IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ROY WILLARD BLANKENSHIP, Plaintiff, v. BRIAN OWENS, in his capacity as Commissioner of the Georgia Department of Corrections; CARL HUMPHREY, in his capacity as Warden of the Georgia Diagnostic Prison; DOES 1-50, UNKNOWN EXECUTIONERS, in their capacities as employees and/or agents of the Georgia Dept. Of Corrections.	)	Civil Action Case No.

VERIFIED COMPLAINT

THIS IS A CAPITAL CASE
EXECUTION SCHEDULED FOR THURSDAY,
JUNE 23, 2011 at 7:00 PM

Plaintiff, ROY WILLARD BLANKENSHIP, is an indigent, death row inmate who is scheduled to be executed by lethal injection on June 23, 2011, at 7:00 p.m. Defendants are officials with the Georgia Department of Corrections (DOC) and unknown prison and DOC personnel who are charged with carrying out the execution. The Eighth Amendment to the United States Constitution and Article I, Section I, Paragraph VII of the Georgia Constitution prohibit executions to be carried out in a manner that constitutes cruel and unusual punishment.

This Complaint presents significant issues concerning whether Georgia DOC's Lethal Injection Procedures (hereinafter "LI Procedures") amount to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment to the United States Constitition and the corresponding provisions of the Georgia Constitution. Mr. Blankenship raises both an action for declaratory judgment and injunctive relief, pursuant to O.C.G.A. §§ 9-4-2 and 9-4-3.

Pursuant to newly adopted lethal injection protocol,[1] Plaintiff is scheduled to be executed by the Department of Corrections by means of lethal injection of three chemicals: Nembutal (Pentobarbital), Pancuronium Bromide, and Potassium Chloride. Defendants' illegally obtained[2] supply of Sodium Thiopental having been seized by the federal Drug Enforcement Agency (DEA) in March 2011,[3] Defendants have opted to proceed using Pentobarbital,[4] whose manufacturer,

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[1] *See* Exhibit 1, 2011 Georgia DOC Lethal Injection Procedure.

[2] *See* Exhibit 2, February 24, 2011 correspondence to Department of Justice with attachments.

[3] *See* Exhibit 3, Bill Rankin et al., "DEA seizes Georgia's supply of lethal injection drug," *Atlanta Journal Constitution* (March 16, 2011).

[4] *See* Exhibit 4, documenting DOC procurement of Nembutal on or about June 3, 2011.

Lundbeck Inc., has explicitly warned Defendants that this drug is not safe for use in judicial lethal injections.[5]

The administration of these drugs, particularly including Pentobarbital, a drug which has not been tested for induction of anesthetic coma in humans,[6] by unqualified and untrained individuals creates a substantial risk of a botched and inhumane execution. Further, without adequate anesthesia, Plaintiff will first experience slow suffocation and then the extraordinary painful activation of the sensory nerve fibers in the walls of the veins caused by Potassium Chloride, ultimately ending with a massive heart attack. The significant danger posed by Defendants' new lethal injection protocol that Plaintiff will be subjected to this excruciating pain, makes execution in this manner a clear violation of Mr. Blankenship's Eighth and Fourteenth Amendment rights and analogous rights guaranteed under the Georgia constitution.

Of particular concern is that Defendants intend to execute Mr. Blankenship using a new protocol based on a new drug, Nembutal (pentobarbital),[7]

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[5] *See* Exhibit 5, June 8, 2011 correspondence from Lundbeck Inc. to Georgia DOC; Exhibits 6-7, articles documenting Lundbeck Inc.'s determination that Pentobarbital is unsafe for judicial lethal injections.

[6] *See* Exhibit 5, Lundbeck Inc. correspondence; Exhibit 8, Report of Dr. David Waisel.

[7] *See* Exhibit 4.

manufactured by the Denmark-based pharmaceutical firm Lundbeck Inc., who announced just after Plaintiff's execution warrant issued that this drug is unsafe and unreliable for use in judicial lethal injections.[8] This development arises even as Defendants are under investigation by the federal Drug Enforcement Agency (DEA) for their illegal procurement in 2010 of a mislabled and possibly tainted batch of Sodium Thiopental, resulting in the seizure by the DEA of Defendants' supply of Thiopental in the winter of 2011.[9]

Based on recent problematic executions using DOC's illegally obtained supply of possibly tainted Sodium Thiopental,[10] it is likely that there will be delivery of an inadequate barbiturate dose, or improper injection procedures rendering any dosage insufficient for sustaining unconsciousness. Thus, the anesthetizing drug will not take affect or will wear off, as may have occurred in

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[8] *See* Exhibit 6, Raymond Bonner, "The Lethal-Drug Maker That's Helping End Lethal Injections," *The Atlantic* (June 8, 2011); Exhibit 5, correspondence from Lundbeck Inc. to Georgia DOC.

[9] *See* Exhibits 2 and 9, Correspondence between attorneys for Andrew Grant DeYoung and Attorney General Eric Holder, and appendices/attachments; Exhibit 3, Bill Rankin et al., "DEA seizes Georgia's supply of lethal injection drug," *Atlanta Journal Constitution* (March 16, 2011).

[10] *See* Exhibit 10, transcript of hearing in *Hammond v. Owens, et al.,* Fulton Co. Superior Court Case No. 2011CV195623, documenting execution of Brandon Rhode on September 27, 2011; Exhibit 11, Josh Green, "Witness to Death: Reporter's account of Hammond execution" (Feb. 5, 2011); Exhibit 12, Declaration of Sheri Johnson; Exhibit 13, Bernard O'Donnell et al., "Brandon Joseph Rhode Executed," *WMAZ* (September 27, 2010).

recent Georgia executions, causing Plaintiff to experience terror and excruciating pain from the next drugs without being able to signal his distress. Moreover, the paralysis will make it impossible for any witness observing the killing to determine whether the condemned is experiencing pain before dying.

Under the Defendants' previous Sodium Thiopental-based protocol using tainted, illegally procured drugs discussed above, slipshod procedures (including faulty consciousness check efforts) resulted in executions in 2010 and 2011 of two Georgia inmates, Brandon Rhode and Emanuel Hammond, who showed clear signs of continued consciousness following injection of thiopental.[11] Now, Defendants intend to carry out Plaintiff's execution via a new drug, Pentobarbital, a slower acting barbituate which is wholly untested as an anesthetic induction agent in human beings,[12] and whose manufacturer has explicitly warned Defendants that the drug is unsafe for use in judicial lethal injections.[13] Defendants literally intend to experiment on Mr. Blankenship to determine the efficacy of this untested and unsafe drug.

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[11] *Id.*

[12] *See* Exhibit 8, Report of Dr. David Waisel.

[13] *See* Exhibit 5.

As a result, Plaintiff has a real concern, in light of past botched lethal injections which form part of a larger pattern of reckless disregard for the law[14] and the safety and well-being of death-sentenced prisoners under Defendants' care, that the addition of a new, untested drug (Pentobarbital acknowledged by its manufacturer to be unsafe for precisely the purpose Defendants intend to use it) to the Defendants' lethal injection protocol has fundamentally compromised the ability of Defendants to execute Mr. Blankenship in a manner that complies with the State and Federal Constitutional guarantees against cruel and unusual punishment.

Plaintiff seeks equitable, injunctive and declarative relief to prevent the Defendants from carrying out his execution through implementation of a new lethal injection protocol.

JURISDICTION AND VENUE

1. This action is brought to enforce rights conferred by the United States and Georgia Constitutions and other applicable laws. It is brought under the

[14] Notably, Rainbow Medical Associates, Inc., and its founder, Dr. Carlo Musso, who have the exclusive contract for execution medical services with Defendants, are implicated in numerous violations of state and federal drug law and regulations and are under investigation by the Dreg Enforcement Agency for illegally procuring and distributing controlled narcotics for lethal injection purposes to corrections departments in Tennessee and Kentucky. *See* Exhibit 14, documenting Defendants' contractual relationship with Dr. Musso and Rainbow Medical; Exhibit 15, complaint before the Georgia Composite Medical Board.

authority vested in this Court pursuant to O.C.G.A. §§ 9-4-2 and 3, O.C.G.A. § 9-5-1 and O.C.G.A. §§ 9-6-20 to 25.

2. Venue is proper in Fulton County as substantial equitable relief is sought against at least one Defendant residing in Fulton County. *See* O.C.G.A. § 9-10-30.

3. All actions, and refusals to act, of the Defendants are under color of state law and with deliberate indifference to Plaintiff's rights.

PARTIES

4. Plaintiff ROY WILLARD BLANKENSHIP is a death row inmate who is being housed at the Georgia Diagnostic Prison. Plantiff Blankenship is a United States citizen and a resident of the State of Georgia. He is scheduled to be executed by lethal injection on June 23, 2011.

5. Defendant BRIAN OWENS is the Commissioner of Corrections for the State of Georgia and is the chief administrative officer of the Georgia Department of Corrections. He is authorized by statute to supervise, direct and execute the functions vested in the Georgia Department of Corrections, including the administration and execution of the death penalty. *See* O.C.G.A. §42-2-6(b). He is being served in his official capacity for prospective relief.

6. Defendant CARL HUMPHREY is the Warden of the Georgia Diagnostic Prison in Jackson, Georgia, where Plaintiff is confined. His duties include physically carrying out executions by injection of lethal drugs. He is being served in his official capacity for prospective relief.

7. Plaintiff is ignorant of the true names of Does 1-50, but alleges that they have or will participate in his execution by virtue of their role in designing, implementing and/or carrying out the lethal injection process. When Plaintiff discovers the Doe Defendants' true identities, he will amend this Complaint accordingly.

EXHAUSTION OF REMEDIES

8. Exhaustion of administrative remedies is not required as there is no administrative procedure available to grant Plaintiff the relief requested. See *Conklin v. Zant*, 202 Ga.App. 528, 414 S.E.2d 741 (1992); *Wilson v. Ledbetter*, 260 Ga. 180, 390 S.E.2d 846 (1990). Plaintiff has nevertheless attempted to exhaust remedies by filing an informal and formal grievance which were denied on June 8, 2011, and June 10, 2011, respectively. *See* Exhibit 16.

I. FACTUAL ALLEGATIONS

9. On June 6, 2011, Judge Michael Karpf of the Superior Court of Chatham County issued an execution warrant in the case of *State v. Blankenship*,

Case No. 28456.[15] In response to the warrant, the Georgia Department of Corrections has set Mr. Blankenship's execution for June 23, 2011 at 7:00 p.m.

10. Georgia's death row is housed at the Georgia Diagnostic Prison in Jackson, Georgia. Executions are carried out at this prison and are overseen by the Warden and staff of the prison. Georgia has executed approximately 26 inmates by lethal injection.

A. The New Lethal Injection Protocol Uses a Drug Which is Untested in Human Subjects for Induction of Anesthetic Coma and Whose Potential Efficacy is Further Undermined by Inadequate Consciousness Check Procedures.

11. The Georgia Department of Corrections (DOC) has adopted a new written protocol for carrying out executions by lethal injection.[16] This protocol is not meaningfully different from DOC's 2007 protocol,[17] except in the choice of barbituate for use in inducing anesthetic coma. According to the new protocol, inmates are executed using three drugs administered one after the other. The first drug is Pentobarbital, an barbiturate that induces unconsciousness. The drug is

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[15] On the same day, the Office of the Attorney General confirmed that the Department of Corrections had obtained a supply of Nembutal (pentobarbital) with which to carry out Mr. Blankenship's execution. *See* Exhibit 34.

[16] *See* Exhibit 1, 2011 Lethal Injection Protocol.

[17] *See* Exhibit 18, 2007 Lethal Injection Protocol.

also marketed under the name of Nembutal[18] and manufactured by the Lundbeck pharmaceutical company based in Denmark. Unlike the drug used in Defendants' previous protocol, Sodium Thiopental, which is widely used in surgical settings to induce anesthetic coma in human patients, Pentobarbital has never been tested on human beings for the purpose of inducing anesthetic coma *and has been declared unsafe for use in judicial lethal injections by its manufacturer*.[19] Given that there is no data regarding the appropriate dosage on human beings for inducing unconsciousness, and that it is a slower acting barbituate than Sodium Thiopental, there is substantial risk that the Pentobarbital, successfully and completely injected, may not be effective in causing a deep, lengthy anesthetized state in a condemned individual.[20] In other words, the condemned person may not lose consciousness sufficiently prior to injection of Pancuromium Bromide and Potassium Chloride, resulting in a "substantial risk of serious harm." *Baze v. Rees*, 553 U.S. 35, 50 (2008).

12. The second drug administered is Pancuromium Bromide. It is a paralyzing agent that interferes with the nerve impulse emanating from the brain to

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[18] *See* Exhibit 4, documenting DOC purchase of Nembutal.

[19] *See* Exhibit 5.

[20] *See* Exhibit 8, Report of Dr. David Waisel.

the muscles by blocking the neurotransmitters that direct muscles to move. This includes the muscles which enable a person to breathe, swallow, speak, blink, or move extremities. Pancuromium Bromide leaves the muscles in a flaccid state so that the person to whom it has been administered appears calm and relaxed. The paralysis induced by Pancuromium Bromide is of a long duration.

13. The third and final drug used is Potassium Chloride which causes the condemned person's heart to stop, leading to brain death in several minutes. The sensation of this drug flowing through the veins causes an extreme and excruciating burning pain.

14. None of the DOC personnel actually implementing the LI Procedures have any medical training.[21] Nor do any of the medical personnel who insert IV lines or monitor the ensuing LI Procedures have any training in anesthesiology.[22]

15. The use of Pentobarbital and Pancuromium Bromide together creates an unnecessary risk of severe pain and suffering. If the Pentobarbital is not given in sufficient dosage (and there is no recognized sufficient dose for use on human patients), the condemned can be conscious during injection of the remaining lethal

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[21] *See* Exhibit 19, Final Order, *Alderman v. Donald*, Case No. 1:07-CV-01474 (N.D.Ga. May 2, 2008) at 11.

[22] *Id.*

injection drugs. The conscious (or "sentient") inmate would experience choking and suffocation, feel the burning of the Potassium Chloride in his veins, and then experience a massive heart attack.

16. Under prior procedures which used Sodium Thiopental – a drug routinely used in surgical settings involving human patients -- as an induction agent, the Supreme Court explained that "proper administration of the first drug, sodium thiopental, eliminates any meaningful risk that this prisoner would experience pain from the subsequent injections of" the other two drugs. *See Baze*, 553 U.S. at 49.[23] However, *Defendants have abandoned use of Sodium Thiopental*, a drug widely used and tested in human anesthetic induction, in favor of a wholly untested slower acting barbituate, Pentobarbital (Nembutal), a drug whose manufacturer has explicitly warned Defendants that it is unsafe for use in judicial lethal injections.[24] According to Dr. David Waisel:

> The non-standard use of a novel drug for lethal injection increases the importance of safeguards in preventing undue harm to the inmate. The ability to assess the patency of the intravenous injection to protect against inffiltration is inadequate. The use of pentobarbital as an agent

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[23] In addition, prior judicial findings upholding the validity of Defendants' LI Procedures rested on the assumption that "there would be minimal risk of improper mixing of sodium thiopental if the manufacturer's simple instructions were followed." Exhibit 19, Final Order, *Alderman v. Donald,* Case No. 1:07-CV-01474 (N.D.Ga. May 2, 2008) at 25.

[24] *See* Exhibit 5

to induce anesthesia is not FDA approved, has no relevant clinical history and has no relevant clinical reference doses on which to determine what dose would cause a clinically adequate depth of anesthesia, much less an adequate lethal injection dose. Although the protocol provides for repetition of the lethal injection procedure should the condemned show residual signs of life after injection of all three chemicals, the protocol does not provide instructions to specifically assess why the procedure did not cause death initially so as to avoid the problem upon re-implementation of the procedure. The limited instructions of how to provide rescue to the inmate are incoherent and are unlikely to resolve the most likely etiologies. **The combination of significant unknowns from a lack of clinical history related to using pentobarbital to induce anesthesia, inadequate implementation of procedural safeguards and a history of sloppiness in regard to lethal injection puts the inmate at risk for serious undue pain and suffering.....**

Unlike pentobarbital, sodium thiopental has a long history of being used for clinical induction of anesthesia in healthcare and for induction of anesthesia for lethal injection. It has recently been used in a single drug technique. The FDA package insert classifies sodium thiopental as an ultra-short acting barbiturate.

However, the use of pentobarbital as an agent to induce anesthesia has *no* clinical history and is non-standard. The FDA package insert classifies pentobarbital as a short-acting barbiturate, not an ultra-short acting barbiturate. Developed in 1928, pentobarbital has never been considered as an agent to induce anesthesia, in large part because of the extended length of action. There are therefore no standard clinical doses of pentobarbital to induce anesthesia, making it much harder to determine how much pentobarbital would constitute a sufficient overdose....

Because of these significant unknowns and a lack of clinical history related to using pentobarbital to induce anesthesia, using pentobarbital puts the inmate at risk of needless pain and suffering.

Exhibit 8, Waisel Report (emphasis in original).

17. Furthermore, in addition to the lack of any recognized adequate dosage of Pentobarbital for inducing anesthetic coma, the previously mentioned evidence of recent botched lethal injections directly undermines prior judicial findings that Defendants' consciousness checks were reliable and would prevent problems precisely like those observed in these recent executions.[25] Dr. David Waisel warns in his report:

> Based on review of Georgia's new protocol and information concerning potentially botched recent executions, I have serious concerns about the adequacy of monitoring for continuing consciousness of the inmate after injection of Nembutal, particularly in light of lack of information available about how fast Nembutal takes effect in a lethal injection scenario. Georgia's protocol provides for no specific method of verifying whether the inmate is unconscious after injection of Nembutal. There is certainly no provision for any physical consciousness check, such as physically touching the inmate's eyelids. Moreover, there is no provision that individuals professionally trained and certified as being competent in assessing consciousness upon induction of anesthesia – such as emergency medicine physicians, critical care medicine physicians, anesthesiologists and certified registered anesthetists -- will competently check for consciousness in an inmate undergoing lethal injection. In addition, there is no protocol for determining what constitutes "residual signs of life" or who is going to check for them after complete administration of all three lethal injection drugs. This lack of a meaningful framework for consciousness check could easily result in a mis-identification of an inmate as unconscious when in fact the inmate is conscious but paralyzed, raising a high risk of needless

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[25] *See* Exhibit 19, Final Order, *Alderman v. Donald*, Case No. 1:07-CV-01474 (N.D.Ga. May 2, 2008) at 35-36.

> pain and suffering. Indeed, it appears that sloppy and inadequate consciousness check methods may have caused just this problem in the Rhode and Hammond executions.

Exhibit 8, Waisel Report.

B. Defendants Are Implicated In and Under Investigation for Violations of Federal Drug Laws and Regulations in Connection with Procurement of Lethal Injection Drugs of Questionable Efficacy which Previously Resulted in Apparently Botched Executions.

18. Defendants have also shown a clear disregard for federal drug laws and regulations in obtaining and using lethal injection drugs. In 2010, confronting an acute nationwide shortage of Sodium Thiopental,[26] the Georgia DOC did an end run around federal law governing the importation of controlled substances by purchasing a supply of mislabeled[27] Sodium Thiopental for lethal injection purposes directly from Dream Pharma, Inc., which operated out of a storefront driving school in London, England.[28] The importation of Sodium Thiopental (a

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[26] *See* http://www.msnbc.msn.com/id/39385026/ns/health-health_care/t/shortage-drug-holds-some-us-executions/# (Sept. 27, 2010); Exhibit 20, letter from state Attorneys General to U.S. Attorney General Eric Holder requesting help procuring adequate supplies of Sodium Thiopental.

[27] The Thiopental was labeled as having been manufactured by a company that had ceased to exist four years earlier. *See* Exhibit 21, Michael Clark statement.

[28] *See* Exhibit 2, Appendix A to February 24, 2011, correspondence; "Drug sold in UK to be used for execution in Georgia," (Jan. 21, 2011) located at http://www.bbc.co.uk/news/uk-12263460.

Schedule III controlled substance under the Controlled Substances Act) from abroad violated the Food, Drug and Cosmetics Act of 1938.[29] The DOC purchased the Thiopental directly from Dream Pharma although DOC was not registered with the Drug Enforcement Agency (DEA) as an importer of non-narcotic controlled substances. *See* Exhibit 2 and attachments. Nor did the DOC provide a declaration of importation to the DEA. *Id.* Nor did DOC possess a DEA license to possess, dispense, or distribute a Schedule III non-narcotic controlled substance. *Id.*[30]

19. On September 27, 2010, Defendants executed Georgia inmate Brandon Rhode using the illegally imported Dream Pharma Thiopental.[31] Mr. Rhode's eyes remained open throughout the lethal injection process, strongly suggesting that he was conscious after administration of the illegally imported

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[29] *See* Exhibit 22, Daniel Kracov statement.

[30] This is in direct contradiction to prior judicial findings upholding the validity of Defendants' LI Procedures on the basis that Defendants procured their supply of lethal injection drugs pursuant to proper DEA licensure. *See* Exhibit 19, Final Order, *Alderman v. Donald*, Case No. 1:07-CV-01474 (N.D.Ga. May 2, 2008) at 6.

[31] *See* Exhibit 23, Final Order, *Hammond v. Owens*, Fulton Co. Superior Court Case No. 2011CV195436, finding that Brandon Rhode was executed using Defendants' supply of Sodium Thiopental which had been obtained from Dream Pharma.

Sodium Thiopental of questionable viability.[32] On January 25, 2011, Georgia inmate Emanuel Hammond attempted to raise the alarm as to Defendants' illegal procurement of Thiopental of questionable provenance from Dream Pharma and asked this Court to stay Mr. Hammond's execution, but this Court denied relief, finding that the Defendants' conduct did not raise a concern about the risk of pain and suffering upon use of the Dream Pharma Thiopental.[33] Defendants then executed Emanuel Hammond with the same batch of Dream Pharma Sodium Thiopental. Hammond was also reported to have opened his eyes and grimaced after injection of the Thiopental, suggesting inadequate sedation. *See* Exhibits 11-12. As Defendants knew that they had illegally procured mislabled and potentially tainted Sodium Thiopental, Defendants cannot "plead[] that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Baze*, 553 U.S. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9 (1994)).

20. Additionally, on or about February 24, 2011, attorneys for Georgia inmate Andrew Grant DeYoung contacted the United States Attorney General requesting that the Department of Justice investigate Defendants in light of

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[32] *See* Exhibit 10, *Hammond v. Owen et al.*, Fulton Co. Superior Court Case No. 2011CV195623, transcript of hearing of January 25, 2011.

[33] *See* Exhibit 24, Order denying relief in *Hammond v. Owen et al.*, Fulton Superior Court Case No. 2011CV195623 (Jan. 25, 2011).

Defendants' illegal importation and possession of Sodium Thiopental of highly questionable provenance. *See* Exhibit 2 and attachments. On or about March 16, 2011, the DEA seized Defendants' entire supply of Sodium Thiopental. *See* Exhibit 3. On April 11, 2011, Mr. DeYoung's attorneys again contacted the Attorney General,[34] pointing out that sloppy record keeping and handling of Defendants' Thiopental supply may have resulted in Defendants' losing or misplacing a quantity of the drug, in violation of 21 U.S.C. § 827 and 21 C.F.R. § 1304.21(a).[35]

C. Execution Services Medical Personnel are Implicated in and Under Investigation for Illegal Procurement and Distribution of Controlled Narcotics to Other State Corrections Departments for Use in Judicial Lethal Injections.

21. Although prior judicial findings upholding the validity of Defendants' LI Procedures rested on the assumption that trained medical personnel would vigilantly oversee lethal injections in Georgia in order to ensure safety and

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[34] *See* Exhibit 9, correspondence of April 11, 2011.

[35] "Every registrant required to keep records ... *shall maintain on a current basis a complete and accurate record of each such substance* manufactured, imported, received, sold, delivered, exported, or otherwise disposed of by him/her." (Emphasis added).

humaneness in their implementation,[36] evidence has emerged which directly undermines this assumption. Defendants contract with an entity known as Rainbow Medical Associates, headed by a phsyician, Dr. Carlo Musso, who is also president of CorrectHealth, Inc., a Georgia corporation which provides prison health care services statewide.[37] In the winter of 2011, CorrectHealth and Rainbow Medical Associates were involved in the illegal importation, procurement and distribution of Sodium Thiopental for judicial lethal injection purposes in Kentucky and Tennesee, having been referred to Dr. Musso by the Defendants.[38] The supplies of Sodium Thiopental distributed by CorrectHealth/Rainbow to Kentucky and Tennessee were subsequently seized by the DEA, and Dr. Musso and his organizations are currently under investigation by the DEA for violations of applicable federal drug laws and regulations.[39] Evidence indicates Dr. Musso even attempted to parlay his illegal interstate drug dealing into opportunities to

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[36] *See* Exhibit 19, Final Order, *Alderman v. Donald*, Case No. 1:07-CV-01474 (N.D.Ga. May 2, 2008) at 7-10, 30, 35-36.

[37] *See* Exhibit 14, Documents detailing DOC's contract with Rainbow Medical Associates and Dr. Musso; CorrectHealth website at www.correcthealth.org.

[38] *See* Exhibit 15, Complaint before Georgia Composite Medical Board and attachments.

[39] *Id.*

expand his prison health services businesses into those states.[40] Notably, Dr. Musso denied any involvement in narcotics deals with Kentucky and Tennessee Departments of Corrections, despite clear documentation to the contrary.[41]

22. Thus, the medical personnel who monitor and oversee Defendants' LI Procedures are completely unreliable actors with respect to their roles in ensuring safe and humane lethal injections in Georgia. Dr. Musso and his business entities have been directly implicated in illegal narcotics procurement and distribution. Dr. Musso, the physicians and nurses in his employ, and his business entities also have a financial conflict of interest in that they are under an imperative to ensure not safe and humane lethal injections but instead that any problems which may occur during lethal injections do not compromise either their financial ties to Defendants or their business relationships with other states' Departments of Corrections with whom they have traded lethal injection narcotics and sought expanded prison health services opportunities.

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[40] *Id.*

[41] *Id.*

D. Defendants Have Been Explicitly Warned by the Drug Manufacturer that the New Drug Incorporated into Defendants' Lethal Injection Protocol is Unsafe for Use in Judicial Lethal Injections.

23. Finally, on or about May 20, 2011, Defendants drafted a revised lethal injection protocol which substituted Nembutal (Pentobarbital) for Sodium Thiopental but otherwise did not meaningfully alter the 2007 lethal injection protocol. *See* Exhibits 1, 18.[42] On or about June 3, 2011, Defendants procured a supply of Nembutal from Cardinal Health, a pharmaceutical retailer based in Ohio. *See* Exhibit 4. On or about June 7, 2011, the manufacturer of Nembutal, Lundbeck Corporation, announced publicly that Nembutal was untested for use on human patients and was unsafe for use in judicial lethal injections, and the next day forwarded correspondence to Defendants explicitly warning Defendants to the same effect. *See* Exhibits 5-7.

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[42] Notably, Defendants' LI Procedures have been developed without *any* oversight by the body charged with establishing DOC policies and procedures, the Board of Corrections. The Board "is charged with the responsibility for establishing the general policy to be followed by the Department of Corrections . . . The Board is authorized to promulgate, adopt and establish rules and regulations for the administration of the Department of Corrections and County penal institutions which are placed under Board control." O.C.G.A. § 125-1-1-.02. While the Board generally complies with its charged responsibility by considering a wide range of issues from the acquisition of pharmaceutical drugs to jail backlogs to staff training (*see* Exhibit 25), the Board has consistently failed to review lethal injection protocols even though rules and regulations promulgated by the Department are required to comply with the Board's policies. O.C.G.A. § 125-1-1-.02.

E. Defendants Cannot Be Trusted to Carry Out a Safe, Humane and Constitutional Lethal Injection of Plaintiff Under the Current Circumstances.

24. This Court was warned during litigation in the case of Emanuel Hammond in January 2011 that the Defendants' appeared to have engaged in illegal importation of mislabeled and possibly tainted Sodium Thiopental from a questionable foreign supplier and used that Sodium Thiopental in a previous execution which appeared to have been botched, causing inmate Brandon Rhode to be conscious during the administration of Pancuromium Bromide and Potassium Chloride, undoubtedly resulting in severe pain and suffering.[43] At the time, this Court found nothing amiss in Defendants' conduct which would even suggest that anything improper had taken place, and it did nothing to prevent Mr. Hammond's execution by use of the same procedures and drugs, resulting in another execution suggestive of inadequate sedation and pain and suffering.[44]

25. Dr. David Waisel, an anesthesiologist who has reviewed Georgia's procedures and protocols emphasizes his concerns as follows:

> I am concerned about a culture of corner-cutting, willingness to evade applicable laws and regulations, lack of meaningful training of

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[43] *See* Exhibits 10, 13.

[44] *See* Exhibits 11-12.

> execution team personnel and general sloppiness within Georgia's Department of Corrections, as well as the fact that medical personnel with whom DOC contracts for execution services have been implicated in and are under investigation for serious breaches of federal drug laws and regulations themselves, all of which translates into a heightened probability of sloppiness, lack of attention to detail and failure to adequately monitor for problems in the actual execution process. This cultural attitude tacitly if not explicitly encourages violation producing conditions in staff, because staff realize that there is flexibility in following burdensome policies or regulations. Documentation of shoddy record keeping with respect to its supply of lethal injection drugs, in violation of federal laws and regulations, is emblematic of a failure to maintain basic safeguards as to its lethal injection procedures in general. In its scramble to obtain enough sodium thiopental to carry out executions, Georgia DOC clearly evaded applicable federal drug laws in obtaining its previous batch of thiopental from a foreign dealer of questionable reliability and integrity in the fall of 2010. These drugs were used on inmates Rhode and Hammond, previously discussed, and there is evidence this may have resulted in botched executions. Georgia's skirting of federal drug laws resulted in the seizure of DOC's entire supply of thiopental by the federal Drug Enforcement Agency in the winter of 2011. The Georgia DOC clearly privileges expediency over safety and reliability with respect to its lethal injection procedures. I am therefore extremely concerned that there is a substantial risk of needless pain and suffering for inmates subject to execution in light of DOC's nebulous lethal injection protocol, reckless use of a novel drug whose own manufacturer has warned about its unreliability for use in lethal injections, and documented history of reckless disregard for federal drug laws and regulations.

Exhibit 8.

26. Now it is abundantly clear that in their desperate scramble to ensure that executions in Georgia could continue, no matter the cost in terms of potential pain and suffering of the condemned, Defendants engaged in reckless and illegal

acts to procure lethal injection drugs of questionable provenance and effectiveness and are under active investigation by the DEA for these acts. It is clear that Defendants have contracted with medical personnel who are themselves also under investigation by the DEA for having illegally procured and distributed controlled lethal injection narcotics. It is clear that prior executions carried out by the Defendants may well have been botched, resulting in extreme pain and suffering of the condemned inmates. It is clear that Defendants have been explicitly warned by the manufacturer of Nembutal that the new drug Defendants have incorporated into their LI Procedures is untested on humans and unsafe for use in judicial lethal injections, yet Defendants plan to execute Mr. Blankenship regardless. Defendants simply cannot be trusted to carry out a safe and humane execution under the current circumstances and there is a "substantial risk of serious harm" to Plaintiff as a result. *Baze*, 553 U.S. at 50.

II. APPLICATION OF GEORGIA'S LETHAL INJECTION PROCEDURES CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE GEORGIA CONSTITUTION.

27. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 26.

28. "Prior rulings by [the Georgia Supreme] Court regarding the constitutionality of [Georgia's lethal injection procedures] cannot be determinative of the issue. . . [because] . . . whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the evolving standards of decency that mark the progress of a maturing society." *Dawson v. State*, 244 Ga. 327, 329 (2001) (citations omitted). Although the Supreme Court has previously declared Georgia's lethal injection procedures constitutional in *Nance v. State*, 280 Ga. 125, 127 (2005), standards have evolved and new evidence has been gathered and developed that calls into question the decision in *Nance*.

29. Since *Nance* was decided, "[t]ime [has] work[ed] changes, [and brought] into existence new conditions and purposes." *Dawson*, 244 Ga. at 329. For instance, the use of an untested, unreliable and unsafe slower acting barbituate drug, Pentobarbital -- calls into question the Georgia Supreme Court's decision in *Nance*. As can been readily seen, the evidence proffered in previous lawsuits of course could not have included recent evidence of Defendants' reckless, law-breaking misconduct in obtaining questionable drugs from a foreign supplier and then substituting a wholly untested new drug when Defendants' misconduct triggered a federal raid to seize its previous supply of lethal injection drugs. Nor could the evidence previously proffered have included the most recent executions

which appeared to show that Defendants used inadequate sedation and consciousness checks before injecting inmates Rhode and Hammond with Pancuromium Bromide and Potassium Chloride. Nor could the evidence have previously included an explicit warning from the manufacturer of the drug to be used as an anesthetic that the drug is unsafe for judicial lethal injections. Mr. Blankenship has proffered evidence that changes the analysis and this new evidence directly refutes the findings in *Nance* as well as the federal District Court in *Alderman v. Donald*, Case No. 1:07-CV-1474 (N.D.Ga. May 2, 2008) (Exhibit 19).

30. The Eighth Amendment prohibits the unnecessary and wanton infliction of pain. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). Specifically, it forbids the infliction of unnecessary pain in the execution of a sentence of death. *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . ."). The prohibition against "serious" pain includes punishments that cause a "foreseeable risk of gratuitous and unnecessary pain." *Hill v McDonough*, 126 S.Ct. 2096, 2102 (2006); *Farmer v. Brennan*, 511 U.S. 825, 842, 847 (1994) (stating that the Eighth Amendment is violated by prison officials when they know of a risk of serious harm and proceed without taking reasonable measures to abate the risk).

31. Recently, in finding the Tennessee Lethal Injection Procedures unconstitutional, Judge Trauger summarized the law as follows:

> These cases demonstrate that, although lethal injection is the most prevalent form of execution, it is not sacrosanct, and that the constitutionality of a three-drug protocol is dependant on the merits of that protocol. Where protocols provide for safeguards to ensure that the inmate is unconscious before the admission of potentially painful drugs, courts have held that they do not violate the Eighth Amendment. *See, e.g., Taylor*, 487 F.3d at 1084-85. However, where the protocols do not provide for such safeguards and, instead, contain "critical deficiencies," an Eighth Amendment claim is proven. *See, e.g., Morales*, 465 F. Supp. 2d at 979.

Harbison v. Little, No. 3:06-01206, at 55 (M.D. Tenn. Sept. 19, 2007).

32. In light of Defendants' history of botched lethal injections as recently as this year, the vague and undefined parameters of Defendants' lethal injection protocol, Defendants' willingness to engage in blatant flouting of federal drug laws, Defendants' willingness to contract with medical execution services entities also implicated in illegal procurement and distribution of controlled narcotics and who have a financial interest in camouflaging any problems which may arise in the lethal injection process, and Defendants' substitution of its illegally obtained Sodium Thiopental with an untested and unsafe alternative drug, Pentobarbital, there is little dispute that the 2011 LI Procedures, which are virtually identical to the 2007 LI Procedures except as to the barbituate employed, in light of

Defendants' reckless and illegal conduct privileging expediency over safety, fail to provide the appropriate safeguards to ensure that the condemned is properly anesthetized before injecting painful drugs. As such, the 2011 LI Procedures are unconstitutional.

33. Defendants are acting under color of Georgia law in using an arbitrary, capricious and irrational method of execution by administering to Plaintiff Blankenship chemicals that risk unnecessary pain in the execution of a sentence of death, thereby depriving Plaintiff Blankenship of his rights under the federal and Georgia Constitutions to be free from cruel and unusual punishment and treating him with deliberate indifference to his health, safety and serious medical needs in violation of his rights under the federal and Georgia Constitutions.

34. The LI Procedures, which specify the State's lethal injection protocol, violate Plaintiff's rights under the Cruel and Unusual Punishment clause of the Georgia Constitution on their face and as applied because: (a) the Procedures create the unreasonable, severe and unacceptable risk of unnecessary physical and psychological pain; (b) the Procedures do not comport with contemporary norms and standards of society; (c) the Procedures offend the dignity of the person and

society; and (d) the Procedures constitute deliberate indifference to the condemned's safety, health and serious medical needs.

35. The failure of the DOC to take sufficient measures to minimize the risk of unnecessary, extreme and excruciating pain and mutilation, when the risk could easily be minimized, violates the Georgia Constitution's prohibitions against cruel and unusual punishment and violations of due process.

CONCLUSION

36. The 2011 LI Procedures do not present sufficient safeguards, as written or applied, to ensure that the condemned inmate is properly anesthetized prior to introducing two painful drugs. The drug Defendants have chosen to induce anesthetic coma in Plaintiff, Nembutal, is untested on human subjects and has been declared by its manufacturer to be unsafe for use in judicial lethal injections. Defendants' illegal conduct in recent lethal injections strongly suggests that Defendants tend to privilege expediency over safety in effectuating lethal injections and that this tendency has directly resulted in botched lethal injections in which the condemned inmates were not sufficiently sedated during injection of painful drugs. Further, the lack of appropriate monitoring of the condemned's anesthetic depth combined with the vast discretion given to untrained, unsupervised, non-medical professionals by the 2011 LI Procedures, creates an

serious risk of torturous pain that is far too great to be ignored. Further, Defendants have contracted with medical execution services personnel who are themselves implicated in serious violations of federal and state drug laws, and who have financial incentives to downplay or cover up any potential problems which may arise in the course of Plaintiff's execution, and they are unreliable monitors and/or intervenors in the event that Plaintiff should not reach a sufficient depth of unconsciousness so as to avoid pain and suffering.

37. Given the high probability of success on the merits and the fact that the Drug Enforcement Agency is currently investigating Defendants and their contracted medical execution services partner with respect to issues raised in this litigation, the threatened injury far outweighs any interest of the State. Accordingly, we respectfully request that this Court grant the TRO simultaneously filed with this Complaint and/or enter a stay of execution pending the outcome of federal investigations into the conduct of Defendants and their contracted medical execution services provider, pending the procurement of safe, tested, legal narcotics which can ensure a humane, constitutional lethal injection process, or until Defendants can otherwise ensure that its LI Procedures will employ properly trained and unconflicted DOC and medical personnel who can safely implement

lethal injection procedures which minimize the risk that Plaintiff will be conscious during injection of painful chemicals designed to cause his death.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Roy Blankenship prays for:

1. Temporary, preliminary, and permanent injunctive relief to enjoin the Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing Plaintiff until such time as Defendants can demonstrate that properly trained and unconflicted DOC staff and medical personnel can implement LI Procedures using safe and legal means as well as safe, tested and legal lethal injection drugs which have not been declared unsafe by their manufacturer;

2. Temporary, preliminary, and permanent injunctive relief to enjoin the Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing Plaintiff until such time as Defendants can demonstrate that measures are in place to allow for Plaintiff's execution in a manner that complies with the Eighth Amendment to the United States Constitution and Article 1, Section I, Paragraph VII of the Georgia Constitution;

3. Any such relief as the Court deems just and proper.

Dated this 20th day of June, 2011.

Respectfully submitted,

Brian Kammer (Ga. 406322)
Lynn Pearson (Ga. 311108)
Georgia Resource Center
303 Elizabeth Street, NE
Atlanta, GA 30307
404-222-9202

COUNSEL FOR MR. BLANKENSHIP

VERIFICATION

Before me, the undersigned authority, personally appeared ROY WILLARD BLANKENSHIP, who, being first duly sworn, says that he has personal knowledge of the allegations in the foregoing petition, and that the allegations and statements contained therein are true and correct to the best of his knowledge.

Dated this 9th day of June, 2011.

Roy Willard Blankenship

Sworn to and subscribed before me
this 9th day of June, 2011.

NOTARY PUBLIC

LYNN DAMIANO
NOTARY PUBLIC
FULTON COUNTY, GEORGIA
MY COMMISSION EXPIRES
MARCH 27, 2012

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ROY WILLARD BLANKENSHIP, Plaintiff, v. BRIAN OWENS, in his capacity as Commissioner of the Georgia Department of Corrections; CARL HUMPHREY, in his capacity as Warden of the Georgia Diagnostic Prison; DOES 1-50, UNKNOWN EXECUTIONERS, in their capacities as employees and/or agents of the Georgia Dept. Of Corrections.	)))))))))))))))	Civil Action Case No.

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served a copy of the foregoing document this day by hand delivery on counsel for Defendants at the following address (and have served another copy e-mailed in pdf format at the email address below):

Sam Olens
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Joseph Drolet
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Atlanta, GA 30334

I also hereby certify that I have caused to be served a copy of the foregoing document this day by hand delivery on counsel for Defendants at the following

address (and have served another copy e-mailed in pdf format at their respective email addresses):

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This the 20th day of June, 2011.

_____
Attorney