No. 14-70028

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIE TYRONE TROTTIE,
Plaintiff-Appellee
vs.
BRAD LIVINGSTON, Executive Director,
Texas Department of Criminal Justice,
WILLIAM STEPHENS, Director, Correctional Institutions Division,
Texas Department of Criminal Justice,
JAMES JONES, Senior Warden, Huntsville Unit
and
UNKNOWN EXECUTIONERS;
Defendants-Appellants

On Appeal from the United States District Court for the
Southern District of Texas, Houston Division, C.A. No. 4:14-cv-2550

This is a capital case;
Mr. Trottie is scheduled to be executed September 10, 2014.

PLAINTIFF-APPELLANT'S OPENING BRIEF: APPEAL OF DISTRICT COURT'S DENIAL OF MOTION FOR TEMPORARY RESTRAINING ORDER

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel certifies that the interested parties are the State of Texas and all those parties who are identified in the caption of the case and their counsel.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests that this Court calendar this case for oral argument. The issues presented have never been addressed by this Court in the normal course of litigation, and have never been the subject of oral argument. Matters relevant to this litigation are developing daily. Oral argument will assist this Court in understanding the issues presented and in resolving the merits of this appeal. *See* Fed. R. App. P. 34(a); 5th Cir. R. 34.2.

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INTRODUCTION

Mr. Trottie's case presents unique circumstances – evidence that the drugs intended for use in his execution are expired, and will thus inflict serious harm upon injection. Moreover, the broader factual and legal landscape has shifted yet again since the last time a condemned inmate came before this Court challenging the process by which Texas intends to carry out its next execution. Yet the haste with which this matter has proceeded, because of the dilatory actions of Defendants, has resulted in a glossing over of pivotal facts that compel the relief Mr. Trottie requests. They are, briefly and as detailed below, the following:

- Despite the fact that Mr. Trottie requested information from Defendants for information about the drugs with which they intend to carry out his execution on August 13, 2014, **it was not until 4:55 p.m. on September 2nd** that Defendants provided their response.[1] That response conveyed only the most minimal information that Mr. Trottie understood to be (1) irrelevant to him, or (2) made clear that the drugs Defendants intend to use in his execution are expired. Mr. Trottie filed this action in the District Court the following day. Defendants' responsive pleadings filed in the Court below on September 4, 2014, made clear that the drugs are beyond their use date.

- There is a substantial risk that the use of expired drugs will subject Mr. Trottie to torturous pain. That fact is supported by scientific literature and the expert affidavits submitted to the Court below.

- Defendants' bald assertion that the drugs will not expire until September 30th is not supported by either documentary or expert

[1] Until that time, the only information Defendants provided to Mr. Trottie was that they would be "using compounded pentobarbital and following the same protocol we have been following since July 2012."

evidence. The documents provided to Mr. Trottie by the defendants, considered in light of standards set forth in state and federal law and the U.S. Pharmacopeia, firmly support Mr. Trottie's assertion that there is a substantial likelihood that the drugs Defendants intend to use in his execution are beyond their use date.

- Defendants' bald and belated assertion to the contrary begs the intervention of this Court, both in terms of a stay of execution and an order compelling Defendants to produce information relevant to a minimally scientific and reliable calculation of expiration date.

- Although the Courts understandably are loathe to get involved in the minutiae of the science – or lack thereof – integral to execution by lethal injection, it is the very nature of the drugs being used, and the secrecy surrounding their procurement and application, that has led to botched executions nationwide.

- Without access to the information necessary to reveal the fallacy in Defendants' bald assertions regarding the validity and potency of the drugs by which they intend to carry out Mr. Trottie's execution, Mr. Trottie cannot protect his Eighth Amendment rights.

- To impose the standard asserted as necessary by Defendants – that Mr. Trottie must himself offer an alternative readily available method of execution before he can protect his rights – is unworkable, unconstitutional, and not compelled by existing Supreme Court case law. That argument has been brought into significant question by the decision of the United States Supreme Court to stay the scheduled execution of Mr. Bucklew on May 21, 2014, despite the state's repeated insistence that it may execute Mr. Bucklew because he failed to propose a "specific, feasible, more humane method of execution." *See Bucklew v. Lombardi*, 134 S.Ct. 2333 (2014).

In light of this evidence, and in the shadow of the increasing numbers of botched executions around the country, to let Mr. Trottie's execution proceed would flaunt and defy the protections and mandates of the Constitution.

STATEMENT OF JURISDICTION

On September 3, 2014, Appellant filed a civil complaint pursuant to 42 U.S.C. § 1983 against the above named defendants. The district court possessed subject matter jurisdiction pursuant to 42 U.S.C. § 1983. *See Hill v. McDonough*, 547 U.S. 573 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004). In conjunction with that suit, Appellant requested a temporary restraining order or temporary injunction, asking that the District Court order Defendants to turn over relevant information about the lethal injection drugs they intend to use to carry out Mr. Trottie's execution, and a stay of execution to permit him to review the information provided. The court below denied Mr. Trottie's request. *See* App. 1 (Order and Opinion, *Trottie v. Livingston*, No. 4:14-cv-2550 (S.D. Tex. Sept. 5, 2014)). Notice of appeal was filed in the Southern District of Texas on September 8, 2014. This Court has jurisdiction to review the district court's denial of Mr. Trottie's requests for injunctive relief, constituting a final decision disposing of all issues between the parties. 28 U.S.C. §§ 1291 & 1292(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellant Mr. Trottie has made a showing of a substantial likelihood of success on the merits of his claim that use of drugs that are beyond their use date and use in his execution will subject him to torturous pain;

2. Whether Mr. Trottie has made a showing of a substantial likelihood of

success on the merits of his claim that he has a right to information about the drug with which Defendants intend to carry out his execution so that he may protect his right not to be subjected to cruel and unusual punishment;

3. Whether in these circumstances Mr. Trottie must first proffer an alternative and readily available alternative method of execution before he can prevail on either his 8th Amendment or due process claims.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On August 13, 2014, Mr. Trottie sent via email to Sharon Howell, General Counsel for Defendants, a request for information about the drug or drugs that would be used to carry out his execution.[2] After a week passed and no response had been received, Mr. Trottie's counsel sent a second email, inquiring about a response. The following day, Ms. Howell responded:

> *We will be using compounded pentobarbital and following the same protocol we have been following since July 2012. You are asking for some information that has been specifically protected by the Office of the Attorney General, so we anticipate seeking a decision from the OAG next week. By the time we file our decision request, we will disclose to you any information that is not protected under the PIA.*

See Exhibit C, attached (email correspondence with Defendants' counsel). That

[2] That request is attached as Exhibit B. The last execution that took place in Texas was on April 16, 2014. Upon information and belief, and based on information about the short "shelf life" of compounded pentobarbital, Plaintiff believed that Defendants would have had to purchase newly compounded drugs, and would have had to do so shortly before his scheduled execution so that the drugs would not expire. As such, an earlier request for information would have been futile.

same day, undersigned counsel sent the following email to Ms. Howell:

> *Sharon:*
>
> *The request Mr. Adler sent specifically acknowledged the recent ruling of the Attorney General's office, and asked that you redact any information (the source of the drug) accordingly. Given the imminence of Mr. Trottie's scheduled execution, we would greatly appreciate it if you would both provide the requested information not exempted by the Attorney General's ruling, and not wait the full ten days to request an opinion from the Attorney General.*
>
> *Could you please let us know?*
>
> *Also, please provide any information, including any Request for a Decision, responsive information, etc, via email to this group - NOT via snail mail.*

Id. Once again, counsel for Defendants did not respond. Thus, on August 26, undersigned counsel sent the following email message:

> *Sharon -*
>
> *Could you acknowledge receipt of this email (from August 21st) and confirm that all communications, including a Request for a Decision, will be communicated via electronic transmission (email)?*

Id. Two days later, on August 28th, Ms. Howell responded:

> *We will provide you with an electronic copy.*

Id. Undersigned counsel responded immediately:

> *Thank you. Can you please tell us when you expect that to happen?*

Id. No further communication from Defendant was received until Tuesday, September 2nd, when counsel for Mr. Trottie received from Defendants - via the U.S. postal service - a copy of a Request for a Decision from the Attorney Generals

Office. The Request was dated August 28th, but postmarked August 29th.

On September 2nd, at approximately 4:56 p.m. counsel for Mr. Trottie received an email from Defendants' counsel, attaching the information they considered public and releasable in response to Mr. Trottie's August 13, 2014 request. *See* Exhibit C-2. What little information Defendants did reveal is meaningless, with one exception: the indication that the drugs Defendants intend to use are expired or beyond their "use date" – and thus give rise to a substantial risk that Mr. Trottie will suffer the excruciating pain to which other inmates have very recently been subjected. The receipt of that information compelled this litigation.

Thus, on September 3rd, Mr. Trottie filed in the District Court below his Original Complaint, and a Motion for Temporary Restraining Order or Preliminary Injunction. The District court denied that Motion on September 5, 2014. *See* RE #3. This appeal follows.

II. RELEVANT FACTS

A. TEXAS' EXECUTION PROTOCOL.

Since July 2012, Texas has executed condemned prisoners with a single dose of what it alleges to be pentobarbital, made by an undisclosed and non-FDA-regulated compounding pharmacy, and composed of unknown ingredients whose sources Defendants also hide. *See* Exhibit A (July 2012 Execution Protocol).

B. THE DRUGS DEFENDANTS INTEND TO USE TO EXECUTE MR. TROTTIE ARE BEYOND THEIR USE DATE (EXPIRED).

As detailed above, on September 2nd, Defendants provided their response to Mr. Trottie's inquiry regarding the drugs that would be used in his execution. *See* RE-B (re-scanned copies of illegible pages attached as RE-B-2). In pertinent part, the documents produced reflect that testing was performed on March 17, 2014, and that the tests administered include Potency (108%), Bacterial Endotoxin, and Rapid ScanRDI Microbial Detection. *See* RE-B-2. Although there is a space on the sheet for "Eagle Sterility Test," none was performed.

In Defendant's Response in Opposition ("Response") to Mr. Trottie's Motion for Temporary Restraining Order, they assert (without documentation or support): "The specific vials of pentobarbital Texas will use to execute Trottie are not expired (and will not expire until September 30, 2014) and have been demonstrated to be potent." *See Trottie v. Livingston*, No. 4:14-cv-02550 (Dkt # 6), p. 13. Defendants' Response also states that the drugs to be used in Mr. Trottie's execution will come from the same "batch" as the drugs used in the executions of Jose Villegas[3] (on April 16, 2014), Ramiro Hernandez Llanas (April 9, 2014) and Tommy Lynn Sells (April 3, 2014). *Id*. at p. 10.[4]

[3] Mr. Villegas is the inmate who said from the gurney "it does kind of burn," a comment reminiscent of the grim executions (neither noted or acknowledged by Defendants) carried out in Oklahoma and South Dakota using compounded pentobarbital. Given this statement, the fact that he was the last inmate executed with the subject drugs heightens concerns about the lasting efficacy of the drug – even five months ago.

Defendants' finite statement that the subject drugs "will not expire until September 30, 2014" is not supported by a shred of evidence, expert or otherwise,[5] or the relevant science, which understands that expiration dates of compounded chemicals is not a fixed science, is dependent on factors including the quality and sterility of the original ingredients, the proficiency of the compounders and the testing laboratory, and storage conditions.[6]

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[4] Plaintiff's assertion in his Complaint and Motion below that Defendants had not provided any relevant information regarding the drugs to be used in Mr. Trottie's execution was based on the assumption that Defendants would not be using a drug that had been tested for potency and purity almost five months ago. Defendants' statement in their Response in Opposition that they intend to execute Mr. Trottie with drugs from the same batch used in executions carried out in April, not tested for potency, contaminates, or stability since March 17, and never tested for sterility, confirms Mr. Trottie's initial concern that the drugs were beyond their use date. Undersigned counsel were about to file a Reply to Defendants' Response in Opposition in the Court below, addressing these matters, when the District Court issued its Opinion.

[5] Mark Dershwitz, the expert uniformly relied upon by Departments of Corrections around the country – including Texas – recently announced that he would no longer be serving as an expert for states defending their lethal injection methods and protocols *See* Andrew Welsh-Huggins, State's Leading Lethal Injection Expert Ends Role, Lexington Herald-Leader (Aug. 21, 2014), available here: http://www.kentucky.com/2014/08/20/3388279/states-leading-lethal-injection.html?sp=/99/1250/. In 2011, then TDCJ-CID Director Rick Thaler submitted an affidavit in conjunction with *In re Foster*, No. D-1-GN-11-000710 (250th Judicial District, Travis County). In explaining the process by which Texas "researched" the move from sodium thiopental to pentobarbital, Dir. Thaler averred: "Oklahoma, which has a substantially similar execution drug protocol to that of Texas, consulted with Mark Dershwitz, M.D., Ph.D., an anesthesiologist upon whom TDCJ has relied in the past to evaluate its drug protocol. Dr. Dershwitz supported the use of 5 grams of pentobarbital to replace sodium thiopental in the execution drug protocol . . . I have reviewed Dr. Dershwitz's expert report."

[6] Given that the drugs were not tested until March 17th, they had to be compounded sometime before that, leading to a highly questionable and unusually lengthy shelf life of greater than six months. As detailed below, this in combination of other factors leads to the conclusion that the drugs are beyond their use date.

The date of the testing (March 17, 2014) upon whose results Defendants rely, in combination with Defendants' assertions about when the subject drugs "expire[]"[7] and the batch from which they come, considered in conjunction with the U.S. Pharmacopeia, state law, and relevant treatises, lead to the inevitable conclusion that the drugs with which Defendants intend to execute Mr. Trottie are beyond their use date.[8]

The calculation of the "beyond-use-date" (BUD) is no simple matter, and is dependent on numerous variables, including, pivotally, the stability and sterility of the subject compounded drug:

> Pharmaceutical stability depends on the purity and concentration of specific ingredients, packaging and environmental exposure and storage . . . Small changes in any of those variables can cause rapid loss of drug strength or much shorter than expected shelf-life. . . . even the most expert and caring pharmacist's visual, olfactory or other professional judgment, in the absence of scientific testing results, about sterility and stability of compounded pharmaceuticals can be dangerously wrong.

Newton, David and Dunn, Bernard, *A Primer on USP Chapter <797> "Pharmaceutical Compounding–Sterile Preparations," and USP Process for Drug and Practice Standards*, p.11.[9]

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[7] The appropriate terminology is "Beyond Use Date" or "BUD".

[8] Given the time frame, Mr. Trottie was not able to obtain an expert affidavit specific to these issues in the one day he had available to file his Complaint and Motion in the Court below. He did not, of course, anticipate that Defendants would produce evidence and statements revealing the intended use of drugs beyond their use date.

[9] Available here: www.nhia.org/members/documents/usp_**797**_primer.pdf

U.S. Pharmacopeia Chapters 797[10] addresses Sterile Compounding; Chapter 795[11] addresses Nonsterile Compounding. While compounded pentobarbital for use in injections is traditionally a "sterile" compound[12], the level of risk assigned is dependent on the risks in the particular compounding process and the intended use for the drug. USP Chapter <797> at 11. Moreover, the calculation of BUDs depends on numerous factors, *Id*. at 39-40, and even after it is assigned, it can be affected dramatically by subsequent storage conditions.[13] Chapter 797 tackles the question of assigning BUD's to sterile compounds, USP Chapter <797> at pp. 39-42, and refers repeatedly to USP Chapter <795> precisely because there are a multitude of intervening events that can render a "sterile compound" "nonsterile" for purposes of a BUD calculation. "Beyond-use dates of compounded sterile preparations based on chemical and physical stability for Chapter <797> are the same as those for compounded nonsterile preparations in Chapter <795>." *See* Newton and Dunn, p. 11. The multiplicity of variables underscores the impossibility of reliable date certain BUDs, and the importance of subsequent

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[10] Available here: www.doh.wa.gov/Portals/1/Documents/2300/USP**797**GC.pdf.

[11] Available here: www.**usp**.org/sites/default/.../**usp**.../gc**795**.pdf

[12] Defendants make this point in their Opposition below. *See* Opposition, Dkt #6, at p.13, fn. 11. What Defendants failed to understand is that compounded drugs that are supposed to be "sterile" can become non-sterile in a variety of ways, including through the use of non-sterile raw ingredients. Thus, the affidavit of Mr. Trottie's expert, discussed *infra*, is highly relevant.

[13] *See, e.g*, *Id*. at 40

testing – and stability and sterility testing in particular – multiple times over a drug's shelf life, not just shortly after it is compounded. *Id.*; *See also* USP Chapter <795> "Stability Criteria and Beyond-Use Dating."

While it is impossible to assess the accuracy of a BUD without knowing detailed information about the compound, the raw ingredients, the compounders, and the testers, it is possible to review the relevant science and codes to recognize the unreliability of a stated "expiration date" of the length asserted by Defendants. Even this brief discussion of the relevant factors and the undisputed inadvisability of naming an expiration date certain – particularly in light of the scant testing conducted five months ago – makes clear that Defendants' assertion of the "expiration date" of September 30, 2014 cannot stand, and cannot have come from a qualified, reputable source.

> Examples of generally recommended BUD's are instructive:
>
> When CSPs are known to have been exposed to temperatures warmer than the warmest labeled limit or to temperatures exceeding 40 degrees for more than 4 hours, such CSPs should be discarded unless direct assay data or appropriate documentation *confirms their continued stability*.

USP Chapter <797>, p. 40 (emphasis added).

> In short, because beyond-use dating periods established from product-specific data acquired from the appropriate instrumental analyses are clearly more reliable than those predicted theoretically, the former approach is strongly urder to support dating *periods exceeding 30 days.*

Id., p. 41 (emphasis added). The Texas Administrative Code provisions on compounding sets time limits for BUDs in the absence of sterility testing as well as when non-sterile ingredients are used. As does the USP (and to which it liberally cites), it separates sterile compounded drugs into three categories- low, medium, and high risk—and provides BUD requirements for each unless certain criteria is met. Each of those BUDs are far shorter than six months:

> (IV) For a low-risk preparation, *in the absence of direct sterility testing* results or appropriate information sources that justify different limits, the storage periods may not exceed the following periods: before administration the compounded sterile preparation is stored properly and are exposed for not more than 48 hours at controlled room temperature, for *not more than 14 days if stored at a cold temperature, and for 45 days if stored in a frozen state* between minus 25 degrees Celsius and minus 10 degrees Celsius. For delayed activation device systems, the storage period begins when the device is activated.
>
> (V) For a medium-risk preparation, *in the absence of direct sterility testing* results the beyond use dates may not exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for *not more than 30 hours at controlled room temperature, for not more than 9 days at a cold temperature, and for 45 days in solid frozen state* between minus 25 degrees Celsius and minus 10 degrees Celsius.
>
> (VI) For a sterilized high-risk level preparation, *in the absence of passing a sterility test*, the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for *not more than 24 hours at controlled room temperature, for not more than 3 days at a cold temperature, and for 45 days in solid frozen state* between minus 25 degrees Celsius and minus 10 degrees Celsius.

See 22 Tx. ADC s.291.133 (2)(B), (C) and (D) (emphasis added).

Lastly, as the above discussion makes clear, as does the Texas Administrative Code, the sterility of the compound – and repeated testing of same – is critical to an accurate assessment of a BUD. *No* sterility testing has been conducted of the drug Defendants intend to use to carry out Mr. Trottie's execution. *See* RE B-2.

Regardless of the complex weave of specific conditions and factors contributing to the BUD of the compounded drug with which Defendants intend to carry out Mr. Trottie's execution, the "expiration" date specified by defendants is implausible. This is particularly so when the only minimal testing it was subjected to was performed five months ago, and notably failed to include a sterility test – a test that is central to the calculation and veracity of an expiration or beyond use date.

C. DEFENDANTS' ASSERTIONS ABOUT EXPIRATION DATE ARE DOUBLY SUSPECT IN LIGHT OF THE FEDERAL DRUG ADMINISTRATION'S RECENT CONDEMNATION OF EAGLE LABORATORIES, WHOSE TESTING DEFENDANTS RELY UPON TO ASSERT POTENCY AND PURITY.

The documents provided by Defendants in response to Mr. Trottie's request for information include the results of testing conducted by Eagle Laboratories. *See* RE B-2. Eagle Laboratories has had significant and recent problems. In 2013 the Federal Drug Administration (FDA) issued a post-inspection report (an "FDA

483," attached as RE F) that is extremely critical, and finds significant problems with every significant aspect of Eagle's laboratory, equipment, personnel, and processes. The summary of Observation 1 of the FDA form states without equivocation: "Laboratory controls do not include the establishment of scientifically sound and appropriate specifications, standards and test procedures to assure that components conform to appropriate standards of identity, strength, quality and purity." *Id*. at p. 1. Of the many problems detailed in Observation 1 is finding L: "your firm has failed to Validate the Test Method for any potency assays conducted by your firm. *You have not determined the evaluation of accuracy, sensitivity, specificity, and reproducibility of the test methods used in the analyses of drug products submitted by clients to your firm*." *Id*. at p.2 (emphasis added). One of the many additional critiques states:

> Controls are not recovered, yet drugs are still passed, and there is no documentation of the deviation. Sterility and Contamination Tracking Logs are not kept, and there are no signatures to indicate any review of such Logs. There is no Quality Control Unit and thus no one "that has responsibility and authority for approving ["Or] rejecting all procedures, methods, and specifications *related to the identity, slrength, quality and purity of drug products submitted to your firm for analysis . ...* "

Id. at p. 4 (emphasis added).

In short, there is good reason to mistrust the results of any test conducted by Eagle Labs.

Moreover, independently contracted testing laboratories – such as Eagle –

are highly suspect. *See* Kimberly Kindy, *Labs that test safety of custom-made drugs fall under scrutiny*, WASHINGTON POST (Oct. 5, 2013), available here http://www.washingtonpost.com/politics/labs-that-test-safety-of-custom-made-drugs-fall-under-scrutiny/2013/10/05/18170a9e-255f-11e3-b3e9-d97fb087acd6_story.html and attached as RE G. The article is worth quoting at length:

> Thousands of contaminated or potentially tainted medications have made it to market over the past year after laboratories responsible for testing custom-made pharmaceutical products failed to follow proper procedures, FDA records show.
>
> The Food and Drug Administration uncovered the problems during a series of surprise inspections at dozens of specialty pharmacies over the past year, prompted by last fall's deadly meningitis outbreak tied to tainted steroid injections made by one of the pharmacies, New England Compounding Center (NECC).
>
> The FDA found unsanitary conditions and sloppy procedures at 60 specialty pharmacies. Behind each one of these pharmacies, known as compounders, independent testing laboratories were affirming that the drugs were safe, sterile and mixed at the proper strength, FDA records show.

Id. Of course, Eagle Laboratories is one of the labs under FDA scrutiny. When contacted by the Washington Post:

> Eagle's general manager said he does not think the company should have to conform to legal safety standards that apply to drug manufacturers — called Good Manufacturing Practices — but that in most cases, the company has agreed to make the changes recommended by the FDA.

See RE G. Whether those changes have taken place is unclear.

D. ALL OF THESE FACTORS AND RISKS ARE HEIGHTENED IN THE CURRENT LANDSCAPE, WHERE LETHAL INJECTION DRUGS – INCLUDING AND PARTICULARLY COMPOUNDED PENTOBARBITAL – HAVE BECOME INCREASINGLY DIFFICULT TO PROCURE.

Because manufactured pharmaceuticals are no longer available for use in executions, Departments of Corrections around the country – including TDCJ - have recently turned to compounded drugs, including compounded pentobarbital. As even compounding pharmacies are increasingly reluctant to produce drugs for use in lethal injections, and the raw ingredients essential to same are near impossible to obtain, the prisons' ability to procure the necessary drugs has become increasingly difficult – forcing states to go to increasingly questionable suppliers.[14]

Yet, the quality of the pharmacy, information about where it gets its Active Pharmaceutical Ingredient (API), and the patterns and practices and qualifications of the testing laboratories, are critical to an assessment of the potential risks associated with the drugs they produce, both generally, and vis a vis the individual inmate. *See* RE C, paras 17-23. The affidavits of pharmacologist Larry Sasich (RE C) and Dr. David Waisel (RE D) [15] set forth in full detail the unregulated

[14] *See* Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. Times, Nov. 8, 2013, at A1.

[15] The affidavits of Larry Sasich and Dr. Waisel, Record Excerpts C, C-2 and D, were obtained in conjunction with recent but prior litigation. They thus address specifics as to Woodlands Pharmacy, PCCA, and Eagle Laboratories that may (or may not) be relevant to these proceedings. However, the affidavits also provide ample information relevant to this litigation.

nature of the compounding industry, and the resulting problems that can be seen in the quality, efficacy, and integrity of the drugs produced. Dr. Sasich details some of the specific problems that can result from subpar practices and testing by incompetent laboratories, and makes clear that each lot or batch of compounded drugs carry their own risks. *See* RE C, paras. 19, 23-24; RE C-2, p.1.

E. THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE USE OF EXPIRED DRUGS TO CARRY OUT MR. TROTTIE'S EXECUTION WILL CAUSE TORTUROUS PAIN.

Drugs that are compromised, contaminated, expired, or sub-potent are highly likely to cause Mr. Trottie excruciating pain in violation of the 8th Amendment. *See* RE C, paras. 25, 30; 33, 46; RE D at paras. 6-14. Drugs that are beyond their use date carry a high risk that the compounded drug will develop microbial contamination, resulting in excessive endotoxins, and other unintended physical contaminants. RE C-2 at p.4. Diversion, mishandling, or improper storage after analytical testing could result in circumstances that sub-par drug quality that would be "expected to prolong the execution and multiply the pain and suffering beyond the objective of causing the condemned person's death. Highly unpredictable, rapidly evolving, and potentially painful and agonizing reactions may ensue should the pentobarbital be contaminated by endotoxins or exotoxins. Similarly, should solid particulate matter of any kind contaminate the solution or precipitate out of

solution during intravenous injection, there is a substantial risk of pain and suffering upon injection of the solution." RE C at para. 30.

Dr. Waisel further describes the ways in which such compromised drugs could cause excruciating pain upon injection. *See* RE D, paras. 6-14. In the context of a lethal injection predicated on the use of pentobarbital, the use of an drug beyond its use date deriving from a deeply flawed and unregulated industry is highly likely to result in at least several causes for substantial risks of serious, unnecessary, and lingering pain and suffering:

> a. Lack of identity as to the product the label represents the substance to be;
> b. "[S]ub- and super-potency," resulting in unanticipated effects such as pulmonary embolism, nausea and vomiting, suffocation and gasping for breath before the hoped-for loss of consciousness, and partial or complete lack of effect;
> c. Contamination with dangerous allergens or substances capable of causing immediate anaphylactic reactions;
> d. Contamination with bacteria or fungus with immediate excruciating effects, such as "[h]ighly unpredictable, rapidly evolving, and potentially painful and agonizing reactions" before the condemned person is unconscious (assuming it works even to that extent);
> e. Incorrect pH (acidity level) resulting in serious pain from the burning sensation on injection analogous to the effect of injecting an unanesthetized condemned person with potassium chloride; and, without limitation,
> f. Formation of precipitates, e.g. solid particles, with the foreseeable result of a painful pulmonary embolism in the most serious of cases.

RE C at paras. 28, 30-35; RE D, paras. 6-14.

F. INTERVENING FACTUAL AND LEGAL DEVELOPMENTS RELEVANT TO THE APPLICATION OF PRIOR RULINGS OF THIS CIRCUIT FORECLOSING RELIEF.

5. Steadily Increasing Numbers of Botched Executions

Simply put, the mechanism for putting a person to death in this country is on the verge of collapse. Four recent executions shed light on the substantial risk of serious harm that execution drug failure can cause. Twelve seconds into his January 9, 2014 execution in Oklahoma, which utilized a three-drug cocktail that included pentobarbital obtained from an unnamed compounding pharmacy, Michael Lee Wilson uttered his chilling final words: "I feel my whole body burning."[16]

A week later, Ohio executed Dennis McGuire with a combination of drugs never before used in lethal injection in the United States, and he "struggled, made guttural noises, gasped for air and choked for about 10 minutes."[17]

On April 29th, 2014, after the lethal drugs were purportedly administered to Clayton Lockett in Oklahoma, he regained consciousness, writhed, groaned and took 43 minutes to die, reportedly from a heart attack. Midway through these

[16] Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate over Lethal Injections*, New York Times, Jan. 17, 2014, at A15.

[17] Alan Johnson, *Inmate's Death Called 'Horrific' Under New, 2-Drug Execution*, The Columbus Dispatch, Jan. 17, 2014.

horrific events, the prison drew the blinds on the execution chamber, obscuring what really happened from public scrutiny.[18]

On July 23rd, it took Arizona death row inmate Joseph Wood nearly two hours to die after he was injected with drugs obtained in secrecy from a compounding pharmacy.[19]

It is highly likely that the tortured executions of Mr. Wilson resulted from contaminated, sub-potent, or otherwise sub-par drugs. *See* RE C, para. 33. The cause or causes of Mr. Wood's and Mr. McGuire's botched executions is still unknown.

Defendants argued below that "Trottie cannot use evidence of [] executions from other states following a different protocol – based on different drugs – to transform his speculation into the required significant showing." To begin, as set forth above, Mr. Trottie's showing is far from speculative, is supported by science, expert affidavits, and the assertions made and documents provided by Defendants. Defendant's denial of the relevance of executions in other states first ignores the execution of Mr. Wilson, executed with compounded pentobarbital, whose last words were "I feel my whole body burning." Second, Defendants assertion generally sounds like the person standing in the middle of a burning building

[18] Katie Freckland, *Clayton Lockett writhed and groaned. After 43 minutes, he was declared dead*, The Guardian, April 30, 2014, available at http://www.theguardian.com/world/2014/apr/30/clayton-lockett-oklahoma-execution-witness.

[19] Michael Muskal, *How did Arizona Execution go Wrong*, L.A. TIMES, July 24, 2014.

shouting that there is not fire. The system of executions by lethal injection is collapsing around us, and is being widely condemned, without regard for the type of drug that is used in a particular botched execution, but because of the fact of the horrific nature of those botches, and our recognition that neither our society nor the Eighth Amendment should condone such state actions, nor accept the States' commonplace assertions – even in the face of these botches – to just "trust us." See Exhibits H and I to Plaintiff's Motion. While what victims' have had to endure is unimaginable and unacceptable, comparative suffering has no place in an Eighth Amendment analysis.

Moreover, it is the system of execution by lethal injection that is failing, not only executions using midazolam, or midazolam and hyrdromorphone. Regardless of cause, the availability of execution drugs has diminished to the degree that prisons are increasingly insistent on conducting the business of executions – including the purchasing process of the drugs via illegal transactions from highly questionable sources – in secret. See Id. One wonders, if execution by hanging or firing squad was the dominant method being questioned, if Defendants would distinguish Texas on the basis of the rope fiber or bullets used.

6. **The Increasing Lengths to Which Departments of Corrections – Including Texas' – are Willing to Go to Avoid Transparency and Accountability.**

Just a few days ago information came to light that the officials with the Missouri Department of Corrections responsible for carrying out executions repeatedly lied, under oath, about their execution process and the drugs used, including the fact that they had, in fact, repeatedly administered the drug midazolam.[20]

Defendants have also lied, on federal forms and in the process of purchasing drug purchases, and have behaved in less than forthright or honest manner in numerous aspects of their behavior surrounding the carrying out of executions. TDCJ's purchases (actual and attempted) of lethal injection drugs have been riddled with deceptive and questionable practices and communications. Their responses to requests for information have similarly been deceptive, limited, and are only provided after they consume every day and hour they are allotted under the Public Information Act.

TDCJ purchases its drug supplies using a purchase order stating that the drugs are for and to be delivered to the "Huntsville Unit Hospital," with a street

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[20] Chris McDaniel, *Missouri Swore It Wouldn't Use A Controversial Execution Drug. It Did*, St. Louis Public Radio, Sept. 2, 2014, available here: http://news.stlpublicradio.org/post/missouri-swore-it-wouldn-t-use-controversial-execution-drug-it-did. Defendants are also in possession of midazolam, and have been since June 2013.

address matching that of the Huntsville Unit. *See, e.g.* RE B, B-2, E.. The Huntsville Unit Hospital has not existed since 1983.[21]

TDCJ attempted to purchase compounded pentobarbital from one Pharmacy Innovations, also in the name of the "Huntsville Unit Hospital." The prescription for the pentobarbital was written, simply, for James Jones – who is in fact the warden of the Huntsville Unit, where executions take place. After the order was placed, Pharmacy Innovations was informed of the purpose of the pentobarbital TDCJ was attempting to purchase. Shortly thereafter, Pharmacy Innovations cancelled the order before it had been filled. *See* RE E.

The DEA Form 222[22] TDCJ uses to purchase its execution drugs states that the registered agent is "TDCJ, Huntsville Unit Hospital," a "hospital/clinic." The last time TDCJ renewed their DEA registration – in November 2011, they removed "Huntsville Unit Hospital" from the registration form. The Form 222 TDCJ currently uses is thus false. *See* RE B; B-2.

The last known supplier of execution drugs was the Woodlands Pharmacy. After their name was revealed, Woodlands wrote a letter to a member of the Texas Board of Criminal Justice and various officials within the Texas Department of Criminal Justice, asking for return of their drugs. In the letter, Woodland

[21] *See* Raimer, Ben and Stobo, John, *Health Care Delivery in the Texas Prison System*, JAMA, July 28, 2004 – Vol. 292, No. 4 at 486-487.

[22] A form reflecting the purchaser's registration with the DEA authorizing purchase of controlled substances.

Pharmacy states that a representative of TDCJ made statements leading to the "belief that this information would be kept on the 'down low' and that it was unlikely that it would be discovered that my pharmacy provided these drugs."[23]

7. **Increasing Concerns on the Part of the Courts and the Public in the Wake of these Developments.**

In the wake of these events, Oklahoma and Ohio have temporarily stayed executions.[24] The State of Louisiana is under orders to disclose the "identity of the [execution] drugs' manufacturers and sources" and the "entities involved in supplying and testing those lethal chemicals." *In re LeBlanc*, 2014 WL 1245251 (C.A.5 (La.)). Missouri's attorney general stated that the state's "creeping" secrecy "may not be prudent."[25] Attorney General Eric Holder forcefully stated that condemned prisoners have a right to know the composition and sources of the drugs that the states use in carrying out executions.[26]

The growing consensus that transparency and caution, at a minimum, are warranted is reflected in the unprecedented volume of coverage, commentary and

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[23] *See* Brandi Grissom, TDCJ Refuses to Return Execution Drugs to Pharmacist, Texas Tribune (Oct. 7, 2013), available here: https://www.texastribune.org/2013/10/07/tdcj-refuses-return-execution-drugs-pharmacist/ . TDCJ refused to return the drugs as Woodlands requested. *Id*.

[24] Mark Berman, *Oklahoma attorney general agrees to delay execution for six months*, Washington Post, May 8, 2014; Elizabeth Barber, *Federal judge orders halt to executions in Ohio until mid-August*, Christian Science Monitor, May 28, 2014.

[25] Jeremy Kohler, *Missouri attorney general: State needs its own execution pharmacy*, St. Louis Post-Dispatch, May 29, 2014.

[26] http://www.nbcnews.com/storyline/lethal-injection/attorney-generalholder-condemned-should-know-lethal-drugs-n169981.

concern by journalists, editorial boards, prison directors, doctors, pharmacists, and many others on all sides of the issue. *See* Exhibits H and I, attached to Motion below (partial listing of opinions and editorials written in the wake of Mr. Lockett's and Mr. Wood's botched executions).

Texas courts have expressed their concerns about Texas' behavior and practices, even before the more recent events and developments outlined above. Judge Gilmore, in granting Plaintiffs motion for Temporary Restraining Order, stated:

> Without some detail about the source of the drugs and the integrity of the testing, Plaintiffs are prevented from raising a specific Eighth Amendment challenge to their executions. Until Plaintiffs have full disclosure of the produce with which Texas will cause their death, they cannot fully develop a challenge to its process The question is not whether some error may cause a significant chance of pain in the execution procedure, but whether even a properly conducted execution will result in intolerable pain because of the substance used.

Sells v. Livingston, No. 4:14-cv-00832 (S.D.Tex. April 2, 2014), slip op. at p.5, reversed by *Sells v. Livingston*, 561 Fed. Appx. 342 (5th Cir. 2014).

Although District Court Judge Ellison felt bound by Circuit precedent and thus denied Mr. Robert Campbell's Motion for a Temporary Restraining Order, he stated:

> Troublingly, though, in sanctioning the State's refusal to disclose potentially relevant information, Fifth Circuit case law appears to leave the inmate with nothing but speculation to rely on.
> . . . .
> The horrific narrative of Oklahoma's botched execution of Clayton

> Lockett on April 29, 2014 requires sober reflection on the manner in which this nation administers the ultimate punishment. While the law currently does not permit injunctive relief, this Court urges the Fifth Circuit to reconsider its jurisprudence that seems to shield crucial elements of the execution process from open inquiry.

Campbell v. Livingston, No. 4:14-cv-01241 (S.D.Tex. May 9, 2014), slip op. at 2.

Judge Bye, dissenting from denial of rehearing, eloquently expressed his concerns:

> Missouri continues to frustrate the efforts of inmates such as Rousan to investigate the method of execution the State plans to use to end their lives. Missouri shields these shadow pharmacies—and itself—behind the hangman's cloak by refusing to disclose pertinent information to the inmates. This Court is largely left to speculate as to the source and quality of the compounded pentobarbital—or whatever chemical cocktail du jour Missouri elects to serve this time around. So long as Missouri insists on carrying out executions, it is fundamentally important the State is sufficiently transparent about its protocol to allow adequate review of the constitutionality of its chosen method.

Zink v. Lombardi, 2014 WL 16478528 (C.A.8 (MO.)) (Bye, J., dissenting).

From a different perspective, Judge Kozinski, dissenting from denial of rehearing en banc, stated forcefully:

> If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path and return to more primitive—and foolproof—methods of execution. The guillotine is probably best but seems inconsistent with our national ethos. And the electric chair, hanging and the gas chamber are each subject to occasional mishaps. The firing squad strikes me as the most promising.
> . . . .
> While I believe the state should and will prevail in this case, I don't understand why the game is worth the candle. A tremendous number of taxpayer dollars have gone into defending a procedure that is inherently flawed and ultimately doomed to failure. If the state wishes to continue carrying out executions, it would be better to own up that using drugs is a mistake and come up with something that will work, instead.

Wood v. Ryan, No. 14-16310 (8th Cir. July 21, 2014) (Kozinski, J., dissenting to denial of rehearing en banc.

Numerous other courts have expressed concerns about the efficacy and constitutionality of lethal injections in the current landscape, about states' determination to avoid transparency, and about the risk that inmates will face torturous executions forbidden by the Eighth Amendment.[27]

8. **Relevant Intervening Legal Developments: the Decision of the Supreme Court to Stay the Scheduled Execution of Mr. Bucklew.**

Prior rulings of this Circuit rely in significant part on an interpretation of *Baze v. Rees* that imposes on plaintiffs raising Eighth Amendment lethal injection challenges the burden of offering an "alternative" method of execution. Those rulings have since been significantly undermined by the decision of the United States Supreme Court to stay the scheduled execution of Mr. Bucklew on May 21, 2014. *See Bucklew v. Lombardi*, 134 S.Ct. 2333 (2014). In *Bucklew*, the Court entered a stay despite the state's repeated insistence that it may execute Mr.

[27] *See, e.g.*, *Arthur v. Thomas*, 2013 WL 5434694 (M.D. Ala. Sept. 30, 2013) (allowing Eighth Amendment claims against execution protocol to proceed); *In re: Ohio Execution Protocol Litigation*, No. 2:11-cv-1016 (Order of May 27, 2104, staying all further executions to permit adjudication of adequacy of new execution protocol); *Schad v. Brewer*, No. 13-02001-ROS (D. Ariz. Oct. 5, 2013) (disclosing that state supply of pentobarbital expired in November 2013); *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012) (finding execution protocol in violation of state constitution); *Sims v. Dep't of Corr. & Rehab.*, 157 Cal. Rptr. 3d 409 (Cal. Ct. App. 2013) (finding execution protocol in violation of state law); *Baze v. Thompson*, No. 06-CI-574 (Franklin Cir. Ct. Dec. 5, 2013) (denying state's motion to lift injunction against executions); *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Dec. 11, 2013) (staying execution so constitutionality of new execution protocol could be evaluated).

Bucklew because he failed to propose a "specific, feasible, more humane method of execution." If that were the standard, the Supreme Court would have permitted his execution to proceed. It did not.

The *Bucklew* ruling casts grave doubt on the Fifth Circuit's prior decisions requiring that the plaintiff plead an "alternative method of execution". *See Whitaker*, 732 F.3d at 468.

SUMMARY OF THE ARGUMENT

Baze v. Rees, 553 U.S. 35 (2008), addressed the constitutionality of Kentucky's three-drug lethal injection protocol. Indeed, The Supreme Court granted *certiorari* in *Baze* to "determine whether Kentucky's lethal injection *protocol* satisfies the Eighth Amendment." *Id*. at 47 (emphasis added). The Court's focus was not on the drug, but on the administration of the three drugs used in Kentucky's protocol – about which they had abundant information, none of which Kentucky attempted to hide.

In the intervening six years, the increasing scarcity of lethal injection drugs – and consequent concerns about quality and states' efforts to keep the details about the source and administration of the drugs secret – have become the central feature of botched executions, and Eighth Amendment concerns. These concerns, and the constitutional issues they raise, are very different than those before the Supreme Court in *Baze*. Mr. Trottie submits that these differences render the second prong

of *Baze* – the requirement that condemned inmates proffer an alternative, readily available method of execution – inapplicable to the issues he presents.

The minimal documents provided by Defendants, when considered in conjunction with scientific treatises, federal and state regulations, and the affidavits of Mr. Trottie's expert, compel the conclusion that the drugs Defendants intend to use to carry out his execution are beyond their use date (expired), and thus expose Mr. Trottie to the substantial risk that this execution will inflict severe and torturous pain. As this Court has stated: "Plaintiffs must point to facts or evidence based on science and fact showing the likelihood of severe pain." *Sells*, No. 14-70014 (unpub.), slip op. at p.5, citing *Whitaker v. Livingston*, 732 F.3d 465 (5th Cir. 2013). Mr. Trottie has done so.

To permit Defendants' bald assertion to the contrary to defeat all of Mr. Trottie's claims defies logic, the law, and the Constitution. Indeed, it leaves him – and any condemned inmate raising a constitutional challenge to the method of his impending execution – in an impossible Catch-22. In combination with the Defendants' delaying and obfuscating maneuvers – forcing Mr. Trottie to raise these matters to the court at the last minute, in the shadow of an execution date and in the context of request for injunctive relief – effectively keeps Mr. Trottie from protecting his constitutional right not to be executed in a manner that inflicts

torturous pain.[28] In light of the botched executions of Mr. Wilson, Mr. McGuire, Mr. Lockett, and Mr. Woods, we have come to understand just how gruesome those botches can be.

ARGUMENT

I. THE RELEVANT STANDARDS

Generally, four requirements must be met before a preliminary injunction may issue: (1) a substantial likelihood that plaintiff will prevail on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant; and (4) granting the preliminary injunction will not disserve the public interest. *See Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195–96 (5th Cir. 2003). The primary justification for applying this remedy is to preserve the court's ability to render a meaningful decision on the merits. *Canal Authority of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

> Although the fundamental fairness of preventing irremediable harm to a party is an important factor on a preliminary injunction application,

[28] These actions are aggravated by the fact that previous attempts by condemned inmates to litigate these issues before they face an execution date were dismissed – at the urging and argument of Defendants – for lack of ripeness because no execution date exists. *See Whitaker v. Livingston*, No. H-13-2901 (S.D. Tex. Dec 4, 2013). This holding, and the tension it creates when considered in light of the case law of this Circuit condemning inmates who raise lethal injection challenges once an execution date has been set – are the subject of an appeal of the Whitaker decision that is currently pending in the Fifth Circuit Court of Appeals, and scheduled for oral argument on October 8, 2014. *See Whitaker v. Livingston*, No. 14-20750 (C.A.5).

> the most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.

Id. (quoting Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil § 2947).

The standard for granting a stay of execution is also well-settled, and dovetail with the standards for obtaining a preliminary injunction. Relevant considerations for granting a stay include the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). The "traditional" standard for a stay also requires a reviewing court to determine "where the public interests lie." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The District Court decision is reviewed for an abuse of discretion. *See Janvey v. Alguire*, 647 F.3d 585, 591-92 (5th Cir. 2011). "As to each element of the district court's preliminary injunction analysis the district court's findings of fact are subject to a clearly-erroneous standard of review, while conclusions of law are subject to broad review and will be reversed if incorrect." *Id*. (internal citations omitted).

In this case, a meaningful decision must be one that not only permits adjudication of Mr. Trottie's rights and prevents an execution that inflicts excruciating pain, but also one that does not permit TDCJ to proceed,

unaccountable and without review, despite repeated instances reflecting persistent efforts to obscure their intentions and actions. In short, TDCJ should not be permitted to hide behind its own misconduct to evade review of the constitutionality of its actions, past and future.

II. THE DECISION OF THE DISTRICT COURT BELOW – THE RESULT OF A TRUNCATED PROCESS BECAUSE OF DEFENDANTS' DELAYED DISCLOSURE OF INFORMATION - WAS AN ABUSE OF DISCRETION.

Defendants did not disclose any information to Mr. Trottie until the last possible minute – almost three weeks after Mr. Trottie's request. In one day, based on the minimal information disclosed, Mr. Trottie filed the pleadings necessary to bring this action, articulating the concerns about expiration date. Those concerns were not fully realized, however, until Defendants filed their Response in Opposition below, which stated that the lethal injection drugs with which they intend to carry out Mr. Trottie's execution did not "expire" until September 30, 2014. This statement brought Mr. Trottie's concerns into stark relief – and he was about to file a Reply to Defendant's Response, detailing the concerns outlined herein, when the District Court issued its opinion. As such, and as a result of the extraordinarily truncated nature of these proceedings, the District Court's opinion amounts to an abuse of discretion.

Thus, the District Court did not have before it the full facts regarding the expired nature of the drugs Defendants intend to use, and did not give the facts

alleged the full attention they demanded.[29] As a result, the District Court found:

> Trottie has not alleged any change in Texas' procedure or execution drug that would distinguish the prior unsuccessful legal challenges. Instead, Trottie focuses on four recent executions in other states that have received substantial media attention, arguing that the problems in these executions may have resulted from defective drugs.

Trottie v. Livingston, No. 4:14-cv-02550, Dkt #8 (Sept. 5, 2014), slip op. at 10.

Of course, Mr. Trottie's action, based on information disclosed one day before he filed his action and before the important additional information disclosed in Defendants' Response in Opposition, alleges specific harm from the use of expired drugs. The District Court further notes the Defendants' statement that the drugs intended for Mr. Trotties execution come from the same batch used previously – Id. at 11 – but as Mr. Trottie did not have time to file his Reply brief, the Court did not have the information necessary to understand the very negative implications of that assertion: that the drugs are expired. Moreover, the District Court relies on Defendants' erroneous and misinformed distinctions between sterile and nonsterile drugs to reject Mr. Trottie's assertions regarding the expired nature of the subject drugs. Id. Once again, without the benefit of Mr. Trottie's

[29] Plaintiff could not have anticipated that Defendants would disclose information revealing that the drugs they intend to use are beyond their use date. It has taken no small amount of time to gather the documents, sources, and information necessary to present that argument to the Court. The truncated nature of these proceedings, which do not permit full and judicious briefing, should not accrue to Mr. Trottie's detriment, particularly where Defendants are the sole cause of the compressed time frame in which this matter is proceding.

Reply, the District Court's findings are in error. The District Court's findings are clearly erroneous. See *Janvey*, 647 F.3d at 591-92 (5th Cir. 2011).

The District Court's conclusions of law flow from these erroneous findings. Mr. Trottie does not speculate, but presents specific facts and evidence detailing the expired nature of the drugs, and the substantial risk they will subject him to severe pain. He has, in short, presented a substantial likelihood of success on at least one of the claims presented in his Complaint. The District Court's Order is an abuse of discretion.

III. THE SUBSTANTIAL LIKELIHOOD MR. TROTTIE WILL PREVAIL ON THE MERITS.

The facts Mr. Trottie alleges and the evidence in support amount to "evidence in the record" *Brewer v. Landrigan*, __ U.S. __, 131 S.Ct. 445 (2010) that is far more than the "speculation" condemned in *Baze v. Rees*, 553 U.S. 35 (2008).

As such, there is a substantial likelihood that (1) Plaintiff is entitled to an order requiring Defendants to disclose information about the lethal injection drugs with which they intend to carry out his scheduled execution; (2) Plaintiff will prevail, at a minimum, on either (a) that there is a substantial risk that the expired drugs in TDCJ's possession with which they intend to execute plaintiff will cause serious and injurious pain, in violation of the Eighth Amendment; or (b) his claim

that due process demands that in this situation he is entitled to timely information regarding the drug or drugs the TDCJ is planning to use to execute him.

A. Mr. Trottie's Case is Easily Distinguished from the Prior Relevant Decisions of this Court.

This Circuit has recently addressed – and rejected - lethal injection challenges similar to those raised by Mr. Trottie. *See, e.g., Campbell v. Livingston*, 2014 WL 1887578 (5th Cir. 2014); *Whitaker v. Livingston*, 732 F.3d 465 (5th Cir. 2013); *Sells v. Livingston*, No. 14-70014 (5th Cir.) (Apr. 3, 2014); *Sells (Hernandez) v. Livingston*, 2014 WL 1357039 (CA 5) (Apr. 7, 2014).

However, there are crucial differences that distinguish this case, and minimize the relevance of the prior decisions of this Court. The crux of those decisions lies in the statement that "plaintiff cannot rely on speculation alone. Plaintiffs must point to facts or evidence based on science and fact showing the likelihood of severe pain." *Sells*, No. 14-70014 (unpub.), slip op. at p.5, citing *Whitaker v. Livingston*, 732 F.3d 465 (5th Cir. 2013); *see also Sells (Hernandez) v. Livingston*, 2014 WL 1357039 (C.A.5 (Tex.)).[30]

[30] Ironically, the District Court in *Whitaker* took Plaintiffs to task for the lack of specificity of the affidavit submitted: "He [plaintiff] offers an affidavit from a case last year in Georgia. . . . The affidavit was given by Larry D. Sasich . . .Sasich repetively assumes and generalizes for 17 pages without tethering it to the facts of the Georgia case much less this one." *Whitaker v. Livingston*, No. H-13-2901 (S.D. Tex. Oct. 5, 2013) (Dkt #18) at p. 3. In the *Sells* case, plaintiffs were able to obtain a new affidavit from Larry Sasich that was detailed and specific to Texas (Ex. D, attached to D.Ct. Motion (Dkt#3)).), and an affidavit from Dr. Waisel (Ex. E, attached to D.Ct. Motion (Dkt#3)), not available to the *Whitaker* Court) specifically discussing how the

As detailed above, Mr. Trottie has presented facts and evidence showing that Defendants intend to use drugs that are beyond their use date, and that such drugs are substantially likely to cause him excruciating pain. Such facts were not present in any of the prior decisions of this Court. In *Whitaker*, Defendants had, on order of the Court, disclosed far more information than was disclosed to Mr. Trottie - Whitaker's primary complaint was as to the timing of the disclosure. This Court thus concluded: "plaintiffs must show some likelihood of success on the merits of the Eighth Amendment claim. A plaintiff cannot argue that if only he had infinite time—or even just a little bit more time—*then* he might be able to show a likelihood of success." *Whitaker*, 732 F.3d at 467. In neither *Campbell*, *Sells* nor *Hernandez* was there evidence that the drugs Defendants intended to use were expired.

Mr. Trottie submits that he has made the showing lacking in the prior cases that have come before this Court.

B. Mr. Trottie has Presented Evidence Establishing a Substantial Risk that the Lethal Injection Drug Texas Purportedly Intends to Use Will Result in a Torturous Execution.

In October 2012, in South Dakota, Eric Robert was executed using compounded pentobarbital. Witnesses reported that he "appeared to clear his throat and gasp heavily, at which point his skin turned a blue-purplish hue. Mr. Robert

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problems arising from compounded drugs could result in severe pain during an execution. Thus, reliance on the decision in *Whitaker* for finding "speculation alone," is inapt.

opened his eyes and they remained open until his death, and his heart continued beating for 10 minutes after he ceased to breathe." [31]

On January 9, 2014, Oklahoma executed Michael Lee Wilson using, upon information and belief, compounded pentobarbital. Prior to losing consciousness, Mr. Wilson cried out, "I feel my whole body burning." Those were his last words. The State has refused to provide any information about what might have gone wrong in Mr. Wilson's execution, but expert pharmacologist Larry D. Sasich, PharmD, MPH, FASHP, signed a sworn affidavit stating, "It is my opinion that Mr. Wilson's reaction is consistent with contaminated pentobarbital sodium injection."[32]

On April 14, 2014, Jose Villegas was executed in Texas, with compounded pentobarbital. As a journalist witness wrote: "Just as the dose of pentobarbital

[31] Missouri Execution: pharmacy will not supply compounded pentobarbital, The Guardian, Feb. 17, 2014, available here: http://www.theguardian.com/world/2014/feb/18/missouri-execution-pharmacy-will-not-supply-compounded-pentobarbital.

[32] Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate over Lethal Injections*, N.Y. Times, Jan. 17, 2014, at A15 (internal quotation marks omitted); Jason Hancock, *Execution secrecy draws criticism in Mo*., Kan City Star, Feb. 7. 2014, available at http://www.kansascity.com/2014/02/07/4806740/execution-secrecy-draws-criticism.html; Mike Ward, *Are Firing Squads, Gas Chambers Heading to Texas*, Austin Amer. Statesman, Feb 9, 2014, available here: http://www.statesman.com/news/news/are-firing-squads-gas-chambers-heading-to-texas/ndJTk/.

began taking effect, he said, 'It does kind of burn. Goodbye.' He gasped several times, then began breathing quietly."[33]

Mr. Trottie is scheduled for execution via a lethal dose of compounded pentobarbital that he has shown to be beyond its use date. Expired drugs present an array of problems that are highly likely to lead to severe pain upon injection. . *See* Affidavits of Dr. Waisel and Larry Sasich, Exhibit H, para. 25, 30; 33, 46 and Exhibit I, paras. 6-14.

Defendants arguments below that prior executions using compounded pentobarbital were uneventful, and there is thus no reason Mr. Trottie's will be any different, are inapt and misguided. Each batch of drugs purchased is separately compounded, possibly with a different API. *See* RE C, paras. 23-24; RE C-2, p.1. Even if, as Defendants' contend, the drugs intended for use to carry out Mr. Trottie's execution are come from the same batch as those used in April, that only underscores the dated nature of the drugs, and the grave concerns that arise from their use.

Defendants' statement pointing to their record of executions is also an ironic echo of the statements made just a few days ago by the Oklahoma Commissioner of Public Safety, defending Oklahoma's record and competency in the wake of the

[33] Michael Graczyk, *Jose Villegas says Lethal Injection 'Does Kind of Burn' During Execution*, Associated Press, April 16, 2014, available here: http://www.huffingtonpost.com/2014/04/16/jose-villegas-executed_n_5163110.html?view=print&comm_ref=false

just released investigative report regarding Clayton Lockett's horribly botched execution: "But he went on to say that Oklahoma had conducted about 110 consecutive executions over 25 years without major problems." Erik Eckholm, IV Misplaced in Oklahoma Execution, Report Says, New York Times, Sept. 4, 2014, available here: http://www.nytimes.com/2014/09/05/us/oklahoma-report-on-clayton-lockett-execution.html?ref=us&_r=0. Of course, Oklahoma's prior record of executions "without major problems" was hardly predictive of the suffering Mr. Lockett endured.

The Eighth Amendment prohibits cruel and unusual punishments and is applicable to the states through the Fourteenth Amendment. This prohibition includes the "infliction of unnecessary pain in the execution of a death sentence." *Louisiana ex. Rel. Francis v. Resweher*, 329 U.S. 459, 463 (1984); *see also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the Eighth Amendment prohibits the "unnecessary and wanton infliction of pain").

Because it is impossible to determine with certainty whether an inmate will suffer from unnecessary pain during an execution before that execution occurs, the question of whether a particular execution procedure will inflict unnecessary pain involves an inquiry as to whether the inmate is "subject an unnecessary *risk* of constitutional pain or suffering." *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004) (emphasis added); *Fierro v. Gomez*, 77 F.3d 301, 307 (9th Cir. 1996)

("Campbell also made clear that the method of execution must be considered in terms of the risk of pain."); *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994).

A medical or quasi-medical procedure inherently carries a risk that a mistake or accident might cause unforeseen pain; therefore, the Eighth Amendment does not require executioners to eliminate all possible risks of pain or accidents from their execution protocols. *See Reswebers*, 329 U.S. at 464; *Campbell*, 18 F.3d at 687. The Eighth Amendment does, however, prohibit the unnecessary risk of pain.

The facts detailed above make clear that there is a specific substantial risk that the use of expired drugs to carry out Mr. Trottie's execution will subject him to severe suffering.

C. Mr. Trottie Submits that he is not Required to Proffer an Alternative and Readily Available Method of Execution to Show a Substantial Likelihood of Success on his Eighth Amendment Claim.

Prior opinions in this Circuit dismissing similar complaints for failing to plead a "readily available" alternative execution method must be reconsidered in light of the Supreme Court's issuance of a stay of execution in *Bucklew v. Lombardi*, 134 S.Ct. 2333 (2014). In *Bucklew*, the Court entered a stay despite the state's repeated insistence that it may execute Mr. Bucklew because he failed to propose a "specific, feasible, more humane method of execution." If that were the standard, the Supreme Court would have permitted his execution to proceed. They did not.

In an attempt to address this argument, Defendants argued below that Mr.

Bucklew's medical condition was unique. Opposition at 24. That is indeed true – but it does not change the fact that Mr. Bucklew had to meet the well-known standard for obtaining a stay of execution, which includes a likelihood of success on the merits of his Eighth Amendment claim. According to Defendants, that claim contains two prongs, the second of which is the "alternative method." Mr. Bucklew presented no such alternative, but was necessarily deemed to have made a showing of a likelihood of success on the merits.

In fact, the requirement of presentation of an alternative method of execution was a prominent feature of the briefing of the parties and the holdings of the lower courts in the Bucklew litigation leading to the Supreme Court stay. *See Bucklew v. Lombardi*, No. 14-2163 (8th Cir.); *Bucklew v. Lombardi*, No. 2:12-cv-04209 (W.D. Mo.) (slip op. May 16, 2014);

Mr. Trottie also submits that Defendants' argument is in error because it conflicts with the Supreme Court's previous holdings. In *Jones v. Bock*, 549 U.S. 199, 213 (2007), the Supreme Court stated:

> In *Hill v. McDonough*, 547 U.S. 573 (2006), we unanimously rejected a proposal that §1983 suits challenging a method of execution must identify an acceptable alternative.

Issued less than one year later, the opinion in *Baze v. Rees*, 553 U.S. 35 (2008), does not remotely suggest that the Court was departing from *Jones* and *Hill*, or that the Court was creating a new pleading or proof requirement of an alternative

execution method. The Court instead disapproved any test that compares one method to another, which would "transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51. Indeed, *Baze* did not attempt to distinguish or even mention *Jones* or *Hill*.

The Court in *Baze* was confronted with the specific claim that Kentucky's execution protocol violated the Eighth Amendment because the state could easily change to a one-barbiturate method or at least discontinue the use of the paralytic agent pancuronium bromide. 553 U.S. at 56-57. That specific claim required the prisoner to show that the proposed alternative was feasible, available, and likely to reduce a significant risk of pain. *Id.* at 52, 61. The *Baze* opinion simply addressed the claim before the Court. It did not erect a new standard for pleading or proving every Eighth Amendment claim relating to manner of execution. In order to do so, it would have had to overrule *Jones* and *Hill*. It is exceedingly unlikely that this was not this Court's intention. *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

D. Plaintiff Is Entitled to an Order Compelling Defendants To Disclose Information Regarding The Lethal Injection Drugs They Intend To Use To Carry Out Plaintiff's Execution.

As history – including the botched executions that have taken place this year alone - teaches, governmental practices are most likely to depart from constitutional requirements when they are insulated from public scrutiny and meaningful review.[34] Indeed, "death penalty states' aversion to transparency is . . . rooted in the desire to conceal inconsistencies and incompetence." Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 Geo. L.J. (forthcoming 2014) (manuscript at 48); *see also id.* (manuscript at 49) ("The lethal injection procedure is more dangerous and inconsistent than ever, and the result is a perpetual effort by states to maintain secrecy at a time when transparency is most paramount.").

As stated in Plaintiff's Complaint, Procedural due process violations occur where (1) state action interferes with a person's life, liberty, or property, see *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989), and (2) the procedures attendant upon that deprivation are constitutionally deficient, *id.*, applying the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

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[34] *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion) ("Without publicity, all other checks [on government] are insufficient . . . ." (quoting 1 Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)) (Internal quotation mark omitted)); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("[I]nformed public opinion is the most potent of all restraints upon misgovernment . . .."). "[S]tates concealing their procedures are more likely to cut corners and make mistakes than if their procedures are in plain view." Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 Wash. U.L. Rev. 1, 61 (2010).

The method by which the state will conduct an execution implicates a condemned inmate's life interest in avoiding an "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).[35]

Procedural due process protects a condemned inmate's right not to be executed in a manner that violates the Eighth Amendment. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 n.3 (1998) (plurality opinion) ("This substantive constitutional prohibition [against cruel and unusual punishment] implicate[s] due process protections."). *See also Ford v. Wainright*, 477 U.S. 399, 413-414 (1986) (condemned prisoners asserting incompetence to be executed are entitled to procedural protections under the 14th Amendment); *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment) ("fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.").

Similarly, the Eighth Amendment prohibits the state from carrying out executions in a manner that produces an "unnecessary and wanton infliction of pain." *Gregg*, 428 U.S. at 173. Thus, in *Baze v. Rees,* the Supreme Court concluded that without the initial administration of a sedative, the injection of

[35] It is beyond dispute that even a condemned inmate "maintains a residual life interest." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 (1998) (plurality opinion); *see also id.* at 288 (O'Connor, concurring in part and concurring in the judgment) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life."); *id.* at 291 (Stevens, J., concurring in part and dissenting in part) ("There is . . . no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.").

pancuronium bromide (a paralytic) and potassium chloride (which stops the heart) would present a "substantial, constitutionally unacceptable risk of suffocation." *Id*., 552 U.S. 35, 53 (2008).

"[S]ubjecting individuals to a risk of future harm – not simply actually inflicting pain – can quality as cruel and unusual punishment. *Id.* at 49. Accordingly, a condemned inmate may file suit in state or federal court to enjoin his executions on the basis of such an Eighth Amendment challenge. *See, e.g. Baze v. Rees, supra; Hill v. McDonough*, 547 U.S. 573 (2006) (holding that Eighth Amendment challenge to lethal injection may be brought pursuant to 42 U.S.C. § 1983).

Because Mr. Trottie has a constitutionally cognizable interest in not being executed inhumanely, the manner of his execution is subject to the requirements of due process. See *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). "The fundamental requisite of due process of law is the opportunity to be heard" when one's rights are to be affected. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Such an opportunity, however, is worthless unless an inmate is given "meaningful" notice of matters that are pending against him so he may present his objections. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 ("It is equally fundamental that the right to notice and an opportunity to be heard

'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded.").

Thus, in criminal cases "[i]f the Government refuses to provide state-secret information that the accused reasonably asserts is necessary to his defense, the prosecution must be dismissed." *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1905–06 (2011). *See, e.g.*, *Jencks v. United States*, 353 U.S. 657, 672 (1957) (holding that a "criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at trial"); *cf. Roviearo v. United States*, 353 U.S. 53, 60–61 (1957) (holding that "[w]here disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the Government withholds the information, dismiss the action").

To fail to compel Defendants to disclose the requested information would only provide a stamp of approval to Defendant's maneuvers that are intended to avoid disclosure – and timely disclosure – to preclude oversight, accountability, or transparency. By failing to provide condemned inmates with this essential

information, a state can "ensure[] itself a way of using a protocol that a court can 'never' look at it in any serious fashion, and it can 'flout' the requirement for a constitutionally sufficient protocol 'without fear of repercussion.'" *Beaty v, Brewer*, 649 F.3d 1071, 1073 (9th Cir. 2011) (dissenting from the denial of rehearing en banc) (quoting *Dickens v. Brewer*, 631 F.3d 1139, 1146 (9th Cir. 2011)).[36]

IV. THERE IS A SUBSTANTIAL THREAT THAT PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF THE INJUNCTION IS NOT GRANTED.

This second prong of the preliminary injunction standard dovetails with the preceding section, discussing the likelihood that Mr. Trottie will succeed on the merits of at least on of the claims presented in his Complaint.

V. THE THREATENED INJURY TO PLAINTIFF OUTWEIGHS THE THREATENED HARM THE INJUNCTION MAY DO TO DEFENDANTS.

Plaintiff seeks narrow injunctive relief. He requests only that Defendants be prohibited from limiting his ability to determine and adjudicate the constitutionality of his contemplated execution, and that Defendants not be

[36] *Cf. Arthur*, 674 F.3d at 1263 (per curiam) ("[T]he veil of secrecy that surrounds Alabama's execution protocol . . . [makes it] plausible that . . . [the protocol] could be unexpectedly changed for his execution."). Absent a right to know the method by which he will be executed, a condemned inmate is placed in a catch-22. This Court has held that "speculation cannot substitute for evidence that the use of the drug is '*sure or very likely* to cause serious illness and needless suffering'" in violation of the Eighth Amendment. *Landrigan*, 131 S. Ct. at 445 (quoting *Baze*, 553 U.S. at 50). But unless the state discloses its protocol, the inmate has no opportunity to "show a demonstrated risk of harm and can only offer speculative allegations." *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2013 WL 6498396, at *1 (W.D. Mo. Dec. 11, 2013).

permitted to subject him to a substantial risk of pain and suffering during his execution. The threatened injury to Plaintiff outweighs any harm Defendants could reasonably posit would accrue to them as a result of an award of temporary injunctive relief. Mr. Trottie is not seeking an indefinite stay of execution, but rather a stay sufficient to allow examination and adjudication of the manner and means by which TDCJ intends to carry out his execution. Several state and federal courts have made the determination that the threatened injury to plaintiffs in similar situations outweighed the States' interest in proceeding with a scheduled execution.[37] Such action is warranted – indeed compelled – here as well.

[37] *See, e.g.*, *Hill v. Owen,* No. 2013-CV-23771 at *3 (GA Sup. Ct. July 18, 2013) (" [W]hile Defendants do indeed have an interest in carrying out a sentence timely, the injury that would be sustained by Plaintiff if he were to be executed in such a way that violated his Eighth Amendment right would far surpass that of Defendants having to put off Plaintiff's execution another time."); *Valle v. State of Florida*, 70 So.3d 525 (Fla. July 25, 2011) (granting preliminary injunction pending an evidentiary hearing on the constitutionality of the change to the execution protocol); *Arthur v. Thomas,* No. 11-15548 at *3 (11th Cir. Mar. 23, 2011) (issuing preliminary injunction to allow courts time to review changes to the execution protocol); Order, *Taylor v. Crawford*, No. 2:05-cv-04173-FJG at 13 (W.D. Mo. June 26, 2006) (concluding that "it is within [the Court's] equitable powers to fashion a remedy that 'preserves both the State's interest in proceeding with Plaintiff's execution and Plaintiff's constitutional right not to be subject to an undue risk of extreme pain'" and staying executions pending revision of protocol) (quoting *Morales*, 415 F. Supp.2d at 1046)); Opinion and Order, *Cooey v. Taft*, No. 2:04-cv-01156 at *9 (S.D. Ohio Dec. 21, 2006) ("The Court is not persuaded that issuance of the preliminary injunction will cause substantial harm to the State by comparison [of that to the plaintiff] . . . . Any delay in carrying out [the plaintiff's] execution should and can be minimal."); Order, *Brown v. Beck*, slip op., 2006 WL 3914717, No. 5:06-ct-03018-H at *14; Order Allowing Preliminary Injunction, *Robinson v. Beck*, No. 07 CVS 001109 (Wake County Super. Ct. Jan. 25, 2007) (granting preliminary injunctive relief pending proper approval of revised lethal injection protocol).

VI. GRANTING THE PRELIMINARY INJUNCTION WILL SERVE, NOT DISSERVE, THE PUBLIC INTEREST.

Granting temporary injunctive relief in this case will not disserve the public interest; rather, it will serve it. It is not in the public interest for the State to strive for opacity in carrying out the gravest of its duties. It is not in the public interest for the State to be allowed to be deceptive in its efforts to procure lethal injection drugs. It is not in the public interest for Defendants to be permitted to manipulate the system to preclude disclosure of the information necessary for Plaintiff to determine if there is a substantial risk he will be subjected to torturous suffering. It is not in the public interest for executions to be administered in a manner that violates the Eighth and Fourteenth Amendments of the United States Constitution. And, although it is in the public interest that the State be able to effectively enforce its criminal judgments, the narrow temporary injunctive relief requested here does not implicate that interest. To the extent that the relief requested burdens that interest, it does so only because of the actions and inactions of Defendants.

VII. THE BALANCE OF THE EQUITIES BENDS DEEPLY IN MR. TROTTIE'S FAVOR.

In *Hill v. McDonough*, --- U.S. ---, 126 S. Ct. 2096 (2006), the Supreme Court held that challenges to administrative lethal injection protocols could be brought pursuant to 42 U.S.C. § 1983. Nevertheless, the Court cautioned that filing an action under § 1983 did not entitle one to an order "staying an execution

as a matter of course." *Id*. at 2104. Rather, "a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. Consequently, "A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id*. (citing *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

As detailed above, it is Defendants' delay in providing the requested information that led to the late filings of these pleadings, their abbreviated nature, and the need for the requested relief. In this case, Defendants themselves tip the scales in Mr. Trottie's favor.

CONCLUSION AND PRAYER FOR RELIEF

The Departments of Corrections that carried out the executions of Mr. Lockett, Mr. Wood, and Mr. Wilson, assured the condemned that their executions would not be torturous. Mr. Trottie submits that there should not have to be a botched execution in Texas for condemned inmates to meet Defendants' interpretation of the substantial showing required.

Plaintiff respectfully requests that this Court grant him the narrow preliminary injunctive relief requested. Specifically, he requests that:

- This Court order Defendants to immediately disclose, under protective order if the Court deems it appropriate and necessary, all information regarding the procurement of the drugs Defendants intend to use to carry out Plaintiff's execution, the supplier or suppliers, the date of compounding, the date and manner of transfer to Defendants and the manner and condition in which the drugs have been stored since compounding, any testing if any that has been conducted beyond that already disclosed by Defendants,; and
- This Court stays Plaintiff's scheduled execution to permit adjudication of the legality and constitutionality of the means by which Defendants intend to carry out his execution.

Dated this 8th day of September, 2014.

Respectfully Submitted,

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STATEMENT PURSUANT TO FIFTH CIRCUIT RULE 8.10

As this brief discusses at some length, despite the fact that Mr. Trottie submitted his request for information on August 13, 2014, Defendants waited until the very last minute – 4:55 pm on September 2, 2014 – to provide responsive information. Mr. Trottie filed this action, including his Motion for Temporary Restraining Order (including a Stay of Execution), the next day, September 3, 2014. Undersigned counsel did everything in their power to file this action and accompanying Motion as soon as possible and without delay. Counsel respectfully submit that these circumstances meet and comply with the standards set out in Fifth Circuit Rule 8.10.

Respectfully Submitted,

/s/ Maurie Levin
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/s/ Jonathan J. Ross
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and forgoing Pleading has been forwarded to counsel for the defendants by electronic delivery to:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32.2.7(b).

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 10,959 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point Times New Roman font.

/s/ Maurie Levin
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Dated: September 8, 2014