

CAPITAL CASE
No. 17-6068

**IN THE
SUPREME COURT OF THE UNITED STATES**

Abu Ali Abdur'Rahman, et al.,

Petitioners,

v.

Tony Parker, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENNESSEE SUPREME COURT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, Petitioners petition for rehearing of the Court's order denying certiorari in this case based on intervening circumstances of a substantial or controlling effect. Alternatively, Petitioner's request that this Court grant the petition, vacate the judgment, and remand for further proceedings in the Chancery Court of Davidson County, Tennessee.

GROUND FOR REHEARING

Petitioners discovered through a public records production that the Drug Enforcement Agency ("DEA") warned an agent of Respondents regarding the use of pentobarbital in executions. *See Attachment A, Email.* Respondent failed to bring this information to this Court's attention in its response in opposition to the petition. Despite the DEA's warning, on January 8, 2018, Respondents adopted a new lethal injection protocol that continues to use pentobarbital as one of two options in a lethal injection. *See Attachment B, Excerpt of January 8, 2018 protocol.* Given the apparent recognition on the part of the DEA that the use of pentobarbital in an execution violates federal law and the State of Tennessee's intransigence in its intent to continue to thwart controlling federal law in the process of executing Petitioners, rehearing is necessary.

The redacted email provided in the public records production from the Tennessee Department of Correction states, "I have some news on the pento. It's not good. I had the DEA invite me over to discuss it. I can call you tomorrow to fill you

in on the details. Are you available?” Attachment A. Because of secrecy laws, no further information can be gleaned absent court-ordered discovery. At a minimum, where the Petitioners only request with respect to Count V of the complaint is a declaration from the Chancery Court of Davidson County that the lethal injection protocol is in conflict with the Controlled Substances Act, and where we now know that the DEA apparently agrees with Petitioners’ argument, rehearing is appropriate.

On January 4, 2018, Attorney General Sessions emphasized the importance of enforcing federal law in the face of State laws that directly contradict the Controlled Substances Act. AG Sessions stated, “It is the mission of the Department of Justice to enforce the laws of the United States, and the previous guidance undermines the rule of law[.]” Matt Zapotsky, et al., *Use of Legalized Marijuana Threatened as Sessions Rescinds Obama-era directive that eased federal enforcement*, Washington Post https://www.washingtonpost.com/world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175_story.html?utm_term=.679659d67033 (last visited February 2, 2018).

Respondents’ lethal injection protocol requires various state actors to engage in numerous violations of federal drug laws. Respondents’ recent action — adopting a new protocol that is knowingly in direct conflict with the Controlled Substances Act — on the date this Court denied certiorari after being warned by the DEA

amplifies the need for this Court to take up this important issue of constitutional significance.

Ours is country of laws. Presidential spokesperson Sarah Huckabee Sanders stated that the President Trump “strongly believes that we should enforce federal law.” *Id.* Federal law must be enforced, even when states disagree with it and even in the face of compelling circumstances. In theory, Tennessee agrees. On January 19, 2018, Tennessee Governor Haslam reiterated his opposition to medical marijuana where federal law continues to classify marijuana as a schedule 1 substance. Chris Bundgaard, *Governor Haslam Not Changing Position on Medical Cannabis*, January 19, 2018, <http://wkcrn.com/2018/01/19/governor-haslam-not-changing-position-on-medical-cannabis/> (last visited February 2, 2018). Governor Haslam takes this position in the face of a devastating opioid crises that could be alleviated by the use of medical marijuana because he quite correctly notes that federal law must be followed.

Indeed Tennessee faced a similar separation of powers dilemma when the cities of Nashville and Memphis voted to decriminalize marijuana possession in personal use amounts. Of the ordinances, Tennessee Attorney General Herbert Slatery (counsel for Respondents here) stated, “A municipal ordinance that attempts to regulate a field that is regulated by state statute cannot stand if it is contradictory to state law.” Joey Garrison, *Bill Haslam Signs Repeal of New Nashville, Memphis Marijuana Laws*, *Tennessean*, April 13, 2017

<https://www.tennessean.com/story/news/2017/04/13/bill-haslam-signs-repeal-new-nashville-memphis-marijuana-laws/100416186/> (last visited February 2, 2018).

The same principles are at issue here. Our constitution does not permit States to act lawlessly even in carrying out their lawful duties.

CONCLUSION

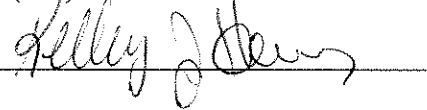
For the reasons presented above and in the petition for certiorari, this Court should grant this petition for rehearing. Alternatively, this Court should grant the petition immediately, vacate the lower court's judgment, and remand this case for further proceedings to allow further inquiry into the newly discovered information that Respondents have been warned against the use of pentobarbital in executions.

Respectfully submitted,

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BY: 

CERTIFICATE

I certify that the foregoing petition for rehearing is restricted to grounds set forth in Rule 44.2 and is presented in good faith and not for purposes of delay.



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CERTIFICATE OF SERVICE

I certify that the foregoing petition for rehearing was served via first-class mail upon counsel for Respondent, Herbert Slatery and Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 2nd day of February, 2018



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ATTACHMENT A

[REDACTED]

From:

Sent:

[REDACTED]
Thursday, July 20, 2017 5:05 PM

To:

Subject:

[REDACTED]
RE: Update

*** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security. ***

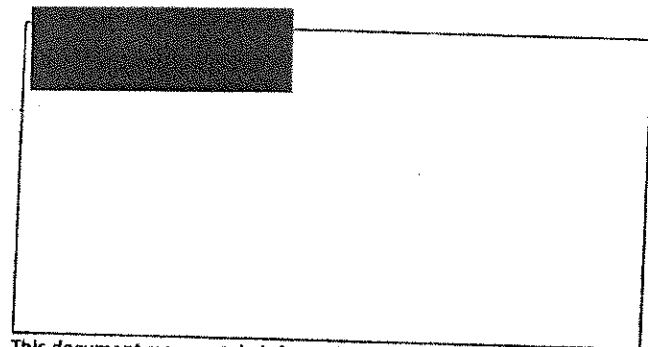
Hello [REDACTED]

I hope you're doing well.

Sorry for the dormancy. We've been busy expanding.

I have some news on the pento. It's not good. I had the DEA invite me over to discuss it. I can call you tomorrow to fill you in on the details. Are you available?

Regards,



This document may contain information covered under the Privacy Act, 5 USC 552(a), and/or Health Insurance Portability and Accountability Act (PL104-191) and its various implementing regulations and must be protected in accordance with those provisions. Healthcare information is personal and sensitive and must be treated accordingly. If this correspondence contains healthcare information it is being provided to you after appropriate authorization from the patient or under circumstances that do not require patient authorization. You, the recipient, are obligated to maintain it in a safe, secure, and confidential manner. Redisclosure without additional patient consent or as permitted by law is prohibited. Unauthorized redisclosure or failure to maintain confidentiality subjects you to appropriate sanction. If you have received this correspondence in error, please notify the sender at once and destroy any copies you have made.

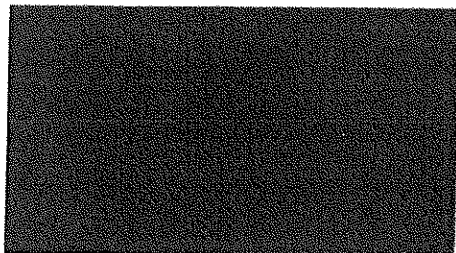
From:

[REDACTED]
Sent: Thursday, July 20, 2017 12:19 PM

To:

[REDACTED]
Subject: Update

Has there been any positive progress on your end? Thx Hope all is well.



ATTACHMENT B

LETHAL INJECTION EXECUTION MANUAL

EXECUTION PROCEDURES

FOR

LETHAL INJECTION

This manual contains a summary of the most significant events and departmental procedures to be followed in the process of carrying out the orders of the Tennessee Supreme Court regarding the imposition of death by lethal injection. It contains a detailed listing of some of the duties and responsibilities of certain key departmental personnel. In addition, the manual covers institutional perimeter security prior to, during, and subsequent to an execution.

It will be used as a guideline for the Warden to assure that operational functions are properly planned with the staff who have designated responsibilities in performing a judicially ordered execution by lethal injection.

SECTION VIII (PERIMETER SECURITY) IS

CONFIDENTIAL

AND IS NOT FOR PUBLIC RELEASE.

TABLE OF CONTENTS

LETHAL INJECTION

I.	Introduction	
	Commissioner's Statement	6
II.	Definitions	
	Definitions	8
	Diagram of Capital Punishment Unit	10
III.	Duties of Management and Administrative Personnel	
	Riverbend Maximum Security Institution Personnel	12
	Warden	13
	Associate Warden of Security	14
	Lethal Injection Recorder	15
	Death Watch Supervisor	16
	Institutional Chaplain	17
	Security Systems Technicians	18
	Physician	19
	IV Team	20
	Facility Maintenance Supervisor	21
	Extraction Team	22
	Escort Officer(s)	23
	Central Office Personnel	24
	Commissioner	25
	Assistant Commissioner of Prisons	26
	Director of Communications and Public Relations	27
	Director of Office of Investigation and Compliance	28
	Director of Religious, Victim and Volunteer Services	29
IV.	Selection and Training of Staff	
	Execution Team Member Selection Criteria, Lethal Injection	31
	Training of Execution Team Members	32
V.	Procurement, Preparation, Introduction of the Lethal Injection Chemical, and Procedures of Accountability	
	Chemicals Used in Lethal Injection	34
	Protocol A: Procurement, Storage, Accountability, and Transfer of the Chemical	35

TABLE OF CONTENTS LETHAL INJECTION CON'T

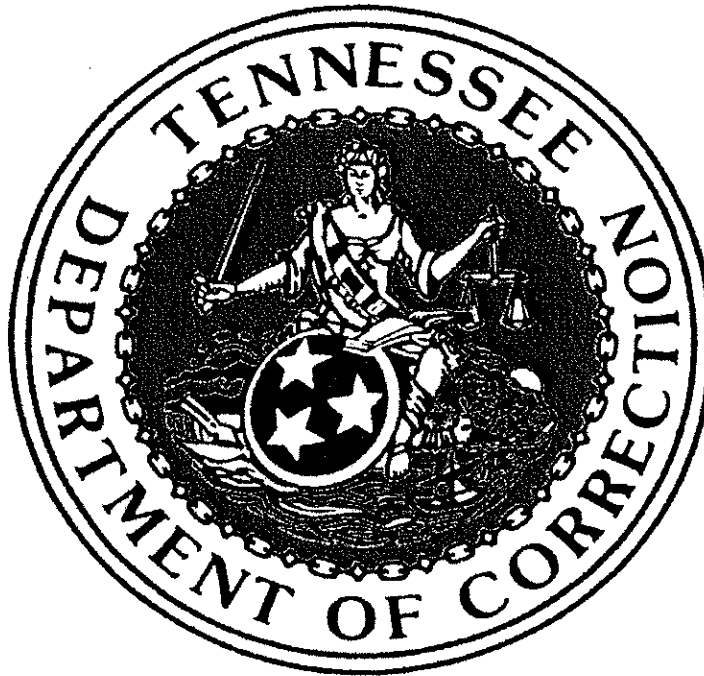
Protocol B: Procurement, Storage, Accountability, and Transfer of the Chemical	37
Protocol A: Lethal Injection Chemical Set-up and Preparation	39
Protocol B: Lethal Injection Chemical Set-up and Preparation	40
IV Line Set-up	42
Insertion of a Catheter and Connection of IV Lines	43
Chemical Administration and IV Monitoring	45
 VI. Death Watch Procedures	
Staff Responsibilities and Special Procedures	48
Execution Team	52
Death Watch Supervisor	54
Control Monitor	57
Floor Officer Monitor	61
Day 1	63
Day 2	63
Day 3- Execution Day	64
Protocol A: Day 3 – Evening Schedule	65
Protocol B: Day 3 – Evening Schedule	68
Post Execution	72
Contingency Issues	73
 VII. Victim Services	
Victim Services	75
 VIII. Perimeter Security – CONFIDENTIAL – Not for Public Release	
Perimeter Security Assignments	78
Perimeter Aerial Diagram	82
 IX. Forms	
Notification Letter to Sheriff's Office to Witness Execution of Inmate	84
Notification Letter to Inmate's Family to Witness Execution	85
Physician's Inventory Checklist	86
IV Team Inventory Checklist	87
Protocol A: Chemical Preparation Time Sheet	88
Protocol B: Chemical Preparation Time Sheet	89
Day of Execution – Lethal Injection Execution Recorder Checklist	91
Protocol A: Lethal Injection Chemical Administration Record (Red)	94
Protocol A: Lethal Injection Chemical Administration Record (Blue)	95

TABLE OF CONTENTS

LETHAL INJECTION CON'T

Protocol B: Lethal Injection Chemical Administration Record (Red)	96
Protocol B: Lethal Injection Chemical Administration Record (Blue)	97
News Release	98
Affidavit Concerning Method of Execution	99
Application for News Media Representative	100
Affidavit to Select Defense Counsel Witness to Execution	105
Lethal Injection Chemical Bin Card Form	106
Form Pharmacist Contract	107

I. INTRODUCTION

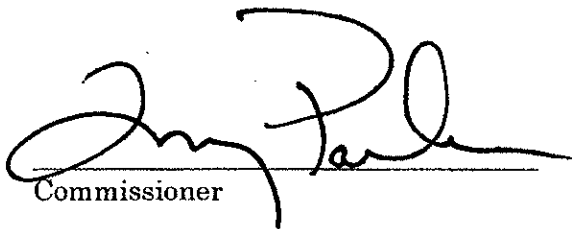


RIVERBEND MAXIMUM SECURITY INSTITUTION



The Tennessee Department of Correction is responsible for the incarceration of convicted felons serving sentences ranging from one year to death. Individuals sentenced to death are executed at Riverbend Maximum Security Institution. Upon the exhaustion of an inmate's appeals, the execution process shall begin.

In the capacity as Commissioner of the Tennessee Department of Correction, it is my duty by law to oversee the humane and constitutional execution of individuals sentenced to death by judicial authority in Tennessee. Tennessee law establishes lethal injection as the primary method for carrying out a death sentence and authorizes the Department to promulgate rules and regulations for the procedures for lethal injection. This manual explains the procedures for lethal injection. It will be reviewed annually, or as needed, by a designated panel.


Commissioner

1/8/18
Date

CHEMICALS USED IN LETHAL INJECTION

The Department will use one of the following protocols as determined by the Commissioner:

Protocol A:

Pentobarbital 100 ml of a 50 mg/mL solution (a total of 5 grams)

Protocol B:

Midazolam 100 ml of a 5mg/ml solution (a total of 500 mg)

**Vecuronium
Bromide** 100 ml of a 1mg/ml solution (a total of 100 mg)

**Potassium
Chloride** 120 ml of a 2 mEq/ml solution (a total of 240 mEq)

PROTOCOL A: PROCUREMENT, STORAGE, ACCOUNTABILITY, AND TRANSFER OF THE CHEMICAL

Procurement

Upon receipt of an order setting an execution date, the Warden or his designee shall contact a physician to obtain a physician's order for the LIC. The Warden or designee shall submit the physician's order to a licensed pharmacy or pharmacist to be filled. A member of the Execution Team checks the supply of the LIC, the concentration, and expiration dates.

Storage of LIC

1. When the LIC is received, a member of the Execution Team and the Warden take the LIC to the armory area of Building 7 at RMSI. The LIC is not stored in the weapon area of the armory due to the occasional employee traffic but rather in the key control section of the armory where there is the least employee need for access. The LIC is placed in an unmovable heavy gauge steel container with security grade locks.
2. All locking devices and storage containers are designed to prevent access to anyone without the proper keys or result in such destruction that entry into the container is unmistakable. There is only one key to access the storage container. That key is issued permanently to the Warden of RMSI. The Warden also has the pattern key to the container in his possession. There are no other duplicates produced. The Warden surrenders the key to no one other than the one member of the Execution Team designated for inventorying the LIC and only for the duration of the count and expiration checking of the LIC. Only the Warden or designee is allowed to access the storage container.
3. The LIC on hand is monitored for expiration dates. All of the LIC boxes/bottles have an expiration date, and all are in tamper-proof containers. As the LIC reaches its expiration date, it shall be disposed of by hazardous waste pick-up.

Accountability of LIC

1. A permanently bound ledger is maintained in the armory/key control area where all employees, including the armory/key control officer(s), sign each time they enter the area. The armory/key control officer performs a visual inspection of each container upon arrival at his workstation to ensure the proper band is in place and that the container has not been compromised in any way.
2. A permanently bound ledger is maintained in the storage area that contains a record of the LIC. An inventory of each lot of the LIC is maintained on a Bin Card form. Any LIC removed for use, disposal due to expiration, or for any other reason is deducted from the inventory. Any LIC received into the storage container is added to the inventory.
3. The storage container has a numbered security band that is broken prior to opening the container. The number of the band is recorded in the ledger. When the storage container is opened for any reason, the band is broken and the justification for entry is recorded in the ledger adjacent to the band number. When the storage container is secured and a new band is placed on the container, a new number is recorded in the ledger.
4. Upon receipt of the LIC, the Warden or designee proceeds to the armory storage area, secures the LIC, and adjusts the inventory appropriately. Prior to the LIC being placed in storage, the expiration date and lot number or other identifying marking is recorded to ensure that the LIC is properly disposed of at the time of expiration.
5. The Warden and the designee jointly verify the inventory of LIC on a semi-annual basis (January/July), at a minimum, and subsequent to each execution. The Warden and the designee make appropriate entries in the ledger with their full signatures that verify the correctness of the LIC count.

Transfer of Location

1. After the LIC is signed out on the appropriate ledger in the armory for execution purposes, the LIC is placed in an inconspicuous container for transport to the Execution Chamber. The Warden's designee is responsible for the delivery of the LIC to the appropriate individuals in the Execution Chamber.
2. If the LIC is not used and not compromised in any way, the LIC is returned to the armory, re-entered on the perpetual inventory ledger, and secured in the refrigerator. The LIC is used only for the execution of the inmate for whom it was ordered.

PROTOCOL B: PROCUREMENT, STORAGE, ACCOUNTABILITY, AND TRANSFER OF THE CHEMICALS

Procurement

Upon direction from the Warden or his designee, a member of the Execution Team checks the supply of chemicals and expiration dates. If he determines that additional chemicals are needed, he contacts the Procurement Officer at RMSI. The RMSI Procurement Officer contacts the Procurement Officer at DeBerry Special Needs Facility (DSNF) to order the needed chemicals. When the chemicals are delivered, the Procurement Officer at DSNF contacts the Procurement Officer at RMSI. One of the members of the Execution Team picks up the chemicals at either the DSNF or RMSI warehouse. A member of the Execution Team checks the supply of the chemicals, the concentration, and expiration dates. The Warden ensures that there are enough lethal injection chemicals kept in inventory at RMSI to carry out three executions.

Storage of LIC

1. The member of the Execution Team and the Warden take the chemicals to the armory area of Building 7 at RMSI. The lethal injections chemicals (LICs) are not stored in the weapon area of the armory due to the occasional employee traffic but rather in the key control section of the armory where there is the least employee need for access. The chemicals are placed in unmovable heavy gauge steel containers with security grade locks.
2. All locking devices and storage containers are designed to prevent access to anyone without the proper keys or result in such destruction that entry into the container is unmistakable. There is only one key to access each storage container. That key is issued permanently to the Warden of RMSI. The Warden also has the pattern key to the container in his possession. There are no other duplicates produced. The Warden surrenders the key to no one other than the one member of the Execution Team designated for inventorying the LICs and only for the duration of the count and expiration checking of the LICs. Only the Warden or designee is allowed to access the storage containers.
3. The chemicals on hand are monitored for expiration dates. All of the chemical boxes and bottles have an expiration date, and all chemicals are in tamper-proof bottles or containers. As the chemicals reach their expiration dates, they are disposed of by hazardous waste pick-up.