethal Injection Procedure.*"

Plaintiffs also contend that Defendants' failure to institute a screening process to evaluate all potential execution team members' skill, competence, professionalism, mental stability, honesty and integrity significantly and unnecessarily increases the risk of botched, inhumane executions. No such screening is contemplated by "Attachment C - *Lethal Injection Procedure.*" Nor have Defendants' instituted a review process to evaluate and reevaluate all potential execution team members' fitness to continue to participate in executions.

Plaintiffs contend that Defendants' failure to institute a reliable record-keeping procedure to allow verification of the amounts of anesthesia used in each execution and to ensure that the anesthetic agent Sodium Thiopental is properly dispensed, controlled and monitored significantly and unnecessarily increases the risk of botched, inhumane executions. *See* Plaintiffs' Rule 56.1 Stmt. ¶ 18. No such record-keeping is contemplated by "Attachment C - *Lethal Injection Procedure.*"

Rather than taking available steps to amend their lethal injection procedure in ways that will reduce the risk of inhumane executions, Plaintiffs contend that Defendants have changed their procedure in ways that actually make it *more* likely that excruciating pain and suffering will be inflicted. Defendants have admitted that, prior to the issuance of "Attachment C - *Lethal Injection Procedure*" on July 16, 2007, their lethal injection procedure required that the Deputy Director or designee meet with the condemned inmate approximately 7 days prior to the scheduled execution to determine whether the inmate's physical condition might present

problems for the establishment of IV access. *See* Doc. 28 ¶ 6. "Attachment C - *Lethal Injection Procedure*" requires no such meeting.

Prior to the issuance of "Attachment C - *Lethal Injection Procedure,*" Defendants' lethal injection procedure required that the Deputy Director or designee mix the lethal chemicals and prepare the syringes "under the direct supervision of a licensed, practicing pharmacist." *See* Doc. 28 ¶ 8. "Attachment C - *Lethal Injection Procedure*" requires only that the Deputy Director or designee supervise the mixing and syringe preparation; the document requires no minimum qualifications or training whatsoever of the person(s) performing the actual mixing and syringe preparation and removes entirely the involvement of a licensed, practicing pharmacist.

Prior to the issuance of "Attachment C - *Lethal Injection Procedure*," Defendants' lethal injection procedure required that the Deputy Director or designee retain control and custody of the lethal injection drug box from the moment it is sealed until he delivers it personally to the executioners in the execution chamber. *See* Doc. 28 ¶ 9. In contrast, "Attachment C - *Lethal Injection Procedure*" requires only that the Deputy Director or designee transfer the box to the institutional vault in the Cummins Unit, and thereafter the drugs are to be delivered by person(s) unknown at an unspecified time to the execution chamber. There is no requirement that the box be delivered by these person(s) to the executioners; it would be perfectly consistent with the terms of the document for the person(s) to leave the box unsupervised in the chamber.

Prior to the issuance of "Attachment C - *Lethal Injection Procedure*," Defendants' lethal injection procedure required that the members of the IV Team be "either a [sic] Emergency Medical Technician, a Licensed Practical Nurse, a Registered Nurse or a Medical Doctor." *See*

Doc. 28 ¶ 10. As of June 22, 2006, the IV Team member was an EMT certified at the highest level, that of paramedic, who had been practicing in excess of 27 years. In contrast, "Attachment C - *Lethal Injection Procedure*" requires only that the individual(s) be "healthcare providers," a term that is not otherwise defined, and suggests but does not require even the qualifications of even a basic EMT or a nurse.

Prior to the issuance of "Attachment C - *Lethal Injection Procedure,*" Defendants' lethal injection procedure required that the Deputy Director or designee be in constant direct wireless communication with the executioners in the control room. *See* Doc. 28 ¶ 15. "Attachment C - *Lethal Injection Procedure*" requires no such wireless communication, and in fact makes no provision for communication of information between any of the execution team members.

Prior to the issuance of "Attachment C - *Lethal Injection Procedure*," Defendants' lethal injection procedure required that the execution personnel who would insert a central line if one was deemed necessary be a "surgical team headed by a licensed surgeon." *See* Doc. 28 ¶ 16. As of June 22, 2006, the surgical team leader was a Diplomat withe the American College of Surgeons and had been a licensed, practicing surgeon for over 15 years. *Id.* In contrast, "Attachment C - *Lethal Injection Procedure*" requires only that the individual(s) be "trained, educated, and experienced." No minimum qualifications or expertise whatsoever are required.

Prior to the issuance of "Attachment C - *Lethal Injection Procedure*," Defendants' lethal injection procedure no longer permitted the use of a cut-down procedure to obtain intravenous access." *See* Doc. 28 ¶ 23 n.5. "Attachment C - *Lethal Injection Procedure*, " however, not only does not prohibit the use of a cut-down, it permits "trained, educated, and experienced" individuals, with no minimum qualifications or expertise whatsoever, to perform such a

procedure.

All in all, Plaintiffs contend, Defendant's procedure for putting humans to death fails to even satisfy the veterinary standard of care for the euthanasia of animals. Both the decisions to use Potassium Chloride and Pancuronium Bromide, and the administration of those dangerous, painful drugs without the provision of meaningful monitoring of anesthetic depth, violate veterinary standards and, indeed, would result in criminal liability in some states if used on animals. *See, e.g.*, Fla. Stat. § 828.058; Ga. Code Ann. § 4-11-16; Me. Rev. Stat. Ann., tit. 17, § 1046; Md. Code Ann., Criminal Law, § 10-611; N.Y. Agric. & Mkts Law § 374; Tenn. Code Ann. § 44-17-303; 510 Ill. Comp. Stat. 70/16 (second violation is a felony); Mo. Rev. Stat. § 578.012; S.C. Code Ann. § 47-3-440; Tex. Health & Safety Code Ann. § 821.056.

Plaintiffs contend that, separately and cumulatively, these deficiencies and failings in Defendants' lethal injection procedure create an unacceptable risk that Plaintiffs will suffer excruciating and wholly unnecessary pain and suffering during their executions. Each therefore constitutes a genuine issue of material fact that requires that Defendants' Motion for Summary Judgment be denied.

2. The Decision of the Eighth Circuit Court of Appeals in *Taylor* Does Not Control the Outcome of This Case

Defendants contend that the Eighth Circuit's decision in *Taylor* entitles them to summary judgment. Their reliance on *Taylor* is misplaced, for the facts of the instant case differ from those at issue in *Taylor* in several crucial respects.[2] Defendants' summary judgment papers first

[2] Plaintiffs note additionally that Mr. Taylor has petitioned the Eighth Circuit Court of Appeals for rehearing by the en banc court, and the court has taken the unusual step of requiring a response to the petition by Defendant Crawford et al. *Taylor v. Crawford*, No. 06-3651 (8th Cir.) It is thus not yet clear whether the panel opinion in *Taylor* actually represents the law of

of all neglect to mention that the Taylor litigation was resolved on the merits only after extensive discovery, a full-dress bench trial, and findings of fact, all of which were ordered by the Eighth Circuit Court of Appeals. *See Taylor v. Crawford*, 445 F.3d 1095, 1099 (8th Cir. 2006) (*Taylor* I) (remanding so that the parties could engage in "further discovery" and so a full evidentiary hearing could be held). Furthermore, when the state changed its protocol after *Taylor I*, the Eighth Circuit Court of Appeals remanded for yet further fact development. *See Taylor v. Crawford*, 457 F.3d 902, 904 (8th Cir. 2006) (*Taylor* II).

After these proceedings had concluded, and Missouri's lethal injection procedure had been fully aired out, the Court of Appeals determined that Mr. Taylor had failed to meet his burden of proving that a constitutional violation had occurred. Specifically, the court stated that: "We have very carefully examined the entire record, and we find no evidence to indicate that any of the last six inmates executed suffered any unnecessary pain that would rise to an Eighth Amendment violation." *Taylor III*, 487 F.3d at 1085. *See also id.* at 1075 ("In each of the past six executions, however, death occurred in five minutes or less from the time the first chemical was administered, and there was not a scintilla of evidence that any prisoner ever suffered any pain other than what was necessary to acquire access to the prisoner's circulatory system through the insertion of the needed intravenous lines"). The court took pains to emphasize that its decision was based upon the record as a whole. *Taylor* III, 487 F.3d at 1075–77 (recounting the trial testimony at length); *id*. at 1083 (basing its judgment not only on the state's written protocol but also on the rest of "the record in this case"). Only in light of this record, in the absence of evidence that any prior executions had been botched, did the Eighth

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this circuit.

Circuit uphold the constitutionality of Missouri's lethal injection protocol on its face.

The record in *Taylor* thus stands in stark contrast to the record in the instant case, which, Plaintiffs contend, shows that at least three executions conducted by the Defendants in the past have resulted in excruciating pain and suffering being inflicted upon the condemned inmates. *See Morales v. Hickman*, 415 F.Supp.2d 1037, 1043-45 (N.Cal. 2006) (noting that record included evidence of problems with prior executions such as "evidence from eyewitnesses tending to show that many inmates continue to breathe long after they should have ceased to do so" which was "evidence of a kind that was not presented in . . . earlier cases"). While the Eighth Circuit found no evidence that the *Taylor* Defendants had demonstrated their incompetence by failing to reliably conduct executions humanely, here we have evidence that Ronald Gene Simmons was crying out in pain and gasping for breath long after he should have been unconscious. (Simmons Dec.) Here we have evidence that Rickey Ray Rector was punctured 10 separate times before a gash was cut in his arm, and that thereafter he was conscious and vocalizing when he should have been under general anesthesia. *See* Plaintiffs' Rule 56.1 Stmt. ¶¶ 6, 18. We also have evidence that Steven Hill was struggling for breath and moving as if he was having a seizure during his execution. *See id*.

In the face of such strong evidence of the adverse consequences of their prior incompetence, Defendants' failure to institute and reliably implement a lethal injection procedure that ensures that their future executions are properly conducted creates not a risk of "accident," *Taylor III*, 487 F.3d at 1080, but a predictable likelihood that past will be prologue. *See Morales v. Tilton*, 465 F.Supp.2d 972, 979 (N.D. Cal. 2006) ("the record in this case . . . is replete with evidence that in actual practice [California's lethal injection protocol] does not

function as intended. The evidence shows that the protocol and Defendant's implementation of it suffer from a number of critical deficiencies"). The analysis that must be conducted in the instant case to determine whether Defendants' procedure engenders an unnecessary risk of pain and suffering is thus quite different than the analysis employed by the circuit in *Taylor*.[3] Plaintiffs' contentions that Defendants have seriously botched several executions in the past, and have multiply failed to institute or implement a lethal injection procedure that adequately guards against the recurrence of similar incidents in the future, are genuine issues of material fact that can only be resolved at a trial following full discovery.

Notably, even a side by side comparison of Defendants' "Attachment C - *Lethal Injection Procedure*" with the written protocol adopted by Missouri in *Taylor* demonstrates that summary judgment is inappropriate here.[4] Defendants' document suffers from a number of serious deficiencies that the Missouri protocol avoids, and so the comparison is anything but favorable to Defendants. The Missouri protocol calls for the administration of 5 grams of Sodium Thiopental; "Attachment C - *Lethal Injection Procedure*" calls for only 3 grams. Although

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[3] A contrary approach would lead to absurd results. If the inquiry were limited to parsing the bare terms of the written protocol no matter how strong the evidence of demonstrated problems with implementation, a State's lethal injection procedure could be ruled constitutional even if, for example, the executioners openly admitted to routinely omitting the use of the prescribed anesthetic drug altogether. *Cf. Morales v. Tilton*, 465 F. Supp.2d 972, 979 (N.D. Cal. 2006) ("As it has from its inception, the resolution of this case thus turns on a single factual question: whether [California's lethal injection protocol], *as implemented*, provides constitutionally adequate assurance that condemned inmates will be unconscious when they are injected with pancuronium bromide and potassium chloride) (emphasis added).

[4] Plaintiffs in no way mean to suggest that if Defendants altered their written document to track word for word the protocol adopted by Missouri, summary judgment would be appropriate. To the contrary, in light of Defendants' demonstrated history of failures of implementation, substantial genuine issues of fact would remain regarding their ability to implement any newly minted written procedure.

Plaintiffs do not dispute that a properly administered 3 gram dose of Sodium Thiopental would result in a surgical plane of anesthesia, the lower the dose that Defendants use, the greater the likelihood that, if problems arise and only a fraction of the dose actually reaches the inmate's brain, the inmate will be conscious and suffering during the execution procedure. (Heath Dec 2006.)

The Eight Circuit noted with approval in *Taylor III* that Dr. Doe I, the doctor in charge of mixing the chemicals and inserting the IVs in past executions who had been revealed to have dyslexia and to have unilaterally lowered the dose of anesthetic on occasion, would not be participating in future executions. *Taylor III*, 487 F.3d at 1075, 1082. In this case, Plaintiffs contend that Defendant John Byus is the leader of the execution team and has been for all past lethal injection executions, including those known to have been badly botched. Defendant Byus was participating in executions as recently as 2004, when he presided over the execution of Charles Singleton, *see* Plaintiffs' Rule 56.1 Stmt. ¶ 6, and there is no reason to believe that Defendants do not intend for him to continue to do so in the future.

In Missouri, the protocol requires that he lethal chemicals be mixed by a person qualified as a physician, a nurse or a pharmacist. *Taylor III*, 487 F.3d at 1082. "Attachment C - *Lethal Injection Procedure,*" in contrast, requires no minimum level of qualifications of the person who will perform the mixing. *See* Plaintiffs' Rule 56.1 Stmt. ¶ 10. The mixing is supposed to occur under the supervision of the Deputy Director or designee, but that person in turn is not required to have any minimum level of qualifications either. *See id*. This is not an insignificant difference; the concentrations of Sodium Thiopental used for executions are different from any of those utilized in clinical settings and thus mixing the drug requires the exercise of

pharmaceutical knowledge and not simply following the instructions on the package. *See id*.

The individual responsible for obtaining IV access under the Missouri protocol is required to be either a physician, a nurse, or an EMT, specifically an EMT - Intermediate or an EMT - Paramedic. *Taylor III*, 487 F.3d at 1082. Under "Attachment C - *Lethal Injection Procedure,*" the IV Team member(s) are not required to have any minimum qualifications at all; they need only be "healthcare providers," a term which is otherwise undefined. *See* Plaintiffs' Rule 56.1 Stmt. ¶ 7. The document cites physician, nurse or EMT by way of examples of individuals who would satisfy the requirement for a healthcare provider, but stops short of requiring any of these qualifications. The document further does not refer to the level of qualification of any EMT who might be employed, leaving open the possibility that the role may be filled by an EMT-Basic, who is unqualified under Arkansas State law to perform any procedure that is invasive of the body such as an IV insertion. *See id*. ¶ 7.

The Missouri protocol instructs the medical person, who as noted must be either a physician, a nurse, an EMT - Intermediate or an EMT - Paramedic, to assess the inmate's consciousness using "standard clinical techniques." *Taylor III*, 487 F.3d at 1084. This assessment is performed by the unqualified Deputy Director or designee under "Attachment C - *Lethal Injection Procedure*" and is limited to "procedures as taught in basic life support or CPR courses." *See* Plaintiffs' Rule 56.1 Stmt. ¶ 11.

The Missouri protocol includes a special section outlining requirements for documenting the use and non-use of the lethal chemicals, to ensure that the dosages that are intended to be administered during each execution are in fact used for that purpose. *Taylor III*, 487 F.3d at 1082-83. Recordation of "the chemicals given, the order in which they are given, and the

quantities of chemicals used and discarded" is expressly required, and "[a]ny deviations from the written protocol must be promptly reported to the department director." *Id.* at 1083. This is important; if there are no checks and balances in place to ensure that the chemicals are properly handled, drugs such as Sodium Thiopental - "an addictive controlled substance," *Morales v. Tilton*, 465 F. Supp. 2d 972, 979 n.9 (N.D. Cal. 2006), - may be diverted for illicit use and fail to reach the condemned inmate. "Attachment C - *Lethal Injection Procedure*" contains no provisions whatsoever requiring documentation of the use of the lethal chemicals. *See* Plaintiffs' Rule 56.1 Stmt. ¶ 18.

Finally, the Missouri protocol specifically guards against the potentially catastrophic consequences of using one IV line to administer the anesthetic and another to push the Pancuronium Bromide and Potassium Chloride. The protocol states that: "When the secondary line is used for thiopental, it is also used for the remaining chemicals." *Taylor v. Crawford*, No. 2:05-cv-04173-FJG (W.D. Mo.) [Doc. 198-2 at E.4.] This provision thus guards against the disastrous possibility, left wide open in contrast by "Attachment C - *Lethal Injection Procedure*," that the anesthetic Sodium Thiopental will be administered through the primary IV insertion site, infiltration will occur at that site and the full dose will fail to reach the inmate's brain, and then the Pancuronium Bromide and Potassium Chloride will be administered through the secondary, fully functional IV. *See* Plaintiffs' Rule 56.1 Stmt. ¶ 12. If that happens, the inmate will be inadequately anesthetized and will experience excruciating pain and agony throughout the administration of the second and third chemicals. *See id*.

III. CONCLUSION

For the foregoing reasons, the Court should find that this case involves multiple genuine

issues of material fact that preclude the entry of summary judgment and should deny Defendants' Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of July, 2007, the foregoing Statement was filed using this Court's EF/CMS electronic filing system and thereby automatically delivered electronically to Assistant Attorney General C. Joseph Cordi, Jr., Catlett-Prien Tower Bldg., 323 Center Street, Suite 200, Little Rock, AR 72201-2610.

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