

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re: Jedidiah Murphy

ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

APPENDIX

Document	Appendix No.	App. Page No.
Ex Parte Jedidiah Isaac Murphy, W-0002323-D (194 th Dist. Ct.) - Writ	1	002
Ex Parte Jedidiah Isaac Murphy, W-0002323-D (194 th Dist. Ct. Oct. 5, 2023)	2	271
Ex Parte Jedidiah Isaac Murphy, No. AP-77,116 (Tex. Crim. App. Oct. 10, 2023)	3	274

Catherine Clare Bernhard
Law Office of Catherine Clare Bernhard
P.O. Box 506
Seagoville, TX 75159
cbarnhard@sbcglobal.net
Tel: 972-294-7262, Fax: 972-421-1604
Member, Bar of the United States Supreme Court

Katherine Froyen Black
Attorney at Law
205 Blue Ridge Trail
Austin, TX 78746
kfroyen@gmail.com
Tel: 415-847-6127

Counsel for Mr. Murphy

Appendix 1

Ex Parte Jedidiah Isaac Murphy, W-0002323-D (194th Dist. Ct.) – Writ

**IN THE 194TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS**

EX PARTE
JEDIDIAH ISAAC MURPHY,
APPLICANT.

§ CAUSE NO. W-0002424-D
§
§ Trial court No. F00-02424-M
§
§
§
§ CAPITAL CASE
§

**APPLICATION FOR WRIT OF HABEAS CORPUS
UNDER ARTICLE I, § 12 OF THE TEXAS CONSTITUTION &
TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 11.05**

****Mr. Murphy is scheduled to be executed October 10, 2023****

Catherine Clare Bernhard
P.O. Box 506
Seagoville, Texas 75159
972-294-7262
fax – 972-421-1604
cbernhard@sbcglobal.net
State Bar No. 02216575

Counsel for Jedidiah Murphy

TABLE OF CONTENTS

Table of Exhibits	iii
Introduction	1
Nature of the Case	3
Jurisdiction and Venue	4
I. Mr. Murphy Meets the Requirements to Bring a Constitutional Writ Application	5
A. This Application’s Challenges to the TDCJ’s Use of Fire-Damaged and Expired Drugs in Mr. Murphy’s Execution Constitutes a Restraint on his Liberty	5
B. Mr. Murphy has No Other Remedy Under Chapter 11 – or any other Texas law – to Obtain Relief from TDCJ’s Restraint on His Liberty	9
II. This Court Is the Proper Venue for This Application	11
Statement of Facts	12
A. TDCJ Intends to Execute Mr. Murphy with Chemical That Was Recently Compromised By a Catastrophic Fire	12
B. TDCJ Is Obstructing Mr. Murphy’s Discovery of the Fire’s Impact on the Substance Respondents Will Use to Execute Him	16
C. Even Before the Fire, All of TDCJ’s Pentobarbital Had Expired	19
D. The pH of TDCJ’s Pentobarbital Has Never Been Tested	22
E. Claims by TDCJ to “Extend” the Expiration Dates are Unscientific and Invalid	24
F. TDCJ Acquires Pentobarbital Without a Prescription	25
G. Recent Litigation in Civil Court Confirms the Factual Allegations Here, As Well As the Need for this Court’s Jurisdiction	25
Claims for Relief	29
Claim 1. Attempting to Execute Mr. Murphy With Fire-Blighted, Expired Pentobarbital Violates the United States Constitution	29

Claim 2. Attempting to Execute Mr. Murphy With Fire-Blighted, Expired Pentobarbital Violates the Texas Constitution's Prohibition on Cruel <i>or</i> Unusual Punishment.....	32
Claim 3. Attempting to Execute Mr. Murphy With Fire-Blighted, Expired Pentobarbital Violates Texas Code of Criminal Procedure, Article 43.24.	35
Claim 4. Texas Pharmacy Act: Respondents Are Without Legal Authority to Execute Mr. Murphy with Fire Damaged Pentobarbital.....	35
Claim 5. Texas Pharmacy Act: Respondents Are Without Legal Authority to Procure, Possess, Distribute, or Administer Expired Pentobarbital	36
Claim 6. Texas Pharmacy Act: Respondents Acted and Continue to Act Without Legal Authority When Compounding, Procuring, Possessing, Distributing, and Administering Pentobarbital	37
Claim 7. Texas Controlled Substances Act: Respondents Do Not Have Legal Authority to Dispense or Administer Pentobarbital to Mr. Murphy.....	40
Claim 8. Texas Food, Drug, and Cosmetic Act: Respondents Do Not Have Legal Authority to Dispense or Administer Pentobarbital to Mr. Murphy.....	42
Claim 9. Texas Penal Code: Respondents Do Not Have Legal Authority to Provide or Administer Pentobarbital to Mr. Murphy	43
Claim 10. Eighth and Fourteenth Amendments of the U.S. Constitution: TDCJ's Violation of State Laws Protecting Him from Unnecessary Pain Violates the Due Process Clause, the Eighth Amendment, and the Equal Protection Clause.	44
Prayer For Relief.....	45
VERIFICATION.....	1
Certificate of Service	2

TABLE OF EXHIBITS

1	Execution Order
2	Death Warrant
3	Judgment of Conviction and Sentence
4	Execution Protocol
5	Huntsville Fire Department Report on Aug. 25 fire
6	Report of Dr. Almgren
7	Myriam Ajemni et al., Stability-Indicating Assay for the Determination of Pento-barbital Sodium in Liquid Formulations, International Journal of Analytical Chemistry, 2015
8	Lab Reports
9	Inventory Logs 2.5 mg
10	Inventory Logs 5 mg
11	DEA Forms
12	Temporary Injunction of Travis County Civil District Court, <i>Ruiz et al. v. TDCJ et al.</i> , (Jan. 10, 2023)
13	Transcript, Jan. 10, 2023, Evidentiary Hearing
14	PIA Request of Sept. 8, 2023
15	PIA Request Followup Correspondence Sept. 19, 2023
16	PIA Response of Sept. 22, 2023

INTRODUCTION

1. On August 25, 2023, an uncontrolled building fire catastrophically damaged the third floor of the Administration Building at the Huntsville Unit of the Texas Department of Criminal Justice. The Huntsville Unit is not only the location where TDCJ (through Respondents Bryan Collier, Bobby Lumpkin, and Kelly Strong) are scheduled to execute Petitioner Jedidiah Murphy on October 10, 2023; it is also the location, on information and belief, where Respondents store (or stored) the single drug they use to carry out such executions: pentobarbital.

2. On information and belief, TDCJ's supply of pentobarbital was exposed to an extended period of excessively-high temperatures (upwards of 1800° Fahrenheit), smoke, and water during the fire and suppression efforts, which lasted up to ten hours.

3. When exposed to high temperatures, pentobarbital quickly degrades, impacting the solution's pH, and causing insoluble precipitates to form. As pentobarbital further degrades, its chemical structure changes, and it turns into an entirely different chemical with a different pharmacological impact on the body.

4. Amplifying the degradation of TDCJ's pentobarbital, there were multiple reasons to doubt its chemical integrity even before the fire: it was stored under improper conditions; TDCJ acquired it via unlawful methods; TDCJ fails to comply with numerous state laws concerning possession of controlled substances;

TDCJ conceals the identity of the pharmacy and laboratory it uses to compound and test it; and – most disturbingly – it was already expired.

5. On information and belief, TDCJ intends to execute Mr. Murphy using these damaged vials of fire-blighted, long-ago expired pentobarbital – or whatever chemical substance it has now become.

6. TDCJ has obstructed Mr. Murphy's attempts to learn the state and integrity of its pentobarbital following the Huntsville Unit Fire, by failing to timely respond to his requests under the Public Information Act and his internal inmate grievance.

7. Absent this Court's intervention, there is a substantial likelihood that the substance TDCJ uses to attempt to execute Mr. Murphy will cause Mr. Murphy significant and unnecessary pain and suffering.

8. In seeking to execute Mr. Murphy with these drugs, TDCJ has acted and continues to act without legal authority and in violation of the United States and Texas Constitutions, and numerous state laws.

9. This action seeks habeas relief from the State's plan to inject fire-blighted pentobarbital – or whatever chemical substance it has become – into Mr. Murphy's body.

NATURE OF THE CASE

10. This is an application for an original writ of habeas corpus brought under Texas Code of Criminal Procedure Article 11.05, and the Texas Constitution, Article I, § 12.

11. Applicant Jedidiah Murphy is illegally restrained in his liberty by the TDCJ, which intends to carry out his execution with recently fire-blighted drugs that were unlawfully obtained and long-expired.

12. TDCJ is a state agency responsible for carrying out the execution of death sentenced individuals.¹ TDCJ personnel responsible for carrying out Mr. Murphy's execution in an unlawful manner include: Bryan Collier, the Executive Director of TDCJ; Bobby Lumpkin, the Director of the TDCJ Correctional Institutions Division, who determines and supervises the manner by which death sentenced individuals are executed²; and Kelly Strong, the Senior Warden of the Huntsville Unit, where the drugs used in executions are stored and administered during executions (collectively, "Respondents").

13. Mr. Murphy brings this habeas action for injunctive relief from imminent violations of the United States Constitution, the Texas Constitution, Texas Code of Criminal Procedure Article 43.24, the Texas Pharmacy Act, the Texas

¹ See generally Tex. Code Crim. Proc. art. 43.14-43.23.

² Tex. Code of Crim. Proc. Art. 43.14(a).

Controlled Substances Act, the Texas Food, Drug, and Cosmetic Act, and the Texas Penal Code.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this application for a writ of habeas corpus pursuant to Article V, § 8 of the Texas Constitution and Article 11.05 of the Texas Code of Criminal Procedure, which give “Texas district courts plenary power to grant writs of habeas corpus.”³

15. An applicant may bring an application for an original writ of habeas corpus under the Texas Constitution and Article 11.05 when no specific habeas procedure prescribed in the Code of Criminal Procedure would be effective to protect a person from a restraint on his liberty. This cause of action—often referred to as a “Constitutional writ” or an “Article 11.05 writ”—serves as a catch-all to satisfy the constitutional guarantee of a habeas remedy that is available “of right.”⁴

³ *Ex parte Hargett*, 819 S.W.2d 866, 867 (Tex. Crim. App. 1991); Tex. Code Crim. Proc. art. 11.05 (vesting jurisdiction in the district courts “to issue the writ under the rules prescribed by law”); *see also* Tex. Const. art. I, § 12 (stating the Texas Constitution guarantees the writ of habeas corpus is “of right, and shall never be suspended”).

⁴ *See Ex parte Valdez*, 489 S.W.3d 462, 464 (Tex. Crim. App. 2016).

I. Mr. Murphy Meets the Requirements to Bring a Constitutional Writ Application.

16. To bring a “Constitutional writ,” an applicant must show that he “is restrained in his liberty,” Tex. Code Crim. Proc. art. 11.01, and that no other remedy is available to him under Article 11.⁵

17. As set forth below, Mr. Murphy satisfies these requirements.

A. This Application’s Challenges to the TDCJ’s Use of Fire-Damaged and Expired Drugs in Mr. Murphy’s Execution Constitutes a Restraint on his Liberty.

18. Mr. Murphy challenges the unlawful, unconstitutional manner in which his death sentence will be carried out. He does not challenge the lawfulness of his death sentence itself. He therefore may use the writ of habeas corpus to challenge the legality of the restraints on his liberty.

19. “A writ of habeas corpus filed in the district court pursuant to its original jurisdiction demands only that the applicant be restrained under the definition of [Tex. Code Crim. Proc.] Art. 11.22.”⁶ Article 11.22 defines “restraint” as “the kind of control which one person exercises over another ... to subject him to the

⁵ *Valdez*, 489 S.W.3d at 464.

⁶ *Rodriguez v. Court of Appeals, Eighth Supreme Judicial Dist.*, 769 S.W.2d 554, 558 (Tex. Crim. App. 1989).

general authority and power of the person claiming such right.”⁷ The term “restraint” is given a “broad” construction in the Texas habeas statute.⁸

20. The sentence of death serves as a restraint on Applicant’s liberty. Mr. Murphy is a prisoner in the custody of TDCJ pursuant to a judgment of conviction for capital murder and sentence of death.⁹

21. The execution itself is also a restraint on liberty. “[T]here can be no question that . . . the use of deadly force” “restrains the freedom of a person.”¹⁰

22. The writ of habeas corpus is available to challenge not only the legality of the restraints themselves, but also the legality of their manner and degree. Texas Code of Criminal Procedure Article 11.23 defines the “scope of [the] writ” of habeas corpus as “applicable to all such cases of . . . restraint . . . where, though the power in fact exists, it is exercised in a manner or degree not sanctioned by law.” For example, the “imposition of conditions of probation that contain unconstitutional infringements of freedom of action constitutes a ‘restraint’ within the scope of habeas corpus relief,” even if the applicant does not challenge the legality

⁷ Tex. Code Crim. Proc. art. 11.22.

⁸ *Ex parte Cathcart*, 13 S.W.3d 414, 417 (Tex. Crim. App. 2000) (citing *Ex parte Ormsby*, 676 S.W.2d 130, 132 n. 4 (Tex. Crim. App. 1984)); *see also* Tex. Code Crim. Proc. art. 11.04 (“Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it.”). *See also* *Peyton v. Rowe*, 391 U.S. 54, 58 (1968) (“The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny.”).

⁹ *See* Ex. 3 (Judgment).

¹⁰ *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

of the probation itself.¹¹ The writ, therefore, would grant relief not from the judgment itself, but from *unlawful implementation* of an otherwise-lawful penalty.

23. Accordingly, “[a]n inmate who alleges that the proposed method of his execution would be cruel and unusual has stated a claim of unconstitutional ‘restraint’ that emanates directly from ‘a judgment imposing a penalty of death.’”¹² Mr. Murphy challenges the “degree” to which his execution will exceed the punishment authorized by law: “when it comes to determining whether a punishment is unconstitutionally cruel [under the Eighth Amendment] because of the pain involved, the law has always asked whether the punishment ‘superadds’ pain well beyond what’s needed to effectuate a death sentence.”¹³

24. Additionally, TDCJ is required to “effectively manage or administer correctional facilities based on constitutional and statutory standards.”¹⁴ TDCJ, through Director Lumpkin, is also required to “determine” the execution procedure

¹¹ *Basaldua v. State*, 558 S.W.2d 2, 5 (Tex. Crim. App. 1977); *see also Ex parte Ormsby*, 676 S.W.2d 130, 132 (Tex. Crim. App. 1984) (An “outstanding collateral consequence of applicant’s invalid conviction . . . is a current and enduring restraint on applicant’s liberty”).

¹² *Ex parte Alba*, 256 S.W.3d 682, 699 (Tex. Crim. App. 2008) (Price, J., dissenting); *accord id.* at 689 (Cochran, J., concurring, joined by Womack, J.) (“[N]o Texas statute limits the authority or jurisdiction of this Court to consider an original habeas application by such an inmate seeking relief from an unconstitutional manner of carrying out his admittedly lawful sentence.”). *See also Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978) (granting habeas review on issue of whether lethal injection as method of execution violated Eighth Amendment); *Ex parte O’Brien*, 190 S.W.3d 677 (Tex. Crim. App. 2006) (assessing merit of habeas petition on whether Texas’s three-drug lethal injection protocol violated Eighth Amendment).

¹³ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126-27 (2019).

¹⁴ Tex. Gov’t Code § 494.001.

and “supervise” the execution.¹⁵ As alleged below, TDCJ’s procurement, possession, distribution and administration of expired and / or fire-damaged drugs for purposes of Mr. Murphy’s execution violates both constitutional and statutory standards. As such, TDCJ’s actions amount to an unlawful restraint on Mr. Murphy’s liberty.

25. To be sure, the plurality opinion in *Alba* on behalf of four judges would have concluded that a constitutional challenge to the method of lethal injection is not cognizable in a writ of habeas corpus because the claim did not “request a change of either the fact or the length of confinement.”¹⁶ But if the court were to determine that Mr. Murphy’s claims were not cognizable under Article 11.01 and Article 11.22’s definition of “restraint,” “such a substantive limitation on the courts’ original habeas corpus jurisdiction would likely constitute a suspension of the writ in violation of Article I, § 12.”¹⁷ It would also violate due process of law under the Texas and federal constitutions, because: “In this context . . . due process of law requires access to some form of habeas corpus.”¹⁸

¹⁵ Tex. Code Crim. Proc. art. 43.14(a).

¹⁶ *Alba*, 256 S.W.3d 682, 685 (Tex. Crim. App. 2008) (plurality opinion); *but see id.* at 697-98 (Price, J., dissenting) (disputing the plurality’s reliance on Supreme Court case law on the relationship between federal habeas and Section 1983 remedies for its cognizability *dictum*).

¹⁷ *Id.* at 698–99 (Price, J., dissenting).

¹⁸ *Id.* at 701 (Johnson, J., dissenting, joined by Holcomb, J.)).

B. Mr. Murphy has No Other Remedy Under Chapter 11 – or any other Texas law – to Obtain Relief from TDCJ’s Restraint on His Liberty.

26. This proceeding – a “Constitutional writ” under Article 11.05 – is Mr. Murphy’s only avenue for relief from the unlawful restraints on his liberty related to the manner of his planned execution.

27. Chapter 11 affords no specific procedure for Applicant’s claims for relief, which concern the manner in which TDCJ carries out his execution:

- a. Article 11.071 applies only if a death-sentenced “applicant seeks relief from [the] judgment imposing a penalty of death.”¹⁹ Applicant’s challenge to the execution procedures is not cognizable under Article 11.071 because it does not seek relief from the judgment of conviction or sentence of death.²⁰
- b. No other specific procedure in Chapter 11 applies, because the action does not “involve a final felony conviction, . . . a case in which probation was imposed, or a felony case after indictment.”²¹

28. Because Mr. Murphy’s request for relief involves a restraint on his liberty for which Chapter 11 does not provide a specific procedure, a “Constitu-

¹⁹ Tex. Code Crim. Proc. art. 11.071, § 1.

²⁰ *Alba*, 256 S.W.3d at 686 (plurality op.) (holding that “Article 11.071 is not the proper avenue for relief” to challenge lethal injection protocol); *id.* at 689 (Cochran, J., concurring) (“This is a circumstance-of-punishment allegation. . . it is not a challenge to the conviction or sentence.”). Judge Cochran’s concurring opinion, joined by Judge Womack, states the narrowest grounds for the decision in *Alba*. See *id.* at 687 (“Although I agree with the [plurality opinion] that applicant’s claim is not cognizable under Article 11.071, I believe that a ‘lethal-injection protocol’ claim may be brought as an original writ application under the Texas Constitution[.]”).

²¹ *In re Smith*, 665 S.W.3d 449, 455 (Tex. Crim. App. 2022).

tional writ" under Article 11.05 (and Article I, Section 12 of the Texas Constitution) is the only avenue for his claims.²²

29. In addition, although Mr. Murphy need not allege it, he has no other adequate remedy available in Texas law. Even where the factual grounds arose after the setting of an execution date (as with the Huntsville Unit fire here), an applicant with a scheduled execution cannot pursue a state civil action, because state civil courts lack authority to enjoin an execution.²³ Neither is a writ of prohibition available.²⁴

30. As described in the Statement of Facts, *infra*, the Court of Criminal Appeals recently vacated a state civil court's temporary injunction in a suit challenging the use of expired execution drugs, because it "purport[ed] to stay the executions of the various inmates" and "circumvent[ed] [the CCA's] mandates and the orders of the inmates' convicting courts."²⁵ Although that lawsuit has not been dismissed and an appeal remains pending before the Third Court of Appeals, it can

²² *Valdez*, 489 S.W.3d at 464.

²³ See *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 395-96 (Tex. Crim. App. 1994) (original proceeding) (holding that order by state civil court purporting to stay execution unlawfully circumvents jurisdiction of Court of Criminal Appeals in death-penalty case); *Alba*, 256 S.W.3d at 690 & n.19 (Cochran, J., concurring) (noting "inability of a Texas civil court to enjoin the carrying out of a lawful criminal sentence in the context of a civil-rights lawsuit" and citing *Holmes*, 885 S.W.2d at 395-96).

²⁴ *Ex parte Chi*, 256 S.W.3d 702, 704 (Tex. Crim. App. 2008).

²⁵ *In re: State ex rel. Ken Paxton*, No. WR-94,432-01, 2023 WL 151779 (Tex. Crim. App. Jan. 10, 2023) (internal quotation marks omitted)).

provide no relief to Mr. Murphy, whose execution would moot his claims,²⁶ and who raises additional claims not at issue in *In re: State ex rel. Ken Paxton*.²⁷

II. This Court Is the Proper Venue for This Application.

31. This Court is the proper venue to consider this application's merits.²⁸

32. As a general rule,²⁹ "the applicant must first seek appropriate relief at the appropriate trial-level court" before seeking relief from the CCA.³⁰

33. Furthermore, Mr. Murphy's claims require a court with the competency to develop a factual record, hear evidence, and make factual determinations.³¹ The trial court of conviction is "Johnny-on-the-Spot" in post-conviction habeas

²⁶ See *Greenwell v. Ct. of Appeals for Thirteenth Jud. Dist.*, 159 S.W.3d 645, 648-49 (Tex. Crim. App. 2005) (finding legal remedy inadequate if "uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective[.]" (internal quotations omitted)). See also *Chi*, 256 S.W.3d at 714 n.43 (Price, J., dissenting) ("Because this Court refuses to exercise habeas corpus jurisdiction, and because the civil courts cannot enjoin executions even if they can entertain challenges to the lethal-injection protocol, dozens, perhaps even scores, of death-row inmates may eventually be executed before the matter could be resolved on the civil side of the docket.").

²⁷ *In re: State ex rel. Ken Paxton* predated the Huntsville Unit fire; and furthermore, the plaintiffs did not raise any of the federal or state constitutional grounds Mr. Murphy raises here.

²⁸ *In re Smith*, 665 S.W.3d 449, 457 (Tex. Crim. App. 2022) (trial court in jurisdiction of underlying offense should ordinarily consider merits of habeas application).

²⁹ Judge Cochran made the case in *Alba* for the CCA breaking from the abstention doctrine to hear a lethal injection claim like this one; but the doctrine remains in place nonetheless. *Alba*, 256 S.W.3d at 689-90 (Cochran, J., concurring) ("Although we have the authority to exercise original-writ jurisdiction under the Texas Constitution, that is a power that we should exercise with great caution. Nonetheless, given the gravity of the claim presented and the inability of a Texas civil court to enjoin the carrying out of a lawful criminal sentence in the context of a civil-rights lawsuit, I would exercise it in this specific situation.").

³⁰ *Valdez*, 489 S.W.3d at 465; see also *id.* ("[T]he court of conviction is ordinarily the appropriate court in which to first seek relief, if it has habeas jurisdiction.").

³¹ *Ex parte Pena*, 484 S.W.3d 428, 430 (Tex. Crim. App. 2016).

corpus litigation, with the means to gather, develop, and evaluate evidence as the “original” factfinder.³²

STATEMENT OF FACTS

34. The current execution protocol was adopted on April 21, 2021.³³

35. That protocol requires that individuals be executed by lethal injection using 5 grams of pentobarbital.³⁴

36. Mr. Murphy is scheduled to be executed pursuant to this protocol on October 10, 2023.

A. TDCJ Intends to Execute Mr. Murphy with A Chemical That Was Recently Compromised By a Catastrophic Fire

37. At approximately 2:30 a.m. on August 25, 2023, a fire erupted in the Administration Building at TDCJ’s Huntsville Unit. It burned for up to ten hours, causing catastrophic damage to the third floor of the Administration Building, among other areas of the building.

38. Multiple agencies, including the Huntsville Fire Department, the Montgomery County Emergency Services, the Willis Fire Department, the Walker County Emergency Services, the New Waverly Fire Department, the Crabb Prairie Fire Department, the Dodge Fire Department, the Riverside Fire Department, the

³² *Ex parte Simpson*, 136 S.W.3d 660, 668-69 (Tex. Crim. App. 2004).

³³ See Ex. 4, TDCJ Execution Protocol.

³⁴ *Id.* at 10.

Walker County Office of Emergency Management, and the Texas Department of Emergency Management responded to the scene.

39. Greg Mathis, Fire Chief of the Huntsville Fire Department, led the fire response. According to Chief Mathis, emergency personnel finally managed to get the main blaze under control at approximately 6:30 a.m., four hours after the initial alarms rang out. However, personnel remained on the scene and continued to battle small fires and smoke in the Administration Building until approximately noon.

40. News reports indicate that the Administration Building was subject to extensive damage. At a press conference held after the fire, Chief Mathis indicated that dealing with the damage will require “a pretty extensive mop-up operation.”³⁵

41. Given the extent of the damage, TDCJ was forced to relocate the staff that worked in the Administration Building as well as 655 inmates who were housed in a housing block next to the Administration Building.

42. The affected areas of the Administration Building remain “sealed off until the State and local investigations can be completed.” *Id.* The investigation remains ongoing.

43. According to a report written by Captain Jon Brandon Kolaja from the Huntsville Fire Department, an unnamed correctional officer approached Captain

³⁵ Brenda Poe, *Walls Unit Damage in Overnight Fire*, The Huntsville Item (Aug. 25, 2023), https://www.itemonline.com/news/walls-unit-damaged-in-overnight-fire/article_9fa1c0a8-4340-11ee-aa57-f735e9eb6f55.html.

Kolaja as the fire was blazing and asked him to “check on the pharmacy”—which, on information and belief, refers to lethal injection chemicals stored in the Administration Building.³⁶

44. According to the report, Captain Kolaja and the unnamed officer donned self-contained breathing apparatuses and entered the burning building in an attempt to retrieve the lethal injection chemicals. When they reached the third floor, however, they discovered that the area was being “overtaken by fire,” and Captain Kolaja and the unnamed officer fled for their safety. *Id.*

45. Captain Kolaja and the officer did not retrieve the lethal injection drugs from the burning Administration Building. Due to the destructive, long-burning fire from which Kolaja and the officer were forced to flee, that part of the building will, on information and belief, be considered a “total loss.”

46. Building fires create an extreme level of heat. “Fully developed building fires can generally attain average gas temperatures throughout the room containing the fire in excess of 1,000 degrees Celsius (1800 degrees Fahrenheit).”³⁷ Features of the Huntsville Unit building would have increased, on information and belief, the internal temperatures even higher than average:

³⁶ See Ex. 5, Huntsville Fire Department Report, p. 2.

³⁷ Milke et al., Overview of Fire Protection in Buildings, Federal Emergency Management Agency, at A-17, available at https://www.fema.gov/pdf/library/fema403_apa.pdf.

- a. The Huntsville Unit building had a clay-tile roof, which trapped the fire within the building and made it harder for firefighters to control it. In addition, firefighters had trouble accessing the necessary areas of the fire due to “building construction,” key-locked doors, and the size and strength of the fire; and outside water hoses could not get close enough to the affected area.³⁸
- b. The fire burned and spread for over five hours before firefighters could bring it under control – and then continued to burn in numerous “hot spots” for another five hours after that.³⁹
- c. The building was slated for major code-compliance upgrades – which had not yet begun – after the State Fire Marshal found “nearly 1700 violations,” including failures to test “fire doors, dampers, or standpipe systems.”⁴⁰

47. When exposed to high temperatures, pentobarbital suspensions quickly degrade, impacting the pH and causing insoluble precipitates to form in the suspension. In other words, solid particles separate from the liquid in a vial, compro-

³⁸ Ex. 5, Huntsville Fire Dept. Rpt., p.2 (“Due to building construction and heavy fire, crews had difficult time making access. This was a prison unit with multiple keys needed for access and control to each area. After L624 and L614 flowed water for some time there was some control of the fire.”); *id.* (“The water was partially successful in limiting the spread, however, the Spanish roofing tiles limited the water to reach all the fire. Also, the distance from the ladder tip to the admin building was farther than an effective water stream from the ladder truck.”); *id.* at 3 (“Suppression Factor: Building construction or design, other, Roof collapse, Egress/exit problem”).

³⁹ Poe, Inmates Evacuated Because of Fire at Texas Prison Unit, *supra*; Ex. 5, Huntsville Fire Dept. Rpt., p.3.

⁴⁰ Ken Miller, All Prisoners Accounted For After Fire at Texas Prison Forces Evacuation, NBCDFW (Aug. 25, 2023), available at <https://www.nbcdfw.com/news/local/texas-news/all-prisoners-accounted-for-after-fire-at-texas-prison-forces-evacuation/3324120/>

mising the consistency of the chemical levels throughout the container.⁴¹ Furthermore, its chemical structure can change, turning into an entirely different substance with a different pharmacological impact on the body.⁴² For example, when pentobarbital is “heated to decomposition it emits toxic fumes of nitric oxide.”⁴³ When exposed to much lower temperatures than a fire – those of 100°C (212°F) – and for only a single hour, chemical changes cause pentobarbital to lose 80 percent of its potency.⁴⁴ Pharmacological authorities further warn that the type of pentobarbital at issue here – compounded pentobarbital – should be used within *48 hours if stored at room temperature.*⁴⁵

B. TDCJ Is Obstructing Mr. Murphy’s Discovery of the Fire’s Impact on the Substance Respondents Will Use to Execute Him.

48. Mr. Murphy’s attempts to gather information about the condition of the substances intended for use in his execution in the wake of the Huntsville Unit fire have been met with bad faith delay and obstruction by TDCJ.

⁴¹ See Ex. 6, Report of Dr. Almgren, at ¶ 31 (“The changes in pH can lead to formation of precipitant.”).

⁴² *Id.* (“Also, exposure of pentobarbital to pH outside of the acceptable range can lead to quicker breakdown of the pentobarbital molecule itself, producing further degradation[.]”). Mr. Murphy intends to file a supplemental scientific report further supporting these allegations.

⁴³ NIH National Library of Medicine, PubChem: Pentobarbital (Compound), available at <https://pubchem.ncbi.nlm.nih.gov/compound/Pentobarbital#section=Decomposition>, citing authorities.

⁴⁴ See Ex. 7, Myriam Ajemni et al., *Stability-Indicating Assay for the Determination of Pentobarbital Sodium in Liquid Formulations*, Int’l Journal of Analytical Chemistry, 2015, at 3.

⁴⁵ Ex. 6, Almgren Rpt., ¶ 15.

49. On September 8, 2023, once the extent of the fire and damage became clearer, counsel Bernhard sent to the TDCJ via email transmission a Public Information Act requesting information about whether and how the lethal injection substances stored at the Huntsville Unit were affected by the fire.⁴⁶

50. On September 19, 2023, still lacking a response, Ms. Bernhard sent a follow-up email inquiry:

The Public Information Act requires that the governmental body must produce the requested information "promptly." Gov't Code 552.221. Given that my client is scheduled for execution in three weeks, the delay in your response is neither prompt nor reasonable. If you intend to seek an Attorney General opinion, please advise immediately, so that I have time to respond. Regardless of the fact that the Act gives you 10 days to request such an opinion, in these circumstances the unnecessary use of the full period flouts the language and the spirit of the Act.

The TDCJ Open Records Coordinator responded:

Your request was received on 9/8/2023 and sent for processing.

We are allowed 10 full business days (Monday through Friday and excluding holidays) to process all requests, which means that your request is currently on day # 8.

All requests are processed in the order in which they are received, not on the basis of need or urgency.⁴⁷

51. On the afternoon of the 10th day, TDCJ responded; but did not provide any documents. Instead, they advised Ms. Bernhard that they would be seeking a

⁴⁶ See Ex. 14, PIA Request of Sept. 8, 2023.

⁴⁷ See Ex. 15, PIA Request Followup Correspondence, Sept. 19, 2023.

Request for Decision from the Office of the Attorney General (“OAG”).⁴⁸ Their request to the OAG asserted that the “documents responsive to this request contain information that is excepted from disclosure under the PIA . . . Specifically, TDCJ invokes . . . sections 552.028 and 552.101 through 552.158 of the PIA.”

52. TDCJ’s invocation of sections “552.101 through 552.158” includes every possible exception from disclosure contained within the PIA except for the last four. They are thus asserting that there are 72 exceptions (only a fraction conceivably applicable) which they argue excepts the information from disclosure.

53. TDCJ’s actions flout the language and spirit of the Act. The PIA Handbook states:

The officer for public information must “promptly” produce public information in response to an open records request. “Promptly” means that a governmental body may take a reasonable amount of time to produce the information, but may not delay. It is a common misconception that a governmental body may wait ten business days before releasing the information. In fact, as discussed above, the requirement is to produce information “promptly.” What constitutes a reasonable amount of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period of time.⁴⁹

54. TDCJ now has until the 15th day from Ms. Bernhard’s original request to submit to the Open Records Division their written comments explaining why the

⁴⁸ See Ex. 16, PIA Response if September 22, 2023.

⁴⁹ PIA Handbook 2022 p. 23 (citations omitted), available at <https://www.texasattorneygeneral.gov/open-government/members-public/overview-public-information-act>).

(72) exceptions to disclosure asserted apply. The 15th day falls on September 29th, 2023 – just shy of two weeks from Mr. Murphy’s scheduled execution.

55. TDCJ’s actions reek of gamesmanship. By unnecessarily delaying their response the maximum amount of time permitted – as opposed to responding “promptly,” as is their duty – they effectively deny Mr. Murphy even the opportunity to argue for his right to the information.

56. Neither Mr. Murphy nor his counsel delayed in seeking the information, as neither the relevance of the fire nor the extent of its damage were immediately clear. The critical nature of the information he seeks – whether a catastrophic event significantly denigrated the substances TDCJ intends to use to carry out his execution – cannot be overstated. TDCJ’s response is simply obstructionist, adding to the necessity of this Court’s action on this application.

C. Even Before the Fire, All of TDCJ’s Pentobarbital Had Expired.

57. There are other problems with TDCJ’s pentobarbital – and its use thereof – that predated the Huntsville Unit fire; however, these issues and the fire’s damage reciprocally amplify one another.

58. Since September 2013, TDCJ has acquired and carried out executions with compounded—as opposed to commercially manufactured—pentobarbital.⁵⁰

⁵⁰ TDCJ conceals the identity of the pharmacy and laboratory it uses to compound and test its pentobarbital.

59. When a drug is commercially manufactured, it is subjected to extensive quality control and testing to ensure that the quality, potency, and purity of the drug is stable until its expiration date.⁵¹ These measures are product-specific.⁵²

60. On the other hand, when drugs are compounded, pharmacists use Active Pharmaceutical Ingredients (“APIs”) to prepare smaller batches of a medication.⁵³ APIs usually exist in a concentrated powder form.⁵⁴

61. Generally, drugs are compounded by specialized compounding pharmacies, with very specific – and sterile – equipment and procedures.⁵⁵ Sterile compounding must follow the strict guidelines set forth in the United States Pharmacopeia (“USP”).⁵⁶ The USP is a compendium of quality requirements, specifications, and practices that apply to the practice of the pharmacy. USP sets the standards for the pharmaceutical industry.⁵⁷

62. If The USP guidelines are not followed it can lead to medication contamination, patient harm, and unpredictable drug effects.⁵⁸

⁵¹ *Id.* at ¶ 6.

⁵² *Id.* at ¶ 7.

⁵³ *Id.* at ¶ 8.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at ¶ 9.

⁵⁷ *Id.* at ¶¶ 9, 11.

⁵⁸ *Id.* at ¶ 11.

63. The expiration date or Beyond Use Date (“BUD”) of a compounded drug is significantly shorter than its commercially available equivalent because compounded drugs do not undergo the same extensive quality testing as commercially available products. The USP directs how pharmacists are to determine the BUD of a compounded product.⁵⁹

64. TDCJ purchases compounded pentobarbital for use in executions in batches that have ranged from nine to twenty-four vials. TDCJ stockpiles compounded pentobarbital, meaning that it obtains more pentobarbital than it can reasonably expect to use prior to its BUD.

65. According to the USP, the maximum BUD for high-risk compounded sterile preparations, like the pentobarbital in TDCJ’s possession, are:

- 24 hours, if stored at room temperature between 20° and 25°C;
- 72 hours, if refrigerated at a temperature range between 2° and 8°C; or
- 45 days, if in a solid, frozen state between -25° and -10°C.⁶⁰

66. On information and belief, TDCJ stores the compounded pentobarbital at room temperature.⁶¹ The USP’s BUD of TDCJ’s pentobarbital is thus 24 hours. In other words, TDCJ’s pentobarbital expires 24 hours after it is compounded.

⁵⁹ *Id.* at ¶ 10.

⁶⁰ *Id.* at ¶¶ 10, 14-15.

⁶¹ See Ex. 8, Lab Reports.

ed because it is kept at room temperature. If it were kept frozen, it would expire 45 days after it is compounded.

67. But at the time of filing this Petition, some of TDCJ's vials of pentobarbital are over **900 days old**;⁶² and the rest of TDCJ's vials of pentobarbital are over **250 days old**.⁶³ On information and belief, TDCJ does not possess any pentobarbital that was not long-ago expired, even before taking into account the effect of the August 25, 2023, fire.

D. The pH of TDCJ's Pentobarbital Has Never Been Tested.

68. The pH of pentobarbital shifts over time, which accelerates the breakdown of pentobarbital molecules and leads to the formation of precipitants. Exposure to excess temperatures accelerates this process. For this reason, the USP specifies that the pH of compounded pentobarbital should be tested and maintained between 9.0 and 10.5.⁶⁴

⁶² According to TDCJ's disclosures, TDCJ last received its 50ml vials of pentobarbital on March 18, 2021. Ex. 9, Huntsville Unit Storage Inventory Logs, Pentobarbital (2.5 grams). *See also* Ex. 11, DEA Forms; Ex. 6, Almgren Rpt. at ¶ 17.

⁶³ TDCJ last received its 100ml vials of pentobarbital on January 5, 2023. Ex. 10, Huntsville Unit Storage Inventory Logs, Pentobarbital (5 grams). *See also* Ex. 11, DEA Forms; Ex. 6, Almgren Rpt. at ¶ 18.

⁶⁴ Ex. 6, Almgren Rpt. at ¶ 31.

69. None of the reports TDCJ has produced indicate that the pH of the pentobarbital in its possession has ever been tested, nor have the solutions been visually inspected for particulates.⁶⁵

70. The pharmacological activity of expired drugs – let alone drugs that were exposed to extreme temperatures – is unpredictable. At minimum, their effectiveness will have vastly decreased.⁶⁶ Some drug degradants have their own pharmacological activity, typically completely different from the original drug.⁶⁷ Expired medications can cause severe side effects, such as organ failure.⁶⁸ Particulates in an intravenous injection, furthermore, can pose risk of painful pulmonary emboli, hematoma, acute inflammation, or phlebitis.⁶⁹ For these and other reasons, the Food and Drug Administration strongly advises against using expired or spoiled medication.⁷⁰

⁶⁵ Ex. 8, Lab Reports.

⁶⁶ See Ex. 6, Almgren Rpt. at ¶ 20; Ex. 7, Ajemni et al., at 3 (exposure to 100°C (212°F) for one hour causes pentobarbital to lose 80 percent of its potency).

⁶⁷ Ex. 6, Almgren Rpt. at ¶¶ 20, 24, 27.

⁶⁸ *Id.* at ¶ 20.

⁶⁹ See, e.g., N. Chiannikulchai, et al., Safety Concerns with Glass Particle Contamination: Improving the Standard Guidelines for Preparing Medication Injections, *Int. J. Qual. Health Care*, 33(2) (Jun. 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8221140/#R5>; J.W. Puntis et al., Hazarts of Parenteral Treatment: Do Particles Count? *Arch. Dis. Child*, 67(12), 1475-77 (Dec. 1992) (“Particulate contamination is known to cause phlebitis in peripheral vessels[.]”), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1793986/?page=2>.

⁷⁰ Ex. 6, Almgren Rpt. at ¶ 20.

E. Claims by TDCJ to “Extend” the Expiration Dates are Unscientific and Invalid.

71. On several occasions, TDCJ has claimed to “extend” the BUD of its expired compounded pentobarbital based on the results of potency testing. TDCJ has removed a vial of pentobarbital from its existing stockpile and returned the individual vial to the pharmacy.⁷¹ The pharmacy then submits the single vials it receives from TDCJ for potency testing. Potency testing, also referred to as assay testing, measures the amount of API in a sample. This is an unscientific and invalid approach to extending the BUD of a compounded drug.⁷²

72. The only valid way to extend a BUD under the USP is to perform stability-indicating studies.⁷³ The method used to test the potency of TDCJ’s compounded pentobarbital is not a stability-indicating test.⁷⁴

73. A stability-indicating test, unlike a potency/assay test, can determine whether there has been any degradation of the drug.⁷⁵ Degradants can be structurally similar to the API, and thus misleadingly inflate the results of assay testing. But

⁷¹ See Exs. 9, 10, Huntsville Unit Storage Inventory Logs.

⁷² Ex. 6, Almgren Rpt. at ¶¶ 21-23.

⁷³ *Id.* at ¶¶ 23, 25-27.

⁷⁴ *Id.* at ¶¶ 23, 25.

⁷⁵ *Id.* at ¶¶ 23, 24-26.

degradants can have very different chemical qualities than the API, like solubility and pH, which impact the substance's function on the body.⁷⁶

74. Pentobarbital degrades over time and the resulting degradants do not have the same pharmacologic effect as pentobarbital. *Id.* at ¶ 27. Thus, the results of potency/assay tests on long-expired pentobarbital is likely highly misleading.

75. In addition, TDCJ has purported to extend the BUD of multiple vials of its pentobarbital based on potency testing performed on a just one vial. But the USP makes clear that the results from tests conducted post-compounding on one vial are not applicable to other vials (whether from the same or different batches).⁷⁷

76. Finally, vials that TDCJ sends to the pharmacy for this testing are sometimes shipped back to TDCJ afterward, and placed back into storage for future executions. This creates a high contamination risk.⁷⁸

F. TDCJ Acquires Pentobarbital Without a Prescription.

77. On information and belief, TDCJ does not obtain or receive a prescription from a medical practitioner when ordering pentobarbital for executions.

G. Recent Litigation in Civil Court Confirms the Factual Allegations Here, As Well As the Need for this Court's Jurisdiction.

78. In December 2022, several death-sentenced Texas prisoners filed a civil lawsuit against TDCJ and its officials, alleging that TDCJ's actions in procur-

⁷⁶ *Id.* at ¶¶ 24, 30.

⁷⁷ *See id.* at ¶ 28-29.

⁷⁸ *Id.* at ¶¶ 33-34.

ing, selecting, storing, and administering drugs in connection to executions constituted *ultra vires* acts that violated several state laws⁷⁹ and would subject the Plaintiffs to unnecessary harm.⁸⁰

79. The District Court held a temporary injunction hearing on January 10, 2023 to determine whether TDCJ planned to use expired pentobarbital in upcoming executions, and whether the use of the expired drugs violated state statutes. The District Court explained that, in accordance with a prior order of the CCA,⁸¹ it could not stay any execution, but it could decide whether to enjoin TDCJ “from committing certain acts while conducting the executions.”⁸²

80. After a two and a half hour hearing,⁸³ the District Court made detailed factual findings, including the following:

- “Defendants’ actions in procuring, selecting, storing, and administering Pentobarbital mean that Defendants must comply with the Texas Pharmacy Act[,]” as well as “the Texas Controlled Substances Act, the Texas Food, Drug, and Cosmetic Act, and the Texas Penal.”⁸⁴

⁷⁹ These include the Texas Pharmacy Act, the Texas Controlled Substances Act, the Texas Food, Drug, and Cosmetic Act, and the Texas Penal Code.

⁸⁰ Original Petition, *Ruiz et al. v. TDCJ et al.*, Case No. D-1-GN-22-007149 (419th District Court, Travis County).

⁸¹ *In re State ex rel. Ken Paxton*, No. WR-94, 432-01, 2023 WL 110625 (Tex. Crim. App. Jan. 4, 2023).

⁸² See Ex. 12, Temporary Injunction of Travis County Civil District Court, *Ruiz et al. v. TDCJ et al.*, (Jan. 10, 2023).

⁸³ Ex. 13, Jan. 10, 2023 Hearing Transcript, *Ruiz et al. v. TDCJ et al.*

⁸⁴ *Id.* at 2-3.

- “Plaintiffs offered unrebutted evidence that all of the Pentobarbital in Defendants' possession is expired.”⁸⁵
- “Plaintiffs offered unrebutted evidence that expired Pentobarbital can cause severe harm or unpredictable drug actions.”⁸⁶
- The harms from expired Pentobarbital include “burning pain[,]” “blockages in the blood vessels [which are] painful[,]” and that “Defendants' procedures create a risk of unnecessary pain and unpredictable activity in the body of condemned people.”⁸⁷
- “Defendants did not offer any evidence or witnesses to dispute Plaintiffs' assertions regarding Defendants practices regarding the legality, purity, stability, or microbiology of the Pentobarbital in Defendants' possession.” *Id.*
- Defendants “have handled their pentobarbital with disregard for its purity, stability, and activity in the body in the presence of degradants and contaminants.”⁸⁸

81. Based on these factual findings, the District Court concluded that TDCJ officials were violating the Texas Pharmacy Act, Texas Controlled Substances Act, the Texas Food, Drug, and Cosmetic Act, and the Texas Penal Code by continuing to store and administer these drugs.⁸⁹ The District Court then issued

⁸⁵ *Id.* at 3.

⁸⁶ *Id.* at 4.

⁸⁷ *Id.* at 4-5.

⁸⁸ *Id.* at 5.

⁸⁹ *Id.* at 2-4.

a temporary injunction ordering TDCJ officials to temporarily refrain from “administering or injecting Plaintiffs” with expired Pentobarbital.⁹⁰

82. The CCA summarily vacated the District Court’s injunction, however, because it “purport[ed] to stay the executions of various inmates” and “circumvent[ed] . . . the orders of the inmates’ convicting courts.”⁹¹ Judge Newell dissented. *Id.* He had previously observed that the law “creates a Catch-22 in which death-row inmates have a civil remedy to pursue claims regarding the method of execution but may not stop the execution to raise them.”⁹²

83. When vacating the injunction, the CCA did not question—let alone reject—the District Court’s factual findings that all of the pentobarbital in TDCJ’s possession is expired and that it would cause a death-sentenced prisoner unnecessary harm and suffering upon administration. Nor did the CCA question or reject the District Court’s legal conclusion that TDCJ officials would violate state law if they used those drugs to carry out a future execution.

84. Hours after the CCA’s ruling, TDCJ officials used expired pentobarbital to execute Robert Fratta. In the following weeks, expired pentobarbital was used in the executions of John Balentine, Wesley Ruiz, and Arthur Brown.

⁹⁰ *Id.* at 6.

⁹¹ *In re State ex rel. Ken Paxton*, No. WR-94,432-01, 2023 WL 151779 (Tex. Crim. App. Jan. 10, 2023) (quotations omitted))

⁹² *In re State ex rel. Paxton*, 667 S.W.3d 752, 753 (Tex. Crim. App. Jan. 4, 2023) (Newell, J., dissenting).

85. Though the State carried out the execution of these men, the lawsuit—joined by Anibal Canales and Ivan Cantu—remains pending on appeal from the District Court’s denial of several defendants’ plea to the jurisdiction.⁹³

CLAIMS FOR RELIEF

Claim 1. Attempting to Execute Mr. Murphy With Fire-Blighted, Expired Pentobarbital Violates the United States Constitution.

86. Mr. Murphy realleges and incorporates by reference the allegations contained in the above paragraphs.

87. The use of pentobarbital that was exposed to extreme heat, smoke, and water during the August 25, 2023 Huntsville Unit fire violates the Eighth and Fourteenth Amendments of the United States Constitution.

88. The use of expired pentobarbital violates the Eighth and Fourteenth Amendments of the United States Constitution.

89. The use of expired drugs that were also exposed to extreme heat, smoke and water violates the Eighth and Fourteenth Amendments of the United States Constitution.

90. The Eighth Amendment forbids the State, in carrying out a death sentence, to inflict pain beyond that necessary to end the condemned prisoner’s life.⁹⁴ “Punishments are cruel when they involve torture or a lingering death . . . some-

⁹³ See *TDCJ et al. v. Canales*, No. 03-23-00248-CV (Tex. App.—Austin) (appellants’ brief filed June 15, 2023).

⁹⁴ *In re Kemmler*, 136 U.S. 436, 447 (1890).

thing more than the mere extinguishment of life.” *Id.* A method of execution violates the Eighth Amendment if it presents a “substantial risk of serious harm.”⁹⁵ A method that “superadd[s] pain, terror, or disgrace” qualifies as cruel and unusual.⁹⁶

91. An inmate establishes an Eighth Amendment violation if he identifies a “feasible, readily implemented” alternative procedure that would “significantly reduce a substantial risk of severe pain.”⁹⁷ To determine whether the risk of pain is “substantial[,]” the state’s method must be “compared to a known and available alternative[]” that the state refuses to adopt without legitimate penological reason.⁹⁸

92. Here, Texas plans to execute Mr. Murphy with expired pentobarbital that was exposed to extreme heat, smoke, and water; and which it has not tested for stability. (Even if it has conducted potency testing, that does not reveal anything about the level of degradation of the drug.)

93. When a drug is degraded, its method of action on the body becomes unpredictable and dangerous. Because TDCJ’s pentobarbital is expired and was exposed to extreme heat – whether the two factors are considered separately or together – it is degraded to an unknown (but likely very high) degree. TDCJ thus does not and cannot know whether they will be injecting Mr. Murphy with pento-

⁹⁵ *Baze v. Rees*, 553 U.S. 35, 50 (2008). See also *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).

⁹⁶ See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1114 (2019).

⁹⁷ *Baze*, 533 at 52.

⁹⁸ *Glossip v. Gross*, 576 U.S. 863, 878 (2015); *Bucklew*, 139 S. Ct. at 1114.

barbital, extremely weak pentobarbital, pentobarbital containing dangerous particulates, or a different chemical altogether. This creates substantial risks of serious, severe, and super-added harm and pain. It also superadds terror, as Mr. Murphy is aware that Texas plans to inject him with unknown drugs. This alone is causing Mr. Murphy needless suffering.

94. The use of pentobarbital that was not exposed to extreme heat, smoke, or water, and whose stability is confirmed by testing, is a simple, feasible, and readily-implemented alternative procedure that would significantly reduce a substantial risk of severe pain.

95. Separately, the use of expired pentobarbital is an unusual punishment under the Eighth Amendment because there is a consensus against the use of expired drugs in execution protocols. Six states that currently have the death penalty (with no moratorium on executions) do not use expired drugs in executions: Arizona, Arkansas, Nebraska, Mississippi, Ohio, and South Carolina.⁹⁹ Prior to abolish-

⁹⁹ Arizona: Def.'s Notice of Protocol Amend., Resp. to Ct. Order and Suggestion of Mootness, 2, *Wood v. Ryan*, No. 2:14-cv-01447-NVW (D. Ariz.); Arkansas: Camilla Domonoske, *Arkansas Readies for 8 Executions, Despite Outcry Over Pace, Method*, Nat'l Pub. Radio (Mar. 31, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/31/521967661/arkansas-readies-for-8-executions-despite-outcry-over-pace-method>; Mississippi: Mem. of Authorities in Supp. Of Mot. To Dismiss and in Opp'n to Mot. For Prelim. Inj., 2, 4, *Jordan v. Fisher*, No. 3:15-cv-00295-HTW-LRA (S.D. Miss.); Nebraska: *Death-Sentenced Prisoner Aubrey Trail Waives Appeals and Petitions Nebraska for Execution Date Despite Unavailability of Lethal Injection Drugs*, Death Penalty Info. Ctr. (Aug. 17, 2023), <https://deathpenaltyinfo.org/news/death-sentenced-prisoner-aubrey-trail-waives-appeals-and-petitions-nebraska-for-execution-date-despite-unavailability-of-lethal-injection-drugs>; Ohio: State Actor Def.'s Mot. For Permission to Remove and Dispose of Expired Drugs at SOCF, 1-2, *In re: Ohio Execution Protocol Litigation*, No. 2:11-cv-1016 (S.D. Ohio); *see also* Jeremy

ing the death penalty, Virginia also did not use expired drugs.¹⁰⁰ Four additional States appear not to use expired drugs in executions: Florida, Georgia, South Dakota, and Tennessee.¹⁰¹ In addition, 23 states and 5 territories do not have capital punishment laws at all.

Claim 2. Attempting to Execute Mr. Murphy With Fire-Blighted, Expired Pentobarbital Violates the Texas Constitution's Prohibition on Cruel or Unusual Punishment.

96. Mr. Murphy realleges and incorporates by reference the allegations contained in the above paragraphs.

Pelzer, *Ohio prison officials seek to destroy expired execution drugs amid fears they might be used*, Cleveland.com (Sep. 13, 2019), <https://www.cleveland.com/open/2019/09/ohio-prison-officials-seek-to-destroy-expired-execution-drugs-amid-fears-they-might-be-used.html#:~:text=In%20a%20legal%20brief%20with,Ohio%20Correctional%20Facility%20in%20Lucasville>; South Carolina: Mot. to Lift Abeyance, Dismiss Appeal, and Vacate Circuit Ct. Order, 1-2, *Owens v. Stirling*, No. 2011-001280 (S.C.).

¹⁰⁰ *Texas Prison Officials Send Virginia Sought-After Drug for Execution This Week*, N.Y. Times (Sep. 26, 2015), <https://www.nytimes.com/2015/09/27/us/texas-prison-officials-send-virginia-sought-after-drug-for-execution-this-week.html>.

¹⁰¹ Florida: Wilson Sayre, *Florida Uses New Drug to Execute First Inmate in More Than a Year*, WUSF Pub. Media (Aug. 24, 2017), <https://wusfnews.wusf.usf.edu/2017-08-24/florida-uses-new-drug-to-execute-first-inmate-in-more-than-a-year>; Georgia: Rhonda Cook, *Expired drugs led to cancellation of execution by lethal injection*, Atlanta Journal-Constitution (Aug. 2, 2012), <https://www.ajc.com/news/local/expired-drugs-led-cancellation-execution-lethal-injection/7W9o5JQYriyQnNG8Yt9HQI/>; South Dakota: *Judge to hear arguments on SD's single execution drug*, Mitchell Republic (Sep. 28, 2012), <https://www.mitchellrepublic.com/news/judge-to-hear-arguments-on-sds-single-execution-drug>; Tennessee: *Tennessee Lethal Injection Protocol Investigation: Report and Findings*, Butler Snow (Dec. 13, 2022), <https://ewscripps.brightspotcdn.com/a2/d3/b79f5e7e497e83cb01d884c62bf7/tn-lethal-injection-protocol-investigation-report-and-findings-12-13-22.pdf>. Counsel could locate no information for Missouri, Alabama, Oklahoma, or the Federal Government.

97. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.” Tex. Const., Art. 1 § 13.

98. The Texas Constitution’s prohibition on “cruel *or* unusual punishment” is facially broader than the Eighth Amendment, because it is violated by cruel or unusual punishments, and not necessarily both.¹⁰² Texas has an unbroken history of employing the disjunctive “cruel *or* unusual” since the 1836 Constitution of the Republic of Texas. Delegates to the 1845 constitutional convention rejected a proposal to conform the language to that of the Eighth Amendment. This reflects the view of Texas’s constitutional framers, who “generally favored greater constitutional guarantees than those provided by the United States Bill of Rights.”¹⁰³

99. In addition, Article I, § 13 of the Texas Constitution should be interpreted in light of the 1856 enactment of Article 43.24.¹⁰⁴ Article 43.24 of the Texas Code of Criminal Procedure states: “No torture, or ill treatment, or unnecessary

¹⁰² The Court of Criminal Appeals has noted that “we have [found] no significance in the difference between the Eighth Amendment’s ‘cruel and unusual’ phrasing and the ‘cruel or unusual’ phrasing of Art. I, Sec. 13 of the Texas Constitution. *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997). But the case on which *Cantu* relied, *Anderson v. State*, 932 S.W.2d 502, 509-10 (Tex. Crim. App. 1996), specifically declined to make such a holding: “[w]e do not decide whether the state constitutional provision is broader than its counterpart.” *Id.* at 509. In fact, *Anderson* assumed that the Texas Constitution’s disjunctive phrase would have significance. “Assuming that the word ‘or’ requires a disjunctive reading of the words ‘cruel’ and ‘unusual,’” the CCA found “that the death penalty is neither.” *Id.*

¹⁰³ James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 St. Mary’s L.J. 399, 402 (1993).

¹⁰⁴ *Jones v. Williams*, 45 S.W.2d 130, 133 (Tex. 1931) (reasoning that judicial interpretation of constitutional provision may be guided by legislative action contemporaneous with constitutional provision).

pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.” Article 43.24 – a bedrock protection for the condemned since the earliest days of the State of Texas¹⁰⁵ – mirrors the constitution’s language on “infliction” of pain, and uses a common synonym for cruel—“ill”—in defining the prohibited treatment. But Article 43.24 imposes a lower burden on an applicant than the Eighth Amendment does; under the Article, a person only needs to demonstrate “unnecessary pain” – not pain “superadded well beyond” what is necessary. Neither does Article 43.24 require the applicant to show that the level of pain is “unnecessary” by comparison to a known and available alternative method.

100. Courts that “separately examine whether the sentence is cruel and whether it is unusual” engage in a comparison of “the gravity of the offense to the severity of the sentence.”¹⁰⁶ They separately “consider whether a ‘consensus exists among the states’ that the sentence offends evolving standards of decency.”¹⁰⁷

101. The use of expired and/or fire damaged pentobarbital to execute Mr. Murphy is cruel *or* unusual, based on the facts alleged above and the reasons stated in Claim 1. The use of expired and fire damaged drugs constitutes an unusual punishment. As previously stated, there is a broad consensus among States against us-

¹⁰⁵ See 1856 Code of Crim. P., 6th Leg., R.S., title VI, art. 713, 1856 Tex.Crim. Stat. at 140.

¹⁰⁶ *State v. Juarez*, 837 N.W.2d 473, 482 (Minn. 2013). See also *Anderson*, 932 S.W.2d at 509.

¹⁰⁷ *Juarez*, 837 N.W.2d at 482 (quoting *State v. Mitchell*, 577 N.W.2d 481, 490 (Minn. 1998)).

ing expired drugs. And it is patently unusual to use a drug after it has been subjected to the damaging conditions of a building fire.

Claim 3. Attempting to Execute Mr. Murphy With Fire-Blighted, Expired Pentobarbital Violates Texas Code of Criminal Procedure, Article 43.24.

102. Mr. Murphy realleges and incorporates by reference the allegations contained in the above paragraphs.

103. Article 43.24 of the Texas Code of Criminal Procedure states “No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.”

104. As stated above and incorporated here, Article 43.24 imposes a lower burden on an applicant than the Eighth Amendment “cruel and unusual punishments” clause.

105. The use of expired and/or fire damaged pentobarbital inflicts torture, unnecessary pain, and ill treatment on Mr. Murphy.

Claim 4. Texas Pharmacy Act: Respondents Are Without Legal Authority to Execute Mr. Murphy with Fire Damaged Pentobarbital

106. Mr. Murphy realleges and incorporates by reference the allegations contained in the above paragraphs.

107. The Texas Pharmacy Act recognizes the “matter of public interest and concern” that “only qualified persons be permitted to engage in the practice of

pharmacy” and that such practice receive the “confidence of the public.”¹⁰⁸ To that end, the Pharmacy Act “control[s] and regulat[es] the practice of pharmacy.”¹⁰⁹ This Act applies equally to incarcerated prisoners within TDCJ.

108. Regulations implemented pursuant to the Pharmacy Act specify that “[a]ny drug which has been exposed to excessive heat, smoke, or other conditions which may have caused deterioration shall not be dispensed.”¹¹⁰

109. TDCJ pentobarbital was exposed to excessive heat, smoke, and moisture during the fire at the Administrative Building on August 25, 2023.

110. Mr. Murphy seeks to enjoin Respondents from administering pentobarbital to Mr. Murphy in violation of the Pharmacy Act and related regulations.

Claim 5. Texas Pharmacy Act: Respondents Are Without Legal Authority to Procure, Possess, Distribute, or Administer Expired Pentobarbital

111. Petitioner realleges and incorporates by reference the allegations contained in the above paragraphs.

112. Under the Pharmacy Act, compounding must be done in compliance with “applicable United States Pharmacopoeia guidelines, including the testing re-

¹⁰⁸ Tex. Occ. Code § 551.002(b).

¹⁰⁹ *Id.* at § 551.002(c)(1).

¹¹⁰ 22 Tex. Admin. Code § 291.3(g)(2)(A).

quirements.”¹¹¹ To compound and deliver a compounded preparation, a pharmacy must comply with applicable USP standards.¹¹²

113. Consistent with the USP, a drug “shall not be stored or transported or begin to be administered to a patient” after its BUD has passed.¹¹³ The BUD “shall be determined as outlined in Chapter 797” of the USP.¹¹⁴

114. According to the BUD set by Chapter 797 of the USP, every vial of TDCJ’s compounded pentobarbital expired between 20 and 43 months ago.

115. The Pharmacy Act accordingly prohibits use of all of TDCJ’s pentobarbital. Respondents’ procurement, possession, distribution, and administration of the pentobarbital in their possession to Mr. Murphy violates the Texas Pharmacy Act. Respondents are thus acting – and plan to act – without legal authority.

116. Mr. Murphy seeks to prevent Respondents from carrying out his execution using expired pentobarbital in violation of the Texas Pharmacy Act.

Claim 6. Texas Pharmacy Act: Respondents Acted and Continue to Act Without Legal Authority When Compounding, Procuring, Possessing, Distributing, and Administering Pentobarbital

117. Petitioner realleges and incorporates by reference the allegations contained in the above paragraphs.

¹¹¹ Tex. Occ. Code § 562.153(2).

¹¹² 22 Tex. Admin. Code § 291.133(f)(1)(D)(ii).

¹¹³ 22 Tex. Admin. Code § 291.133(b)(9).

¹¹⁴ 22 Tex. Admin. Code § 291.133(d)(9)(A)(iii).

118. The Pharmacy Act permits a pharmacy to “dispense and deliver a reasonable quantity of a compounded drug to a practitioner for office use by the practitioner.”¹¹⁵ “Reasonable quantity” means an amount that “does not exceed the amount a practitioner anticipates may be used in the practitioner’s office before the expiration date of the drug.”¹¹⁶

119. Except in limited circumstances, only licensed pharmacists may legally dispense, distribute, or transfer controlled drugs from one person to another.¹¹⁷

120. Unless incident to research, teaching, or chemical analysis, compounding must be authorized by a prescription from a medical practitioner.¹¹⁸

121. It is permissible to compound a drug that is commercially available, such as pentobarbital, only if three conditions are satisfied¹¹⁹:

1. the commercial product is not reasonably available from normal distribution channels in a timely manner to meet a patient’s needs;
2. the pharmacy maintains documentation that the product is not reasonably available due to a drug shortage or unavailability from the manufacturer¹²⁰; and

¹¹⁵ Tex. Occ. Code § 562.152.

¹¹⁶ Tex. Occ. Code § 562.151(3)(A).

¹¹⁷ Tex. Occ. Code §§ 558.001(c), 551.004.

¹¹⁸ Tex. Occ. Code § 551.003(9); *see also* 22 Tex. Admin. Code § 291.133(d)(1)(A).

¹¹⁹ The ensuing paragraphs paraphrase the requirements of 22 Tex. Admin. Code § 291.133(d)(1)(C).

¹²⁰ The unavailability of the commercially available drug must be documented prior to compounding, including, “maintaining a copy of the wholesaler’s notification showing back-ordered, discontinued, or out-of-stock items.” 22 Tex. Admin. Code § 291.133(d)(1)(D).

3. the prescribing practitioner has requested that the drug be compounded (in conformity with additional statutory requirements).

122. Because they do not comply with any of the requirements above, Respondents act without legal authority when compounding, procuring, possessing, distributing, and administering compounded pentobarbital – without a prescription issued by a practitioner – for Mr. Murphy’s execution.

123. Respondents further act without legal authority when they:

- a. compound, procure, possess, distribute, and administer compounded pentobarbital that was not subject to the standards and tests required by the USP;
- b. compound and obtain pentobarbital in an amount in excess of what could reasonably be administered prior to its BUD, as set by Chapter 797 of the USP;
- c. compound and obtain pentobarbital that is essentially a copy of FDA-approved pentobarbital without (a) establishing the FDA-approved version is not commercially available, and (b) providing a prescription documenting a specific need for the compounded version of the drug.

124. Therefore, Respondents’ compounding, procurement, possession, distribution, and future administration of the pentobarbital in their possession to Mr. Murphy violates the Texas Pharmacy Act.

125. Mr. Murphy seeks to enjoin Respondents from administering pentobarbital to him in violation of the Texas Pharmacy Act.

Claim 7. Texas Controlled Substances Act: Respondents Do Not Have Legal Authority to Dispense or Administer Pentobarbital to Mr. Murphy

126. Petitioner realleges and incorporates by reference the allegations contained in the above paragraphs.

127. Pentobarbital is a Schedule II controlled substance.¹²¹

128. The Texas Controlled Substances Act (“CSA”) provides that, other than in an emergency, a person “may not dispense or administer a controlled substance without an electronic prescription.”¹²² The CSA further requires that a prescription for a controlled substance issue from a “practitioner”¹²³ in the normal course of medical practice.¹²⁴ This Act applies equally to incarcerated prisoners within TDCJ.

¹²¹ Tex. Health & Safety Code § 481.032; *Schedule of Controlled Substances*, 45 Tex. Reg. 2249 (March 27, 2020).

¹²² Tex. Health & Safety Code § 481.074(b).

¹²³ In relevant part, the CSA defines a “practitioner” as:

- (A) a physician, dentist, veterinarian, podiatrist, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, analyze, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state;
- (B) a pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state,
- ...
- (D) an advanced practice registered nurse or physician assistant to whom a physician has delegated the authority to prescribe or order a drug or device.

Tex. Health & Safety Code § 481.002(39).

¹²⁴ See Tex. Health & Safety Code § 481.071(a).

129. A prescription for a Schedule II drug must contain the date the prescription issued, the substance and quantity prescribed, the intended use, the practitioner's name, and the name, address, and date of birth of the person for whom the substance is prescribed.¹²⁵

130. The CSA also prohibits a pharmacist from dispensing a controlled substance if the pharmacist "knows or should have known that the prescription was issued without a valid patient-practitioner relationship" or on any occasion "except under a valid prescription and in the course of professional practice."¹²⁶

131. Although the CSA contains exemptions, none apply to TDCJ's acquiring, possessing, distributing, dispensing, or administering pentobarbital in connection with executions of people.¹²⁷

132. TDCJ does not have a valid prescription to dispense or administer pentobarbital, a Schedule II controlled substance, to Mr. Murphy. Such a prescription is required by law.¹²⁸

¹²⁵ Tex. Health & Safety Code § 481.075(e)(1).

¹²⁶ Tex. Health & Safety Code § 481.074(a).

¹²⁷ See, e.g., Tex. Health & Safety Code § 481.061, .062, .065. The CSA explicitly authorizes animal control and humane society personnel to possess pentobarbital under certain circumstances for "the purpose of destroying injured, sick, homeless, or unwanted animals." Tex. Health & Safety Code § 481.111(b). No analogous provision exists authorizing TDCJ to possess pentobarbital for use in executions.

¹²⁸ Tex. Health & Safety Code § 481.074(b).

133. The pharmacy that provides pentobarbital to TDCJ knows or should have known that no valid prescription exists. The pharmacy is therefore prohibited from dispensing pentobarbital to TDCJ Respondents under governing law.¹²⁹

134. Mr. Murphy seeks to enjoin Respondents from dispensing and/or administering pentobarbital to him without a prescription in violation of the Texas Controlled Substances Act.

Claim 8. Texas Food, Drug, and Cosmetic Act: Respondents Do Not Have Legal Authority to Dispense or Administer Pentobarbital to Mr. Murphy

135. Petitioner realleges and incorporates by reference the allegations contained in the above paragraphs.

136. The Texas Food, Drug, and Cosmetic Act likewise requires the issuance of a prescription in order to dispense any drug for which the federal Food, Drug, and Cosmetic Act (“FDCA”) requires a prescription.¹³⁰ Under the FDCA, a prescription is required to dispense pentobarbital.¹³¹ Such a prescription is thus required by state law as well.¹³² This Act applies equally to incarcerated prisoners within TDCJ.

¹²⁹ Tex. Health & Safety Code § 481.074(a).

¹³⁰ Tex. Health & Safety Code § 431.113(c)(1).

¹³¹ 21 U.S.C. § 353(b)(1).

¹³² Tex. Health & Safety Code § 431.113(c)(1).

137. TDCJ does not have a valid prescription to dispense or administer pentobarbital, a Schedule II controlled substance, to Mr. Murphy.

138. Mr. Murphy seeks to enjoin Respondents from dispensing and/or administering pentobarbital to him without a prescription in violation of the Texas Food, Drug, and Cosmetic Act.

Claim 9. Texas Penal Code: Respondents Do Not Have Legal Authority to Provide or Administer Pentobarbital to Mr. Murphy

139. Petitioners reallege and incorporate by reference the allegations contained in the above paragraphs.

140. Under Texas Penal Code § 38.11(a)(1), it is an offense for any person to “provide” (or to possess with intent to provide) a controlled substance “to a person in the custody of a correctional facility or civil commitment facility, except on the prescription of a practitioner.” The Penal Code uses the same definition of “practitioner” as the Controlled Substances Act.¹³³ The Penal Code applies to all persons within the State of Texas, including Respondents.

141. Respondents are in possession of pentobarbital, a controlled substance, and intend to administer it to Mr. Murphy.

142. Respondents do not have a prescription related to such administration and, therefore, are acting in violation of Texas Penal Code § 38.11(a)(1) and without legal authority.

¹³³ See Tex. Penal Code § 38.11(f)(1) (citing Tex. Health & Safety Code § 481.002).

143. Mr. Murphy seeks to enjoin Respondents from dispensing and/or administering pentobarbital to him without a prescription in violation of the Texas Penal Code.

Claim 10. Eighth and Fourteenth Amendments of the U.S. Constitution: TDCJ's Violation of State Laws Protecting Him from Unnecessary Pain Violates the Due Process Clause, the Eighth Amendment, and the Equal Protection Clause.

144. Mr. Murphy realleges and incorporates by reference the allegations contained in the above paragraphs.

145. State laws regulating the procurement, prescription, selection, and administration of drugs, like the Federal drug law, have the “core” legislative purpose to ensure that a “drug” is “safe and effective for its intended use.”¹³⁴ By violating nearly every such statute on the books, Respondents also violate Mr. Murphy’s rights under the Due Process Clause and the Eighth Amendment.

146. Mr. Murphy has a right to life that may not be extinguished without due process, *i.e.* a process compliant with the “law of the land.”¹³⁵ Respondents’ knowing violation of state law, as alleged above, does just that.

147. In addition, Respondents’ use of fire-damaged and/or expired drugs arbitrarily deprives Mr. Murphy of a state-created liberty interest under Article

¹³⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

¹³⁵ See *Hurtado v. People of California*, 110 U.S. 516, 540-541 (1884) (equating “by the law of the land” with “due process of law”); *Walker v. Sauvinet*, 92 U.S. (2 Otto) 90, 93 (1875) (“Due process of law is process due according to the law of the land.”).

43.24;¹³⁶ and their refusal to provide notice or stability testing of the substances they intend to use in his execution deprives him of a fair procedure to secure that liberty interest.

148. Furthermore, Respondents' deliberate use of disparate practices between death-sentenced and other-sentenced Texas prisoners violates Mr. Murphy's right to equal protection of law. Death-sentenced and other-sentenced Texas prisoners are similarly-situated in terms of their need for the safety-net created by state pharmacy and controlled-substance laws; yet Respondents arbitrarily exempt death-sentenced prisoners from all of those provisions when it comes time to execute them. There is no rational basis for Respondents to do so.

PRAYER FOR RELIEF

149. Mr. Murphy prays that this Court:

- Issue the writ;
- Grant a temporary injunction of Respondents' use of drugs affected by the August 25, 2023 Huntsville Unit fire in his imminent execution;
- Grant a temporary injunction of Respondents' use of expired drugs in his imminent execution;
- Compel immediate disclosure/discovery of the documents Respondents have refused to provide to his counsel regarding the effects of the

¹³⁶ Article 43.24 confers on condemned prisoners a liberty interest to be free from the infliction of torture, unnecessary pain, and ill treatment.

August 28, 2023 Huntsville Unit fire, or alternatively submission to the Court for in camera inspection;

- Hold an evidentiary hearing;
- Find Respondents' use of expired drugs and drugs affected by the August 25, 2023 Huntsville Unit fire violates his rights, and enjoin the use of such drugs in his execution; and
- Grant such other relief as law and justice require.

Respectfully submitted,



Catherine Clare Bernhard
P.O. Box 506
Seagoville, Texas 75159
972-294-7262
fax – 972-421-1604
cbernhard@sbcglobal.net
State Bar No. 02216575

Counsel for Jedidiah Murphy

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Catherine Clare Bernhard, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.
2. I am the duly authorized attorney for Jedidiah Murphy, having the authority to prepare and to verify Mr. Murphy's Application for Writ of Habeas Corpus. This Application is presented with his knowing and voluntary consent.
3. I have prepared and have read the foregoing Application, and I believe all the allegations therein to be true to the best of my knowledge.

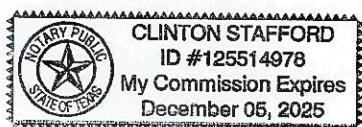
Signed under penalty of perjury.



Catherine Clare Bernhard

STATE OF TEXAS
COUNTY OF DALLAS

SUBSCRIBED AND SWORN BEFORE ME, the undersigned Notary Public, on this the 27th day of September, 2023.



Clinton Stafford
Notary Public in and for the
State of Texas.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the State by service through the court's electronic filing system to ali.nasser@oag.texas.gov in on September 27, 2023.



Catherine Clare Bernhard

EXHIBIT 1

Cause No. F00-02424-M

STATE OF TEXAS

v.

JEDIDIAH MURPHY

§ IN THE 194TH DISTRICT COURT
§ OF
§ DALLAS COUNTY, TEXAS**EXECUTION ORDER**

You, JEDIDIAH MURPHY, were indicted by the Grand Jury of Dallas County, Texas, and charged with the offense of capital murder in cause number F00-02424-NM. A jury in this Court returned a verdict finding you guilty of the offense of capital murder on June 11, 2001, in cause number F00-02424-NM. On June 30, 2001, the same jury in this Court returned answers to the special issues, submitted to the jury at punishment pursuant to Article 37.071 of the Texas Code of Criminal Procedure, and this Court, in accordance with the jury's findings at punishment, assessed your punishment at death. The judgment of this Court was reviewed by the Texas Court of Criminal Appeals on direct appeal, and it was affirmed by that court on June 25, 2003, with mandate issued on September 10, 2003. Subsequently, on March 25, 2009, the Court of Criminal Appeals denied your initial application for writ of habeas corpus. The Court of Criminal Appeals also dismissed your subsequent application for writ of habeas corpus on March 21, 2012. Thereafter, the District Court for the Northern District of Texas, Dallas Division, denied your federal petition for writ of habeas corpus on January 23, 2017, and the United States Court of Appeals for the Fifth Circuit granted your application for a Certificate of Appealability on April 20, 2018. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on August 24, 2018. Afterwards, the United States Supreme Court denied your petition for writ of certiorari on February 25, 2019. This Court now proceeds with the judgment and sentence in your case and now enters the following order.

IT IS HEREBY ORDERED by this Court that you, JEDIDIAH MURPHY, having been adjudged guilty of capital murder and having been assessed punishment at death, in accordance with the findings of the jury and the judgment of this Court, shall at some time after the hour of 6:00 p.m. on the 10th day of October, 2023, be put to death by an executioner designated by the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, who shall cause a substance or substances in a lethal quantity to be intravenously injected into your body sufficient to cause your death and until your death, such execution procedure to be determined and supervised by the said Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.

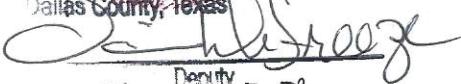
It is ORDERED that the Clerk of this Court shall issue a death warrant, in accordance with this sentence, to the Director of the Correctional Institutions

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Felicia Pitre, District Clerk of Dallas County, Texas, do hereby certify that the foregoing is a true and correct copy as the same appears on record now on file in my office.

Witness my official hand and seal of office, this SEP 26 2009.

FELICIA PITRE, DISTRICT CLERK
Dallas County, Texas


Tammie DeFreeze
Dwight

Division of the Texas Department of Criminal Justice, and shall deliver such warrant to the Sheriff of Dallas County, Texas to be delivered by him to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice together with the defendant, JEDIDIAH MURPHY, if not previously delivered.

The Defendant, JEDIDIAH MURPHY, is hereby remanded to the custody of the Sheriff of Dallas County, Texas, to await transfer to Huntsville, Texas, if not previously delivered, and the execution of this sentence of death.

ENTERED THIS 8th day of May, 2023.


Honorable Ernest White
Presiding Judge
194th District Court
Dallas County, Texas

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Felicia Pitre, District Clerk of
Dallas County, Texas, do hereby certify
that the foregoing is a true and correct
copy as the same appears on record now
on file in my office.

Witness my official hand and seal of
office, this SEP 26, 2022.

FELICIA PITRE, DISTRICT CLERK
Dallas County, Texas

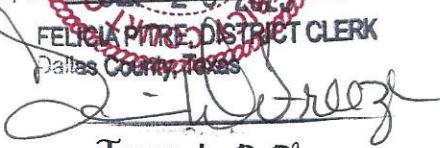

Tammie Defreeze

EXHIBIT 2

DEATH WARRANT

Cause No. F00-02424-M

STATE OF TEXAS

§ IN THE 194TH DISTRICT COURT

v.

§ OF

JEDIDIAH MURPHY

§ DALLAS COUNTY, TEXAS

**TO THE DIRECTOR OF THE CORRECTIONAL INSTITUTIONS DIVISION
OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE AND TO THE
SHERIFF OF DALLAS COUNTY, TEXAS:**

On the 11th day of June 2001, the above-named defendant, in the above-styled and numbered cause, was convicted of the offense of capital murder. On the 30th day of June 2001, the Court sentenced the above-named defendant to death in accordance with the findings of the jury, pursuant to the Texas Code of Criminal Procedure.

The Court, having received the Court of Criminal Appeals's mandate affirming the above-named defendant's conviction for capital murder and having received notice of the Court of Criminal Appeals's denial of the defendant's initial application for writ of habeas corpus, sentenced the above-named defendant to death for the offense of capital murder and ORDERS that the execution be carried out on Tuesday, the 10th day of October 2023, at any time after the hour of 6:00 p.m. at the Correctional Institutions Division of the Texas Department of Criminal Justice at Huntsville, Texas.

The Sheriff of Dallas County, Texas, is hereby commanded to transport the defendant to the Correctional Institutions Division of the Texas Department of Criminal Justice and deliver the defendant, if not previously delivered, and this warrant to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice for the purpose of executing this warrant, and to take from the Director the proper receipt for the defendant, if not previously delivered, and the sheriff will return the receipt to the office of the District Clerk of Dallas County, Texas.

The Director of the Correctional Institutions Division of the Texas Department of Criminal Justice is hereby commanded to receive from the Sheriff the defendant, if not previously delivered, and this warrant, and to give his receipt to the Sheriff, and to safely keep the defendant and to execute the sentence of death at any time after the hour of 6:00 p.m. on the day and date specified in paragraph two of this warrant, by causing a substance or substances in a lethal quantity to be intravenously injected into the body of the defendant sufficient to cause death, and the injection of the substance or substances into the body of the defendant to continue

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Felicia Pitre, District Clerk of Dallas County, Texas, do hereby certify that the foregoing is a true and correct copy as the same appears on record now on file in my office.



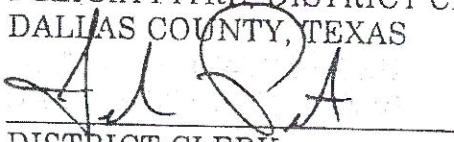
Tammie DeFreeze

until the defendant is deceased, obeying all laws of the State of Texas with reference to such execution.

Witness my hand and seal of the 194th District Court of Dallas County, Texas, at my office in the City of Dallas, Texas, on the 11th day of May, 2023.



FELICIA PITRE, DISTRICT CLERK
DALLAS COUNTY, TEXAS


DISTRICT CLERK

RETURN

The Sheriff of Dallas County, Texas, received this writ on the 11th day of May, 2023, at 12:00 P.M. and executed the same by delivering the within-named defendant, if not previously delivered, in person and this warrant to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice on the 12th day of May, 2023, and by taking his receipts for the said defendant, if not previously delivered, and this warrant, which receipts are hereto attached do here now make my return on this writ this 12th day of May, 2023.

MARIAN BROWN, SHERIFF
DALLAS COUNTY, TEXAS


DEPUTY

On this the 12th day of May, 2023, the following papers related to cause number F00-02424-M, styled THE STATE OF TEXAS v. JEDIDIAH MURPHY, were received from the Sheriff of Dallas County, Texas.

1. One original of DEATH WARRANT to be delivered to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.
2. One certified Execution Order.


Timothy R. Fitzpatrick, Director III
SIGNATURE OF TDCJ OFFICIAL For:

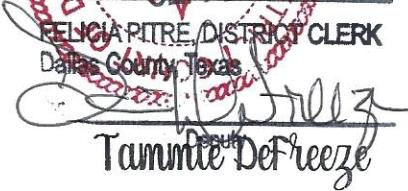
CID Division Director
B. Lumpkin

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Felicia Pitre, District Clerk of Dallas County, Texas, do hereby certify that the foregoing is a true and correct copy as the same appears on record now on file in my office.

Witness my official hand and seal of office, this SEP 7 6 2013.

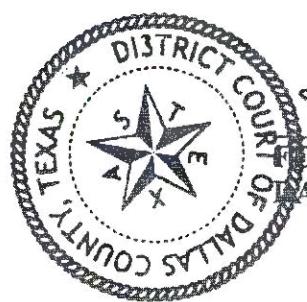

FELICIA PITRE, DISTRICT CLERK
Dallas County, Texas


Tammye Defreeze

You are hereby commanded to carry into execution the order of execution herein in accordance with this Warrant for the execution of the sentence of death, and in accordance with the Judgment and Sentence of this said Court, shown herein, which I certify to be true and correct copies of the original Judgment and Sentence, Mandate, and Order Setting Execution Date now on file on my office and entered on the Minutes of said Court.

HEREIN FAIL NOT, but due return make of this Warrant showing how you have executed the same.

Given under my hand and seal of the 194th Judicial District Court of Dallas County, Texas,
on this 11th day of May, 2023.



FELICIA PITRE, DISTRICT CLERK
DALLAS COUNTY, TEXAS

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Felicia Pitts, District Clerk of Dallas County, Texas, do hereby certify that the foregoing is a true and correct copy as the same appears on record now on file in my office.

Witness my official hand and seal of office, this SEP 26 2023.

FELICIA PITTS, DISTRICT CLERK
Dallas County, Texas

Tammie DeFreeze

EXHIBIT 3



TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

M A N D A T E

THE STATE OF TEXAS,

TO THE 194th JUDICIAL DISTRICT COURT OF DALLAS COUNTY — GREETINGS:

Before our COURT OF CRIMINAL APPEALS, on the 25th day of JUNE, A.D. 2003, the cause upon appeal to revise or reverse your Judgment between:

JEDIDIAH ISAAC MURPHY

VS.

THE STATE OF TEXAS

CCRA NO. 74,145

TRIAL COURT NO. F00-02424-M

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is ORDERED, ADJUDGED AND DECREED by the Court that the judgment be AFFIRMED, in accordance with the Opinion of this Court, and that this Decision be certified below for observance."

Appellant's Motion for Rehearing is DENIED.

WHEREFORE, We command you to observe the Order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE SHARON KELLER,

Presiding Judge of our said COURT OF CRIMINAL APPEALS,

with the Seal thereof annexed, at the City of Austin,

this 10th day of SEPTEMBER, A.D. 2003.

TROY C. BENNETT, JR., Clerk


TROY C. BENNETT, JR., Deputy Clerk
Veronica Arellano

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Felicia Pitts, District Clerk of Dallas County, Texas, do hereby certify that the foregoing is a true and correct copy as the same appears on record now on file in my office.

Witness my official hand and seal of office this SEP 2 0 2023.

FELICIA PITTS, DISTRICT CLERK
Dallas County, Texas


Tammie DeFreeze

THE STATE OF TEXAS

VS.

JEDIDIAH ISAAC MURPHY

IN THE 194TH JUDICIAL DISTRICT
COURT
OF
DALLAS COUNTY, TEXASJUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

JUDGE PRESIDING: HAROLD ENTZ

JULY TERM, A.D., 2001

DATE OF JUDGMENT: 06/30/01

ATTORNEY
FOR STATE: GREG DAVIS/MARY MILLERATTORNEY
FOR DEFENDANT: JANE LITTLE, MICHAEL BYCK & TLE
JENNIFER BALIDOOFFENSE
CONVICTED OF: CAPITAL MURDER

DECREE: A CAPITAL FELONY

DATE OFFENSE COMMITTED: 10/04/00

CHARGING
INSTRUMENT: INDICTMENT

PLEA: NOT GUILTY

JURY VERDICT: GUILTY

FOREMAN: NICHOLE MARIE BRISCOE

PLEA TO ENHANCEMENT
PARAGRAPH(S): N/AFINDINGS ON
ENHANCEMENT: N/AFINDINGS ON
DEADLY WEAPON, THE JURY FINDS THAT DEFENDANT HEREIN USED OR EXHIBITED
BIAS OR PREJUDICE, A DEADLY WEAPON DURING THE COMMISSION OF SAID
OFFENSE TO-WIT: FIREARM.
AND/OR
FAMILY VIOLENCE:PUNISHMENT
ASSESSED BY: JURY - SEE SPECIAL ISSUES ATTACHED HERETO AND
INCORPORATED BY REFERENCE.DATE SENTENCE
IMPOSED: 06/30/01

COSTS: YES

PUNISHMENT AND DEATH
PLACE OFCONFINEMENT: CONFINEMENT IN THE INSTITUTIONAL DIVISION
OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE DATE TO
AND A FINE OF - 0 - COMMENCE: 06/30/01

TIME CREDITED: 101600-063001

RESTITUTION/REPARATION: NO

CONCURRENT UNLESS OTHERWISE SPECIFIED.

PA

VOL. 475 PAGE 106

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Felicia Pitre, District Clerk of
Dallas County, Texas, do hereby certify
that the foregoing is a true and correct
copy as the same appears on record now
on file in my office.

Witness my official hand and seal
this 26 day of SEP, 2005.

FELICIA PITRE, DISTRICT CLERK
Dallas County, Texas

Tammie DeFreeze

ON THIS DAY SET FORTH ABOVE, THE ABOVE STYLED AND NUMBERED CAUSE CAME TO TRIAL. THE STATE OF TEXAS, AND DEFENDANT APPEARED BY AND THROUGH THE ABOVE-NAMED ATTORNEYS AND ANNOUNCED READY FOR TRIAL. DEFENDANT APPEARED IN PERSON IN OPEN COURT. WHERE DEFENDANT WAS NOT REPRESENTED BY COUNSEL, DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED THE RIGHT TO REPRESENTATION BY COUNSEL. WHERE SHOWN ABOVE THAT THE CHARGING INSTRUMENT WAS BY INFORMATION INSTEAD OF INDICTMENT, THE DEFENDANT DID, WITH THE CONSENT AND APPROVAL OF HIS ATTORNEY WAIVE HIS RIGHT TO PROSECUTION BY INDICTMENT AND AGREE TO BE TRIED ON AN INFORMATION. ALL SUCH WAIVERS, AGREEMENTS AND CONSENTS WERE IN WRITING AND FILED IN THE PAPERS OF THIS CAUSE PRIOR TO THE DEFENDANT ENTERING HIS PLEA HEREIN. DEFENDANT IN OPEN COURT WAS DULY ARRAIGNED, AND ENTERED THE ABOVE SHOWN PLEA, WHERE SHOWN ABOVE THAT DEFENDANT ENTERED A PLEA OF GUILTY. DEFENDANT WAS ASMONISHED BY THE COURT OF THE CONSEQUENCES OF THE SAID PLEA AND DEFENDANT PERSISTED IN ENTERING COMPETENT AND SAID PLEA IS FREE AND VOLUNTARY. THE SAID PLEA WAS ACCEPTED BY THE COURT AND IS NOW ENTERED OF RECORD AS THE PLEA HEREIN OF DEFENDANT. THEREUPON A JURY WAS DULY SELECTED, IMPANNELED AND SWORN WHO, HAVING HEARD THE CHARGING INSTRUMENT AS SHOWN ABOVE PRESENTED, AND DEFENDANT'S PLEA THERETO, AND HAVING HEARD THE EVIDENCE SUBMITTED, AND HAVING BEEN DULY CHARGED BY THE COURT AS TO THEIR DUTY TO DETERMINE THE GUILT OR INNOCENCE OF THE DEFENDANT AND AFTER HAVING HEARD THE ARGUMENTS OF COUNSEL RETIRED IN CHARGE OF THE PROPER OFFICER TO CONSIDER OF THEIR VERDICT AND AFTERWARD WERE BROUGHT INTO OPEN COURT, BY THE PROPER OFFICER, DEFENDANT AND HIS COUNSEL BEING PRESENT, AND IN DUE FORM OF LAW RETURNED INTO OPEN COURT THE ABOVE SHOWN VERDICT, WHICH WAS RECEIVED AND ACCEPTED BY THE COURT, AND IS HERE AND NOW ENTERED UPON THE MINUTES OF THE COURT.

AND WHEN SHOWN ABOVE THAT THE CHARGING INSTRUMENT CONTAINS ENHANCEMENT PARAGRAPH(S), WHICH WERE NOT WAIVED OR DISMISSED, THE COURT, AFTER HEARING THE DEFENDANT'S PLEA TO SAID PARAGRAPH(S) AS SET OUT ABOVE AND AFTER HEARING FURTHER EVIDENCE ON THE ISSUE OF PUNISHMENT, THE COURT OR JURY, MAKES ITS FINDING AS SET OUT ABOVE; IF TRUE, THE COURT OR JURY IS OF THE OPINION AND FINDS DEFENDANT HAS BEEN HERETOFORE CONVICTED OF SAID OFFENSE(S) ALLEGED IN THE SAID ENHANCEMENT PARAGRAPH(S) AS MAY BE SHOWN ABOVE.

WHEN IT IS SHOWN ABOVE THE DEFENDANT IS GUILTY OF THE OFFENSE SET FORTH ABOVE, IT IS CONSIDERED BY THE COURT THAT SAID DEFENDANT IS ADJUDGED TO BE GUILTY OF THE OFFENSE SET FORTH ABOVE, AND THAT DEFENDANT COMMITTED THE OFFENSE ON THE DATE SET FORTH ABOVE AS CHARGED IN THE INSTRUMENT SHOWN ABOVE, AND THAT DEFENDANT WAS PREVIOUSLY CONVICTED WHEN SHOWN ABOVE IN THE MANNER ABOVE AND THAT SAID DEFENDANT BE PUNISHED AS HAS BEEN DETERMINED, SAID PUNISHMENT BEING ASSESSED BY THE ABOVE SHOWN ASSESSOR OF PUNISHMENT AS ELECTED IN WRITING BY DEFENDANT, AND BE CONFINED IN THE PLACE OF CONFINEMENT SHOWN ABOVE FOR THE TERM OF TIME SET FORTH ABOVE, AND THAT THE STATE OF TEXAS DO HAVE AND RECOVER OF THE SAID DEFENDANT ALL COSTS IN THIS PROSECUTION EXPENDED INCLUDING ANY FINE SHOWN FOR WHICH LET EXECUTION ISSUE. THE COURT FURTHER MAKES ITS FINDING AS TO DEADLY WEAPON AS SET FORTH ABOVE BASED UPON THE JURY'S VERDICT OR THE FINDINGS OF THE COURT WHEN PUNISHMENT FIXED BY THE COURT. THE COURT MAKES ITS FINDINGS AS TO FAMILY VIOLENCE AND BIAS OR PREJUDICE AS SET FORTH ABOVE.

WHEN IT IS SHOWN ABOVE THAT RESTITUTION HAS BEEN ORDERED BUT THE COURT DETERMINES THAT THE INCLUSION OF THE VICTIM'S NAME AND ADDRESS IN THE JUDGMENT IS NOT IN THE BEST INTEREST OF THE VICTIM, THE PERSON OR AGENCY WHOSE NAME AND ADDRESS IS SET OUT IN THIS JUDGMENT WILL ACCEPT AND FORWARD THE RESTITUTION PAYMENTS TO THE VICTIM.

AND WHEN IT IS SHOWN BELOW THAT PAYMENT OF THE COSTS OF LEGAL SERVICES PROVIDED TO THE DEFENDANT IN THIS CAUSE HAS BEEN ORDERED, THE COURT FINDS THAT THE DEFENDANT HAS THE FINANCIAL RESOURCES TO ENABLE THE DEFENDANT TO OFFSET SAID COSTS IN THE AMOUNT ORDERED.

THEREUPON THE SAID DEFENDANT WAS ASKED BY THE COURT WHETHER HE HAD ANYTHING TO SAY WHY SAID SENTENCE SHOULD NOT BE PRONOUNCED AGAINST HIM, AND HE ANSWERED NOTHING IN BAR THEREOF, AND IT APPEARING TO THE COURT THAT THE DEFENDANT IS MENTALLY COMPETENT AND UNDERSTANDING OF THE PROCEEDINGS.

IT IS THEREFORE, CONSIDERED AND ORDERED BY THE COURT, IN THE PRESENCE OF DEFENDANT, AND HIS ATTORNEY, THAT SAID JUDGMENT AS SET FORTH ABOVE, IS HEREBY IN ALL THINGS APPROVED AND CONFIRMED, AND THAT DEFENDANT, WHO HAS

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Felicia Pitre, District Clerk of Dallas County, Texas, do hereby certify that the foregoing is a true and correct copy as the same appears on record now on file in my office.

Witness my official hand and seal of the
Date, this _____

FELICIA PITRE, DISTRICT CLERK
Dallas County, Texas

Deputy
Tammie DeFreeze

BEEN ADJUDGED GUILTY OF THE ABOVE NAMED OFFENSE, AND WHOSE PUNISHMENT HAS BEEN ASSESSED BY THE COURT OR THE JUDGE AS SHOWN ABOVE, AND WHOSE SAID DEFENDANT BE PUNISHED IN ACCORDANCE WITH THE PUNISHMENT SET FORTH ABOVE, AND THAT DEFENDANT SHALL BE DELIVERED BY THE SHERIFF TO THE DIRECTOR OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, OR OTHER PERSON LEGALLY AUTHORIZED TO RECEIVE SUCH CONVICTS FOR THE PUNISHMENT ASSESSED HEREIN, AND SAID DEFENDANT SHALL BE CONFINED FOR THE ABOVE-NAMED TERM IN ACCORDANCE WITH THE PROVISIONS OF LAW COVERING SUCH PUNISHMENTS. IT IS FURTHER ORDERED THAT THE DEFENDANT PAY THE FINE, COURT COSTS, COSTS AND EXPENSES OF AND RESTITUTION OR REPARATION, AS SET FORTH HEREIN, FOR WHICH LET EXECUTION ISSUE.

DEFENDANT IS HEREBY ORDERED REMANDED TO JAIL UNTIL SAID SHERIFF CAN OBEY THE DIRECTIONS OF THE JUDGMENT.

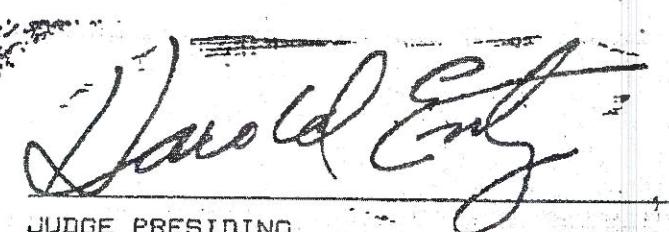
FOLLOWING THE DISPOSITION OF THIS CAUSE THE DEFENDANT'S FINGERPRINT WAS, IN OPEN COURT, PLACED UPON A CERTIFICATE OF FINGERPRINT. SAID CERTIFICATE IS ATTACHED HERETO AND IS INCORPORATED BY REFERENCE AS A PART OF THIS JUDGMENT.

WHEN REQUIRED, A PRESENTENCE INVESTIGATION WAS CONDUCTED IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF LAW.

DEFENDANT EXCEPTS AND GIVES NOTICE OF APPEAL TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS.

COURT COSTS IN THE AMOUNT OF \$242.25

*Immediately upon release, defendant must report in person to the Felony Collections Dept., 2nd fl., Rm. C2-3, Crowley Courts Bldg., Dallas, TX, for payment arrangement of court ordered costs, fines and/or attorney fees.


JUDGE PRESIDING



ness my office and seal this SEP 28 2029
FELICIA PITRE, DISTRICT CLERK
Dallas County, Texas
Deputy
Tammie DeFreeze

EXHIBIT 4

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Correctional Institutions Division

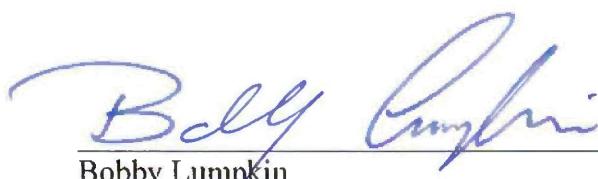


EXECUTION PROCEDURE

April 2021

ADOPTION OF EXECUTION PROCEDURE

In my duties as Division Director of the Correctional Institutions Division, I hereby adopt the attached Execution Procedure for use in the operation of the Texas Department of Criminal Justice Death Row housing units and perimeter functions. This Procedure complies with Texas Board of Criminal Justice Rule §152.51; §§492.013(a), 493.004, Texas Government Code; and Articles 43.14 – 43.20, Texas Code of Criminal Procedure.



Bobby Lumpkin
Director, Correctional Institutions Division

4.21.2021

Date

EXECUTION PROCEDURES

I. Notification of a Scheduled Execution Date

- A. Pursuant to Article 43.15, Texas Code of Criminal Procedure, the clerk of the trial court shall officially notify the Correctional Institutions Division (CID) Director, who shall then notify the Death Row Unit Warden and the Huntsville Unit Warden, of an inmate's scheduled execution date. Once a scheduled execution date is received, the Death Row Unit Warden's office shall notify the unit's Chief of Classification and the Death Row Supervisor.
- B. The Death Row Supervisor shall schedule an interview with the inmate and provide the inmate with the Notification of Execution Date (Form 1). This form provides the inmate with a list of the information that shall be requested from the inmate two (2) weeks before the scheduled execution.
- C. The inmate may be moved to a designated cell. Any keep-on-person (KOP) medication shall be confiscated and administered to the inmate as needed by medical staff on the unit.
- D. Upon the inmate's receipt of the Notification of Execution Date (Form 1), the inmate shall have thirty (30) days to submit a request in writing to the Death Row Unit Warden to have a TDCJ Chaplain or the inmate's spiritual advisor present inside the execution chamber during the inmate's scheduled execution.
- E. The inmate's requested spiritual advisor must be included on the inmate's visitation list and have previously established an ongoing spiritual relationship with the inmate demonstrated by regular communications or in-person visits with the inmate before the inmate's scheduled execution date.
- F. If an inmate requests to have a spiritual advisor present inside the execution chamber during the inmate's scheduled execution, the inmate will provide the Death Row Unit Warden with contact information for the spiritual advisor. Upon receipt of the spiritual advisor's contact information, the Death Row Unit Warden shall contact the spiritual advisor.
 - 1. The spiritual advisor shall have fourteen (14) days from the date of contact with the Death Row Unit Warden to provide credentials to the Death Row Unit Warden verifying the individual's official status as a spiritual advisor. As required in TDCJ Chaplaincy Manual Policy 11.09, "Inmate Ministerial and Spiritual Advisor Visits," the credentials shall be at least one of the following:
 - a. Minister Identification Card supplied by the authorizing denomination or religious group;

- b. License or ordination certificate;
- c. Official letter from an organized religious body or congregation indicating the status of the letter holder as an official representative of the religious body or congregation for all religious functions or for specific prison-related religious functions; or
- d. A current listing as a clergy person in an official listing of ministers and clergy from an organized religious body.

2. The TDCJ will perform a background check, including but not limited to a criminal background check, on the spiritual advisor.
3. If the spiritual advisor is approved to be present inside the execution chamber during the inmate's scheduled execution, the spiritual advisor must satisfactorily complete a two (2) hour, in-person orientation with a staff member of the Rehabilitation Programs Division a minimum of ten (10) days before the inmate's scheduled execution date.
4. If the spiritual advisor is determined to be a security risk, the Huntsville Unit Warden or designee may deny the inmate's request for the spiritual advisor to be present inside the execution chamber during the inmate's scheduled execution.
5. The inmate or spiritual advisor may appeal the denial of the inmate's request to have the spiritual advisor present inside the execution chamber during the inmate's scheduled execution by submitting a request in writing to the CID Director. The decision of the CID Director is final.

II. Preparation of the Execution Summary and Packet

A. Two Weeks (14 days) Before the Scheduled Execution

1. The Death Row Unit is responsible for completion of the Execution Packet which shall include:
 - a. Execution Summary;
 - b. Religious Orientation Statement;
 - c. Current Visitation List;
 - d. Execution Watch Notification;
 - e. Execution Watch Log;
 - f. Inmate Request for Withdrawal (I-25);
 - g. Inmate Property Documentation (PROP-05 and PROP-08); and
 - h. Other documents as necessary.

2. The Execution Summary (Form 2) and the Religious Orientation Statement (Form 3) shall be forwarded to the Death Row Supervisor or the Death Row Unit Warden's designee for completion. A copy of the inmate's current visitation list and recent commissary activity shall also be provided.
3. The Death Row Supervisor shall arrange an interview with the inmate to gather the information necessary to complete the Execution Summary and Religious Orientation Statement.
4. The Execution Summary must be completed and returned by the Death Row Supervisor or the Death Row Unit Warden's designee in sufficient time to be forwarded to the CID Director's Office by noon of the fourteenth (14th) day. After approval by the CID Director, the Execution Summary shall be forwarded to the Death Row Unit Chaplain, the Huntsville Unit Warden's Office, and the Communications Department.
5. If the inmate wishes to change the names of the inmate's witnesses, and it is less than fourteen (14) days before the scheduled execution date, the inmate shall submit a request in writing to the CID Director, through the Death Row Unit Warden, who shall approve or disapprove the changes.
6. While completing the Religious Orientation Statement, staff shall confirm if the inmate still requests the presence of a TDCJ Chaplain or the inmate's approved spiritual advisor in the execution chamber during the inmate's scheduled execution.
7. An inmate may request to have the inmate's body donated to the Texas State Anatomical Board for medical education and research. The appropriate paperwork shall be supplied to the inmate upon request.

B. One Week (7 days) Before the Scheduled Execution

1. The Death Row Supervisor or the Death Row Unit Warden's designee shall notify staff (Form 4) to begin the Execution Watch Log (Form 5).
2. The Execution Watch Log shall begin at 6:00 a.m. Central Time seven (7) days before the inmate's scheduled execution. The seven (7) day timeframe shall not include the day of the inmate's scheduled execution. The inmate shall be observed, logging the inmate's activities every 30 minutes for the first six (6) days and every 15 minutes for the remaining 36 hours.
3. The Communications Department may request information from the Execution Watch Log on the day of the inmate's scheduled execution.

4. The original Execution Packet and the inmate's medical file shall be sent with the inmate in the transport vehicle to the Huntsville Unit or the Goree Unit for a female inmate.
 - a. The Death Row Unit Warden shall maintain a copy of the Execution Packet on the Death Row Unit.
 - b. If there are any changes necessary to the Execution Packet, staff shall notify the CID Director's Office and the Huntsville Unit Warden's Office.

C. The Day of the Scheduled Execution

1. On the morning of the day of the scheduled execution, before final visitation, all the inmate's personal property shall be packed and inventoried. The property officer shall complete an "Inmate Property Inventory" (PROP-05) detailing each item of the inmate's property. The property officer shall also complete a "Disposition of Confiscated Inmate Property" (PROP-08) indicating the inmate's choice of disposition of personal property.
 - a. If disposition is to be made from the Huntsville Unit, a copy of the property forms shall be maintained by the Death Row Unit Property Officer, and the original property forms shall be forwarded to the Huntsville Unit with the inmate's property.
 - b. If disposition is to be made from the Death Row Unit, a copy of the property forms shall be placed in the Execution Packet, and the original forms shall be maintained on the Death Row Unit through the completion of the disposition process.
 - c. The Mountain View Unit Warden shall ensure that a female inmate brings personal hygiene and gender-specific items to the Huntsville Unit as appropriate.
2. Designated staff shall obtain the inmate's current trust fund balance and prepare the Inmate Request for Withdrawal (I-25) for completion by the inmate.
 - a. The following statement shall be written or typed on the reverse side of the I-25 form, "In the event of my execution, please distribute the balance of my Inmate Trust Fund account as directed by this Request for Withdrawal." The inmate's name, number, signature, thumbprint, and the date and time of the inmate's signature shall be included below this statement. Two (2) employees' names and signatures shall be printed and signed below the inmate's signature

as witnesses that the inmate authorized the form.

- b. The I-25 form shall be delivered to the Commissary and Trust Fund Department for processing by 10:00 a.m. Central Time the next business day following the completed execution.
3. The inmate shall be permitted visitation with individuals designated on the inmate's approved visitation list on the morning of the day of the scheduled execution.
 - a. Exceptions may be made to schedule as many visits as possible before the inmate is transported to the Huntsville Unit. These visits are considered "Special Visits."
 - b. Special visits (spiritual advisor, attorney(s), and individuals not on the inmate's approved visitation list) shall be approved by the Death Row or Goree Unit Warden or designee. No changes shall be made to the inmate's approved visitation list.
 - c. No media visits shall be allowed at the Goree Unit.
4. When appropriate, a male inmate shall be escorted to a holding cell at the Polunsky Unit. The Execution Transport Log for Male Inmates (Form 6) shall be initiated, and the inmate shall be prepared for transport to the Huntsville Unit. The Execution Watch Log shall be discontinued when the Execution Transport Log for Male Inmates is initiated.
5. A female inmate may be transported to the Goree Unit before the day of the inmate's scheduled execution. The Execution Transport Log for Female Inmates (Form 7) shall be initiated at the Mountain View Unit. The Goree Unit staff will initiate the Execution Watch Log upon arrival at the Goree Unit, permit visitation as appropriate, and transport the female inmate to the Huntsville Unit. The Execution Watch Log shall be discontinued, and the Execution Transport Log for Female Inmates shall resume when the female inmate departs the Goree Unit.
6. Any transportation arrangements for the inmate between units shall be known only to the Wardens involved, the CID Director, as well as those persons they designate as having a need to know. No public announcement shall be made concerning the exact time, method, or route of transfer.
7. Upon arrival at the Huntsville Unit, the inmate shall be removed from the transport vehicle and escorted by Huntsville Unit security staff into the execution holding area. The CID Director's Office and the Communications Department shall be notified immediately after the inmate arrives at the Huntsville Unit.

8. The Execution Watch Log shall immediately resume when the inmate enters the pre-execution holding area.
9. The inmate's restraints shall be removed, and the inmate shall be fingerprinted and strip-searched.
10. The inmate shall be placed in a holding cell and issued a clean set of TDCJ clothing.
11. The Huntsville Unit Warden shall be notified after the inmate has been secured in the holding cell. The Huntsville Unit Warden or designee shall interview the inmate and review the information in the Execution Packet.
12. The inmate shall be permitted visitation with a TDCJ Chaplain(s), the inmate's approved spiritual advisor, and the inmate's attorney(s) on the day of the scheduled execution at the Huntsville Unit. The Huntsville Unit Warden must approve all visits.
13. There shall be no family or media visits allowed at the Huntsville Unit.

III. Drug Team Qualifications and Training

- A. The drug team shall have at least one medically trained individual. Each medically trained individual shall at least be certified or licensed as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military corpsman. Each medically trained individual shall have one year of professional experience before participating as part of the drug team, shall retain current licensure, and shall fulfill continuing education requirements commensurate with licensure. Neither medically trained individuals nor any other members of the drug team shall be identified.
- B. Each new member of the drug team shall receive training before participating in an execution without direct supervision. The training shall consist of following the drug team through at least two (2) executions, receiving step-by-step instruction from existing team members. The new team member will then participate in at least two (2) executions under the direct supervision of existing team members. Thereafter, the new team member may participate in executions without the direct supervision of existing team members.
- C. The Huntsville Unit Warden shall review annually the training and current licensure, as appropriate, of each drug team member to ensure compliance with the required qualifications and training.

IV. Pre-execution Procedures

- A. The Huntsville Unit Warden's Office shall serve as the communication command post, and entry to the office area shall be restricted.
- B. Inventory and Equipment Check
 - 1. Designated Huntsville Unit staff are responsible for ensuring the purchase, storage, and control of all chemicals used in lethal injection executions for the State of Texas.
 - 2. The drug team shall obtain all equipment and supplies necessary to perform the lethal injection from the designated storage area.
 - 3. An inventory and equipment check shall be conducted.
 - 4. Expiration or beyond use dates of all applicable items are to be checked on each individual item. Outdated items shall be replaced immediately.
- C. Attorney visits shall occur between 3:00 and 4:00 p.m. Central Time, and spiritual advisor visits shall occur between 3:00 and 5:00 p.m. Central Time. The attorney and spiritual advisor may not meet with the inmate at the same time. Exceptions may be granted under unusual circumstances and must be approved by the Huntsville Unit Warden.
 - 1. The inmate's attorney or the inmate's approved spiritual advisor must arrive at the Huntsville Unit no later than 2:30 p.m. Central Time on the day of the scheduled execution to participate in an attorney or spiritual advisor visit with the inmate.
 - 2. The inmate's approved spiritual advisor must arrive at the Huntsville Unit no later than 5:00 p.m. Central Time on the day of the scheduled execution to accompany the inmate in the execution chamber.
 - 3. The failure of an inmate's approved spiritual advisor to arrive at the Huntsville Unit before 5:00 p.m. Central Time on the day of the scheduled execution will not prevent the execution from proceeding.
- D. The inmate shall be served a last meal at approximately 5:00 p.m. Central Time.
- E. The inmate shall be afforded an opportunity to shower and shall be issued a clean set of TDCJ clothing at some time before 6:00 p.m. Central Time.

V. Preparations for the Lethal Injection

- A. One (1) syringe of normal saline shall be prepared by members of the drug team.

- B. The lethal injection drug shall be mixed and syringes shall be prepared by members of the drug team as follows:

Pentobarbital - 100 milliliters of solution containing 5 grams of Pentobarbital.

- C. The drug team shall have available a back-up set of the normal saline syringe and the lethal injection drug in case unforeseen events make their use necessary.

VI. Execution Procedures

- A. After 6:00 p.m. Central Time and after confirming with the Office of the Attorney General and the Governor's Office that no further stays of execution, if any, will be imposed and that imposition of the court's order should proceed, the CID Director or designee shall give the order to escort the inmate into the execution chamber.
- B. The inmate shall be escorted from the holding cell into the execution chamber and secured to the gurney.
- C. A medically trained individual shall insert intravenous (IV) catheters into a suitable vein of the inmate. If a suitable vein cannot be discovered in an arm, the medically trained individual shall substitute a suitable vein in another part of the body but shall not use a "cut-down" procedure to access a suitable vein. The medically trained individual shall take as much time as is needed to properly insert the IV lines. The medically trained individual shall connect an IV administration set and start a normal saline solution to flow at a slow rate through one of the lines. The second line is started as a precaution and is used only if a potential problem is identified with the primary line. The CID Director or designee, the Huntsville Unit Warden or designee, and the medically trained individual shall observe the IV lines to ensure that the rate of flow is uninterrupted.
- D. After the normal saline solution IV has been started and is running properly, the following shall occur as instructed by the Huntsville Unit Warden or designee:
 - 1. If requested by the inmate and previously approved by the TDCJ, a TDCJ Chaplain or the inmate's approved spiritual advisor will be escorted into the execution chamber by an agency representative to observe the inmate's execution.
 - 2. Witnesses to the execution shall be escorted into the appropriate witness rooms.

NOTE: Any behavior by the spiritual advisor or witnesses deemed by the CID Director or designee to be disruptive to the execution procedure shall be cause for immediate removal from the Huntsville Unit.

- E. The CID Director or designee shall give the order to commence with the execution.
- F. The Huntsville Unit Warden or designee shall allow the inmate to make a brief, last statement.
- G. The Huntsville Unit Warden or designee shall instruct the drug team to induce, by syringe, substances necessary to cause death.
- H. The flow of normal saline solution through the IV shall be discontinued, and the lethal dose of Pentobarbital shall be commenced.
- I. When the entire contents of the syringe have been injected, the line shall be flushed with an injection of normal saline solution.
- J. The CID Director or designee and the Huntsville Unit Warden or designee shall observe the appearance of the inmate during application of the Pentobarbital. If, after a sufficient time for death to have occurred, the inmate exhibits visible signs of life, the CID Director or designee shall instruct the drug team to administer an additional 5 grams of Pentobarbital followed with a normal saline solution flush.
- K. At the completion of the process and after a sufficient time for death to have occurred, the Huntsville Unit Warden or designee shall direct the physician to enter the execution chamber to examine the inmate, pronounce the inmate death, and designate the official time of death. After the inmate is pronounced deceased, the spiritual advisor will be escorted from the execution chamber, and the witnesses shall be escorted from the witness rooms.
- L. The inmate's body shall be immediately removed from the execution chamber and transported by a coordinating funeral home. Arrangements for the inmate's body shall be concluded before the execution.

VII. Stays of Execution

- A. Official notification of a stay of execution shall be delivered to the CID Director, the Death Row Unit Warden, and the Huntsville Unit Warden. **Staff must not accept a stay of execution from the inmate's attorney.** After the official stay of execution is received, the Death Row Unit Warden's office shall notify the unit's Chief of Classification and Death Row Supervisor.
- B. Designated staff on the Death Row Unit shall notify the inmate that a stay of execution has been received.

VIII. Confidentiality of Participants

- A. Participants in the execution process shall not be identified, nor shall their names be released to the public.
- B. Before participating in a scheduled execution, the inmate's approved spiritual advisor must sign a nondisclosure agreement and agree to keep confidential all information, including but not limited to the identities of TDCJ employees, members of the drug team, and any other participant in the execution, obtained or learned by the inmate's approved spiritual advisor when participating in the inmate's scheduled execution.
- C. Violation of the nondisclosure agreement may subject the inmate's approved spiritual advisor to civil or criminal penalties under state law.

IX. TDCJ Employee Orientation

- A. TDCJ employees shall receive an orientation with the Huntsville, Goree, Polunsky, or Mountain View Unit Wardens, who shall inform the employees of TDCJ Executive Directive 06.63, "Crisis Response Intervention Support Program," (CRISP).
- B. TDCJ employees shall be encouraged to contact the Regional CRISP Team Leader following their initial participation in the execution process.