

IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

MAR 17 2014

MICHAEL S. RICHIE  
CLERK

Nos. D-2000-1330 and D-2003-829

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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CLAYTON LOCKETT and CHARLES WARNER,

Appellants,

-vs-

EDWARD EVANS in his Official Capacity as the Interim Director of  
THE OKLAHOMA DEPARTMENT OF CORRECTIONS, and  
THE OKLAHOMA DEPARTMENT OF CORRECTIONS,

Appellees.

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SUPPLEMENTAL BRIEF OF APPELLEE  
STATE OF OKLAHOMA

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MARCH 17, 2014

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CLAYTON LOCKETT and )  
CHARLES WARNER, )  
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Appellants, )  
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v. ) Case Nos. D-2000-1330 and )  
 ) D-2003-829 )  
STATE OF OKLAHOMA, )  
 )  
Appellee. )

**SUPPLEMENTAL BRIEF OF APPELLEE IN RESPONSE**  
**TO THE COURT'S MARCH 14, 2014 ORDER**

COMES NOW the Attorney General of Oklahoma, E. Scott Pruitt, by and through Seth S. Branham, Assistant Attorney General, and provides the following supplemental brief on behalf of the State of Oklahoma in response to this Court's March 14, 2014, Order directing briefing on the following issues:

1. Whether this Court's decision in *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234 is controlling as far as the issue in this case for determining whether a stay of execution is warranted.
2. The impact of 22 O.S.2011, § 1001.1 on the requested stay.

I.

**THIS COURT'S DECISION IN *MALICOAT v. STATE* IS CONTROLLING AND REQUIRES DENIAL OF A STAY.**

This Court's decision in *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234 is controlling in the present case and requires denial of an execution stay. In

*Malicoat*, this Court reviewed a constitutional challenge to Oklahoma’s lethal injection protocol as carried out by the Oklahoma Department of Corrections. *Id.*, 2006 OK CR 25, ¶¶ 4-11, 137 P.3d at 1235-39. This claim was asserted for the first time by the defendant in a written objection to the setting of an execution date. *Id.*, 2006 OK CR 25, ¶ 2, 137 P.3d at 1235. This Court treated Malicoat’s claim as a second or subsequent state post-conviction relief application under 22 O.S.2001, § 1089(D)(8) and reviewed the merits of his constitutional claim. *Malicoat*, 2006 OK CR 25, ¶ 3, 137 P.3d at 1235.

Malicoat argued that:

the protocol is unconstitutional because mistakes may be made in its application, and if mistakes are made during his execution, he will suffer a cruel and unusual death contrary to the Eighth Amendment. **Dr. Heath’s Affidavit lists fourteen potential areas in which mistakes may be made in the preparation or administration of the drugs. Many of these involve human error, including failure to properly mix the drugs, mislabeling, errors in insertion of equipment, and errors in administering the drugs.** Some involve mechanical or equipment failure. Some potential mistakes on the list involve equipment which may or may not be used in Oklahoma executions.

*Id.*, 2006 OK CR 25, ¶ 7, 137 P.3d at 1237 (emphasis added) (footnote omitted).

In rejecting these claims, this Court held that Malicoat identified little more than potential problems during the lethal injection process and that the “risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.” *Id.*, 2006 OK CR 25, ¶ 7, 137 P.3d at 1238 (quoting *State v. Webb*, 750 A.2d 448, 456-57 (Conn. 2000)). This Court

also rejected Malicoat's claim that Oklahoma uses "insufficiently licensed or trained persons to carry out executions." *Malicoat*, 2006 OK CR 25, ¶ 8, 137 P.3d at 1238. This Court found that Malicoat was asking it to speculate "that, because [the] training procedures are not part of a public record or submitted to the Court in this case, the execution personnel must be inadequately trained or incompetent. We decline to so speculate." *Id.* This Court too rejected Malicoat's reliance upon anecdotal evidence that inmates may not have been unconscious in previous executions, noting that it "will not speculate on whether mistakes may have been made in past executions." *Id.*, 2006 OK CR 25, ¶ 9, 137 P.3d at 1238.

This Court concluded its analysis in *Malicoat* with the following:

¶ 11 Although this is an issue of first impression in Oklahoma, other jurisdictions have considered and rejected similar claims. After a lengthy analysis the Tennessee Supreme Court concluded, "we cannot judge the lethal injection protocol *based solely on speculation as to problems or mistakes that might occur*. We must instead examine the lethal injection protocol as it exists today." *We agree*.

*Id.*, 2006 OK CR 25, ¶ 11, 137 P.3d at 1239 (emphasis added) (internal footnotes omitted) (quoting *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 308 (Tenn.2005)). This Court overruled Malicoat's objection to the setting of an execution date and denied his accompanying request that his execution date be stayed while litigation was pending in federal court challenging Oklahoma's lethal injection protocol. *Id.* ("We recognize that this issue is being litigated separately in the federal court system. However, Malicoat is not entitled to a

stay of execution while that litigation is pending.”).

*Malicoat* stands for the proposition that a stay of execution may not be granted based on mere speculation that mistakes or problems may occur in the lethal injection process. This is consistent with the United States Supreme Court’s denial of a stay of execution based on its holding that “speculation cannot substitute for evidence that the use of the drug is ‘sure or very likely to cause serious illness and needless suffering.’” *Brewer v. Landrigan*, \_\_U.S.\_\_, 131 S. Ct. 445, 178 L. Ed. 2d. 346 (2010) (Mem.) (quoting *Baze v. Rees*, 553 U.S. 35, 50, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008)).

Appellants’ ultimate goal is to seek discovery of information made confidential by 22 O.S.2011, § 1015(B) because they want to manage every single aspect of Oklahoma’s lethal injection process in light of the speculative possibility of hypothetical harm attendant to the use of any pharmaceutical product. That, however, is completely insufficient to state an Eighth Amendment claim as *Malicoat* makes clear. See *Malicoat*, 2006 OK CR 25, ¶ 7, 137 P.3d at 1237 (“All of these are potential problems during the lethal injection protocol, just as they are potential problems during any surgical procedure. As a society, however, we do not ban surgery because of these potential problems. We take appropriate precautions and rely upon adequate training, skill and care in doing the job.”) (quoting *Ex Parte Aguilar*, 2006 WL 1412666, at \*3 (Tex. Crim. App. 2006) (Cochran, J., concurring)). Reviewing courts do not sit as “best practices” boards for executions “with each ruling supplanted by another

round of litigation touting a new and improved methodology.” *Baze*, 553 U.S. at 51. Instead:

[a] stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes the State’s lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives.

*Whitaker v. Livingston*, 732 F.3d 465, 468 (5<sup>th</sup> Cir. 2013) (quoting *Baze*, 553 U.S. at 61).

In the present case, Appellants seeks a stay of execution in order to obtain discovery in the hopes they can develop a plausible Eighth Amendment claim. This is an insufficient basis for discovery, let alone a stay, under *Malicoat*, *Brewer* and federal decisions applying *Baze*. See *In re Lombardi*, 741 F.3d 888, 895-97 (8<sup>th</sup> Cir. 2014) (en banc); *Whitaker*, 732 F.3d at 467-69; *Sepulvado v. Jindal*, 729 F.3d 413, 419-20 (5<sup>th</sup> Cir. 2013); *Powell v. Thomas*, 641 F.3d 1255, 1257-58 (11<sup>th</sup> Cir. 2011).

In summary, *Malicoat* is controlling and mandates denial of a stay of execution for Appellants’ speculative claims. Also, as mentioned above, *Malicoat* holds that a stay of execution will not be granted pending separate litigation challenging Oklahoma’s lethal injection protocol in another court. This is consistent with previous rulings and governs here. See *Bland v. State*, 2007 OK CR 25, ¶ 10, 164 P.3d 1076, 1079.

## II.

### **A STAY IS UNWARRANTED UNDER 22 O.S.2011, § 1001.1(C) BECAUSE NO ACTION CHALLENGING THE SENTENCE OF DEATH IS PENDING BEFORE THIS COURT.**

The State further submits that a stay of execution is unwarranted because no “action challenging the conviction or sentence of death is pending before it” as required by 22 O.S.2011, § 1001.1(C). Appellants have not filed a second application for state post-conviction relief, *see* 22 O.S.2011, § 1089(D)(8), instead choosing to pursue their constitutional claims in a civil declaratory judgment action before Judge Parrish in *Lockett, et al. v. Evans, et al.*, Oklahoma County District Court Case No. CV-2014-330.

There is no question the Oklahoma Court of Criminal Appeals has jurisdiction to hear these claims. While the Oklahoma Supreme Court in its March 13, 2014, ruling found that Judge Parrish had jurisdiction over Appellants’ civil case, it did *not* find that this Court was without jurisdiction to hear the same claims. Basically, this Court has concurrent jurisdiction to hear the constitutional challenge to § 1015(B) set forth in Appellants’ amended petition filed in Oklahoma County District Court. But Appellants have chosen *not* to present that challenge here. The Oklahoma Court of Criminal Appeals, of course, is where Appellants’ constitutional claims naturally belong. The claims contained in Appellants’ amended petition, filed below, implicate the execution of their sentences, ODOC’s lethal injection protocol and the state constitutional ban on “cruel or unusual punishments.” Okla. Const. art. II, § 9. *See, e.g., Am.*

Pet. at ¶¶ 27, 32-33, 42-44, 46-48 (attached as Exhibit 1). Section 1015 is contained in Title 22 of the Oklahoma Statutes, which contains Oklahoma's criminal procedure statutes, and is found amongst a collection of statutes in Chapter 17 (itself entitled "Death Sentence") addressing post-conviction execution of death sentences. This subject matter, like § 1015 itself, is criminal in nature. While § 1015 is certainly a statute of general applicability, prohibiting as it does the disclosure in civil or criminal discovery of the identity of those involved in the execution process, this fact does not, as Appellants argue, make it a "civil" statute more appropriately reviewed by a civil court. Appellants' challenge to § 1015(B)'s prohibition on disclosure of participants in executions is an attempt to thwart their scheduled execution dates, nearly two years after the statutory language at issue was added. See 2011 Okla. Sess. Laws 213. It is emphatically the province and duty of this Court to say what the law is in a criminal matter. Appellants' request for stay of execution shows clearly that the present case is not civil in nature or fact. Rather, it is designed to thwart execution of their death sentences, something entirely criminal.

Until Appellants file a second application for post-conviction relief challenging their death sentences in this Court, § 1001.1(C) forecloses a stay of execution. This Court should therefore deny Appellants' motion for stay of execution pending resolution of their Oklahoma County civil action before Judge Parrish and any subsequent appeal to the Oklahoma Supreme Court.

### III.

**THE STATE FACES A CURRENT SHORTAGE OF EXECUTION DRUGS WHICH MAY REQUIRE A REVISION TO ITS EXECUTION PROTOCOL TO ALLOW FOR THE USE OF DRUGS THAT ARE AVAILABLE; IN THE MEANTIME, THE STATE CONTINUES TO SEARCH FOR THE NEEDED DRUGS SO IT CAN USE THE EXISTING PROTOCOL TO CARRY OUT APPELLANTS' EXECUTIONS.**

Oklahoma utilizes pentobarbital, vecuronium bromide and potassium chloride in its current lethal injection protocol. *See Pavatt v. Jones*, 627 F.3d 1336, 1339 (10<sup>th</sup> Cir. 2010). On Friday, March 14, 2014, the Oklahoma Department of Corrections (ODOC) informed the Attorney General's Office that it has been unable to obtain some of the drugs needed to carry out Clayton Lockett's execution at 6:00 p.m. on March 20, 2014. As recently as Wednesday, March 12, 2014, ODOC believed it had secured all three drugs needed for the executions of both Lockett and Warner with a commitment from a pharmacy to supply the drugs. By Friday, March 14<sup>th</sup>, however, that commitment fell through and, as of 9:00 a.m. Monday, March 17, 2014, ODOC remains without the drugs needed to carry out the lawful sentences of death for Lockett and Warner.

ODOC and the Attorney General's Office have been informed by multiple sources that pentobarbital remains in short supply and that vecuronium bromide is now difficult, if not impossible, even for hospitals and medical professionals to obtain. At present time, the State has pursued every feasible option to obtain the necessary execution drugs. This has been nothing short of

a Herculean effort, undertaken with the sole objective of carrying out ODOC's duty under Oklahoma law to conduct Appellants' executions. Sadly, this effort has (so far) been unsuccessful.

The shortage of drugs described above may prompt ODOC to revise its execution protocol to incorporate drugs that are currently available, and obtainable, by ODOC on the open market. If that happens, the revised execution protocol will be immediately provided to counsel for Appellants. Absent the State obtaining the necessary drugs to fulfill ODOC's existing protocol, a revised protocol will by necessity govern Appellants' executions.

The State has no doubt that a change in protocol would lead to an inevitable lawsuit, and request for stay of execution, in some court by Appellants in order to challenge the new protocol. This was the State's experience in 2010 when ODOC (along with virtually every other state using capital punishment) switched to pentobarbital as the anesthetic in the execution sequence due to sodium thiopental becoming "effectively unobtainable anywhere in the United States[.]" *See Pavatt*, 627 F.3d at 1337-38 & n.1. *See also Lombardi*, 741 F.3d at 890 (describing Missouri's switch from sodium thiopental to pentobarbital when the only domestic manufacturer of sodium thiopental ceased to produce it, the FDA failed to approve the drug for importation and the European Union announced strict regulations of the export of sodium thiopental to countries that authorize the death penalty).

The State will continue to pursue any and all leads in an attempt to obtain the necessary execution drugs in the days leading up to the scheduled

executions for Lockett and Warner. Should the drugs become available, ODOC intends to proceed forward with these executions as scheduled if Appellants' execution dates have not passed. See 22 O.S.2011, § 1001.1(F) ("should a stay of execution be issued by any state or federal court and then vacated by such court, the sentence of death shall be carried out as ordered prior to the issuance of such vacated stay of execution.").

Respectfully submitted,

**E. SCOTT PRUITT**  
**ATTORNEY GENERAL OF OKLAHOMA**

A handwritten signature in black ink, appearing to read "Seth S. Branham", written in a cursive style.

**SETH S. BRANHAM, OBA #18019**  
**ASSISTANT ATTORNEY GENERAL**

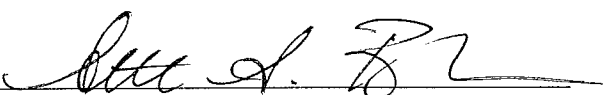
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**CERTIFICATE OF MAILING**

On this 17th day of March, 2014, a true and correct copy of the foregoing was mailed, with full first-class postage pre-paid, to:

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\_\_\_\_\_  
**SETH S. BRANHAM**

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY  
IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

MAR - 7 2014

TIM RHODES  
COURT CLERK

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CLAYTON LOCKETT and CHARLES  
WARNER,

Plaintiffs,

v.

Case No. CV-14-330

EDWARD EVANS, in his Official  
Capacity as the Interim Director of THE  
OKLAHOMA DEPARTMENT OF  
CORRECTIONS and THE  
OKLAHOMA DEPARTMENT OF  
CORRECTIONS,

Defendants.

**AMENDED PETITION FOR DECLARATORY  
RELIEF AND REQUEST FOR INJUNCTION**

Plaintiffs Clayton Lockett and Charles Warner ("Plaintiffs"), seek declaratory and injunctive relief, pursuant to 12 O.S. § 1651 against Interim Director Edward Evans and the Oklahoma Department of Corrections for violations of Plaintiffs' due process rights guaranteed by the Constitution of the State of Oklahoma, which violations are unconstitutionally preventing Plaintiffs from vindicating their state constitutional rights against cruel and unusual punishment. Plaintiffs also seek declaratory and injunctive relief for violations of the Oklahoma Administrative Procedures Act, 75 O.S. § 250.3. Plaintiffs further plead as follows:



## PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs are death row inmates currently imprisoned in Oklahoma State Penitentiary located at 1301 N West St, McAlester, OK 74501. Plaintiffs are citizens of the United States and citizens of the State of Oklahoma. Plaintiff Clayton Lockett has been set for execution on March 20, 2014. Plaintiff Charles Warner has been set for execution on March 27, 2014.

2. Defendant Oklahoma Department of Corrections is the State Agency responsible for carrying out executions of death row inmates. Any action brought against the Oklahoma Department of Corrections must be brought in the county where the Board of Corrections is located. 12 O.S. § 1653(B). Therefore, venue is proper in Oklahoma County, Oklahoma. *Id.*

3. Defendant Edward Evans is sued in his official capacity as the Interim Director of the Oklahoma Department of Corrections. Pursuant to state law, Interim Director Evans is the designated agent who oversees all executions in the State of Oklahoma and is entrusted with the responsibility of ensuring that executions in the State of Oklahoma do not violate state or federal law.

4. Plaintiffs will provide the Oklahoma Attorney General with notice of this action pursuant to 12 O.S. § 1653(C). The undersigned counsel also certifies that the Oklahoma Attorney General has been notified of the Plaintiffs' attempt to obtain a temporary restraining order.

## NATURE OF THE DISPUTE AND FACTUAL BACKGROUND

5. This Complaint does not challenge Plaintiffs' underlying capital convictions or sentences of death, nor does it allege that lethal injection as a form of execution is *per se* unconstitutional. Rather, Plaintiffs challenge the constitutionality of 22 O.S. § 1015(B), which prohibits the disclosure of the identity of all persons who supply the drugs used in an execution. This prohibition provides that the information "shall not be subject to discovery in any civil or criminal proceedings." 22 O.S. § 1015(B).

6. As a result of this statutory prohibition, Plaintiffs are denied access to nearly all information concerning the manner and means by which Defendants intend to carry out their executions. Plaintiffs have reason to believe, however, that Defendants' methods carry a substantial risk of inflicting severe pain, which would violate Plaintiffs' constitutional rights against cruel and unusual punishment. Section 1015(B) unconstitutionally stymies Plaintiffs' ability to prove that Defendants' execution methods are indeed unconstitutional.

7. The pertinent statute vests the Department of Corrections with near-complete discretion in determining the manner and means by which it carries out lethal injection executions. This was not always the case. Until 2011, 22 O.S. § 1014 provided that: "The punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice." However, in 2011, at the same time the

legislature made the source of execution drugs confidential by amending Section 1015, Section 1014 was amended to state: "The punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs until death is pronounced by a licensed physician according to accepted standards of medical practice."

8. Thus, deciding which drug or drugs to use, what dosage(s) to use, where to get the drug or drugs, and how to administer them is left entirely up to the Department of Corrections.

9. The Department's most recent procedure on the subject reveals nothing about how it has resolved these questions. Mirroring the statute, the procedure simply states, "The execution will be by administering a continuous, intravenous, lethal quantity of a drug or combination of drugs until death is pronounced by a licensed non-DOC physician."

10. The most recent Oklahoma execution protocol to which Plaintiffs have access is dated October 21, 2010. That protocol provides for a three-drug method of execution. It calls for the use of sodium thiopental or, if sodium thiopental is unavailable, pentobarbital to serve as an anesthetic, followed by vecuronium bromide to serve as a paralytic, and finally potassium chloride to stop the inmate's heart. *See* OSP-040301-01, § IX.C.6 (Oct. 21, 2010).

11. Plaintiffs do not know and have no way of knowing whether the Department is still following this protocol, whether it has issued a new protocol, or in what ways any new protocol differs from the one in force in 2010. Whatever protocol the Department uses was not adopted in compliance with the notice and publication

requirements of the Administrative Procedure Act and therefore violates the Act. *See* 75 O.S. §§ 250.3(17), 303.

12. On January 3, 2014, the Department of Corrections received an Oklahoma Open Records Act request asking for information about the source of the drugs the Department is currently using for executions. The Department has not responded to that request. Subsequent requests similarly have failed to produce any substantive information about the manner or means by which Defendants plan to execute Plaintiffs.

13. Since 2010, pharmaceutical companies' increasing discomfort with their products being used in executions has drastically restricted the availability of legally obtainable execution drugs. In 2010, Hospira, the only FDA-approved manufacturer of sodium thiopental in the United States, stopped manufacturing the drug in this country.

14. Based on representations made by the Department of Corrections in 2011, in either 2010 or 2011, Defendants began using pentobarbital in place of sodium thiopental to carry out executions.

15. In 2011, Lundbeck, the sole FDA-approved producer of pentobarbital in the United States, began blocking supply of its drug to U.S. corrections departments.

16. Defendants used their last known dose of FDA-approved pentobarbital when they executed Michael Hooper in August 2012.

17. Although the unavailability of sodium thiopental and the restrictions placed on FDA-approved pentobarbital surely required Defendants to revise their execution protocol, Plaintiffs have been unable to obtain any current information about how Defendants plan to execute them; what drugs will be used in their executions; where,

when, and from whom Defendants have obtained execution drugs; and how those drugs have been stored. Thus, at the same time that Defendants are turning to untested and untried execution methods, they also are shielding information about the execution methods from meaningful disclosure or scrutiny.

18. In August 2012, the Oklahoma Department of Corrections represented that it had obtained twenty doses of pentobarbital. To Plaintiffs' knowledge, the Department has not revealed the source of those doses. It is Plaintiffs' understanding, however, that at the time the Department procured those doses, FDA-approved pentobarbital was not available for use in executions. Plaintiffs therefore have good reason to believe that the twenty doses were procured from a non-FDA-approved source, either from a compounding pharmacy or from a supplier of veterinary medicine.

19. Defendants have conducted eleven executions since it used its last known FDA-approved dose of pentobarbital on Michael Hooper in August 2012. Plaintiffs have been unable to obtain any information about how many still remain of the twenty doses the Department of Corrections claimed to have on hand in August 2012, or whether any or all of those doses are expired.

20. While Defendants' cloak of secrecy makes it impossible to know for sure, Plaintiffs believe Defendants are conducting executions with pentobarbital obtained from a compounding pharmacy.

21. Compounding pharmacies mix up batches of drugs to order. Compounded drugs are not FDA-approved products. In medical practice, compounded drugs serve the important role of providing specialized dosages for patients with specific needs.

However, in the context of lethal-injection executions, use of compounded drugs introduces gratuitous and unnecessary risks that an execution will cause pain and suffering and/or be ineffective.

22. Compounded drugs carry additional risks that may render them less effective, create unforeseeable side effects that interfere with other drugs, or cause unnecessary risk of excruciating pain. Compounding pharmacies are subject to minimal government oversight, which has resulted in a number of widespread and extremely harmful contaminations in compounding pharmacies across the country, and has generated significant concerns that compounded drugs may contain substances that are not intended to be administered to the patient.

23. The sources from which compounding pharmacies obtain their active pharmaceutical ingredients ("API") are often part of the global "gray market" that is one of the leading sources of counterfeit drugs entering the United States. And even if the API obtained and used by the compounding pharmacy is not counterfeit, there is a significant risk that it is contaminated.

24. If compounded pentobarbital made for execution purposes includes either a counterfeit or contaminated API, that drug will carry a significant risk of extreme pain and suffering for the condemned prisoner, and may result in a lingering death. Compounded pentobarbital also creates a grave risk that the execution drug will be sub-potent, leading to pain, suffering, and lasting harm without actually killing the condemned inmate.

25. The significant risk of pain and suffering resulting from Defendants' use of execution drugs from unknown and untested sources is exacerbated by Defendants' use of a three-drug execution method, as described in paragraph 10, above.

26. The second drug in the process listed in the October 2010 protocol, vecuronium bromide, paralyzes the condemned inmate, including his vocal chords. Thus, once the vecuronium bromide is administered, the inmate will appear completely placid – and will be unable to move or speak to express distress – even if he is inadequately anaesthetized. This means that if the pentobarbital used to execute Plaintiffs is counterfeit or contaminated, there will be at most only a few seconds for them to make any physical or verbal sign of distress before they are paralyzed by administration of the second drug. And if the compounded pentobarbital is sub-potent, Plaintiffs will experience extreme pain and suffering when the third drug – potassium chloride – is administered to stop their hearts, but their paralysis by vecuronium bromide will mask their suffering from witnesses.

27. Defendants' use of compounded pentobarbital in executions presents Plaintiffs with risks of pain and suffering that are real and not speculative. On January 9, 2014, Defendants executed Oklahoma inmate Michael Wilson. Plaintiffs believe this execution was carried out with compounded pentobarbital as the first drug in the three-drug protocol. According to eyewitnesses, Mr. Wilson's last words, uttered shortly after the first drug flowed into his veins, were "I feel my whole body burning."

28. Similarly, in October 2012, South Dakota executed inmate Eric Robert using compounded pentobarbital. Witnesses to Mr. Robert's execution reported that he

appeared to clear his throat and gasp heavily, at which point his skin turned a blue-purplish hue. Mr. Robert opened his eyes and they remained open until his death, and his heart continued beating for 10 minutes after he ceased to breathe.

29. Further, while Plaintiffs have been prevented by Defendants' reliance on § 1015 from obtaining any information about the source of the drug or drugs intended to execute them, an Oklahoma compounding pharmacy has supplied compounded pentobarbital to other states for use in executions. The Apothecary Shoppe, a Tulsa, Oklahoma, pharmacy, secretly supplied compounded pentobarbital to the State of Missouri for its use in executing Herbert Smulls on January 29, 2014. Upon information and belief, The Apothecary Shoppe provided compounded pentobarbital for at least two other executions in Missouri and executions in other states. The Apothecary Shoppe may well have supplied compounded pentobarbital for executions in Oklahoma.

30. The strength, quality, and purity of the API in the compounded pentobarbital that The Apothecary Shoppe sold to Missouri was tested and certified by Analytical Research Laboratories, in Oklahoma City, Oklahoma. Analytical Research Laboratories also certified the strength, quality, and purity of the API in a compounded injectable medication that – due to fungal contamination – caused a large-scale outbreak of fungal meningitis in October 2012.

31. These two Oklahoma companies' connection to compounded execution drugs gives Plaintiffs good reason to believe that The Apothecary Shoppe and/or Analytical Research Laboratories have a role in providing execution drugs to Defendants.

32. However, Plaintiffs are prohibited by 22 O.S. § 1015(B), from obtaining any meaningful information about the method or means of their own executions. This prohibition violates their due process rights guaranteed by the State Constitution by denying them both notice of the process by which they will be executed and meaningful access to the courts to challenge that process. The law is also in violation the Oklahoma Constitution because it precludes judicial review of the Department of Corrections' lethal-injection procedures.

33. Plaintiffs seek equitable, injunctive and declaratory relief, including a stay of execution, to prevent Defendants from carrying out any execution until they lift the veil of secrecy behind which they are hiding all information necessary for this Court to determine whether their executions will comport with the Oklahoma Constitution.

34. Defendant Evans, and those subject to his supervision, direction and control, is responsible for the enforcement of the laws challenged herein. The relief requested is sought against Defendant Evans as well as against Defendant's officers, employees and agents and against all acting under his supervision, direction or control.

35. "A declaratory judgment action is meant to ascertain uncertain rights and can be used before any actual breach." *Miller v. Gonzales*, 2010 OK CIV APP 56, 239 P.3d 163, 171. Furthermore, the person need not violate the questioned law to obtain a declaration of its validity. *Barzellone v. Presley*, 2005 OK 86, 126 P.3d 588, 592. "[D]eclaratory relief is appropriate when a statute is attacked on constitutional grounds prior to the time a final judgment is issued, because the law need not be violated before

obtaining a declaration of its validity.” *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967, 972 (citing *Oklahoma Tax Commission v. Smith*, 1980 OK 74, 610 P.2d 794).

### CLAIMS FOR RELIEF

#### **I. OKLAHOMA’S LETHAL INJECTION SECRECY LAW AND DEFENDANTS’ RELIANCE ON THAT STATUTE TO WITHHOLD INFORMATION REGARDING THE SOURCE AND PROCUREMENT OF THE DRUGS IT INTENDS TO USE TO EXECUTE PLAINTIFFS DENIES PLAINTIFFS THEIR STATE CONSTITUTIONAL RIGHTS TO MEANINGFUL ACCESS TO THE COURTS.**

36. “‘Due process of law’ as used in the Oklahoma Constitution, Art. 2, § 7, is intended to protect the citizen against arbitrary action, and to secure to all persons equal and impartial justice.” *Ex parte Lackey*, 1955 OK CR 7, 279 P.2d 380, 381.

37. 22 O.S. §. 1015(B), and, in this case, Defendants’ reliance on that statute to withhold critical information regarding the drugs it intends to use to execute the Plaintiffs, erect a virtually insurmountable barrier to the filing and prosecution of a colorable cruel and unusual punishment claim. Based on the statute, Defendants can refuse to identify the source of any execution drugs, both in terms of the pharmacy from which those drugs may be secured and the source of the Active Pharmaceutical Ingredient from which the injectable form of the drug will be made.

38. Information regarding the source of the drugs is critical to an assessment of the likelihood that Plaintiffs’ executions will be botched and/or that Defendants will inflict unnecessary and excruciating pain and suffering on Plaintiffs, in violation of this State’s Constitutional protection to ensure that its citizens are not subject to cruel and unusual punishment.

39. The information that is shielded from disclosure under 22 O.S. §. 1015(B) is indispensably relevant to an understanding of whether the executions Defendants intend to perform will violate Plaintiffs' right under Oklahoma Constitution, Article 2, § 9, not to be subjected to cruel and unusual punishment. The use of a compounding pharmacy to make an injectable compounded form of pentobarbital is fraught with substantial risks that Plaintiffs are incapable of assessing without information.

40. As an initial matter, Plaintiffs have no means to determine the purity of the drug which may be used to execute them, and whether that drug is contaminated with either particulate foreign matter or a microbial biohazard that could lead to a severe allergic reaction upon injection.

41. Moreover, Plaintiffs have no means to assess the qualifications *vel non* of the compounding pharmacy and its agents; the adequacy of its quality assurance, if any; whether the facilities are equipped to make sterile products or to test both the identity and purity of the API; and a host of other potential problems. Plaintiffs accordingly have no means to determine the risk that, for instance, the lethal-injection drug that is manufactured for their executions will or will not actually consist of pentobarbital; if so, that it will contain a dose sufficient to allow their execution without exacting pain and suffering, rather than simply to injure and maim them, possibly irreparably; or that it will not be filled with particulate or biological matter that may lead to a painful allergic reaction to fungus or toxins that have no place in a lethal-injection drug.

## II. SECTION 1015(B) IS UNCONSTITUTIONAL BECAUSE IT PROHIBITS ACCESS TO THE COURTS.

42. “The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.” Oklahoma Constitution, Article 2, § 6.

43. In contravention of Article 2, § 6 of the Oklahoma Constitution, the Oklahoma Legislature has usurped the power of the judiciary when it passed 22 O.S. § 1015(B), which fully shields from judicial scrutiny information pertaining to the execution of Oklahoma citizens. Section 1015(B) explicitly exempts from judicial review the very information necessary to determine whether Plaintiffs’ executions are in violation of their right to be free from cruel and unusual punishment. Oklahoma Constitution, Article 2, § 9.

44. To determine the lawfulness and constitutionality of various aspects of an execution, the judiciary must have access to detailed information about, *inter alia*, the source and purity of the drugs to be used in executing the condemned inmate, and the qualifications of the drug manufacturer/supplier and its agents. Citing § 1015(B), Defendants have concealed from the courts – as well as from Plaintiffs – the only universe of documents that could engender meaningful review.

**III. DUE PROCESS FORBIDS PLAINTIFFS' EXECUTIONS WHILE THE STATE OF OKLAHOMA WITHHOLDS INFORMATION CRITICAL TO A DETERMINATION OF WHETHER ITS INTENDED METHOD OF EXECUTION VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.**

45. It would be a grotesque injustice to permit Defendants to proceed with Plaintiffs' executions while refusing to disclose the very information that could demonstrate that the intended manner of killing Plaintiffs will violate the state constitution.

46. The State statute which prohibits the disclosure of the source of its drugs and the manner in which those drugs have been obtained causes an outright denial of these most basic components of due process. Accordingly, Defendants should be enjoined from proceeding with Plaintiffs' executions until such time as they have revealed the source of the execution drugs and Plaintiffs have been provided a reasonable opportunity to be heard on any challenge of cruel and unusual punishment to the use of those drugs.

47. The State Constitution, which requires due process, demands that Defendants be enjoined from carrying out Plaintiffs' executions while they disclose information critical to a determination of the constitutionality of their intended actions.

48. Section 1015(B) violates liberties protected by the Oklahoma Constitution due to the secrecy relating to the source of the execution drug, Defendants have failed to provide Plaintiffs with any information regarding the source of the Oklahoma Department of Corrections' acquisition of the drugs necessary to ensure a constitutionally adequate execution. Defendant's actions and enforcement demonstrate a lack of

transparency and reliability in its intended manner of executing Plaintiffs. By failing to provide Plaintiffs with notice regarding the source of the supply of the drugs it intends to use in its execution, Defendant is violating Plaintiffs' rights under the Oklahoma Constitution.

49. Upon information and belief, a medical doctor and other medical professionals will participate in and oversee Plaintiffs' executions. Plaintiffs do not have a doctor-patient relationship with these medical professionals. Trained medical professionals know or should know the risks involved in administering a non-FDA approved drug to a human being. Trained medical professionals know or should know the illegality and risks involved in administering a non-FDA approved drug to a person with whom they have no doctor-patient relationship. Defendants who knowingly administer these drugs and/or hire medical professionals to administer these drugs, despite known and substantial risks, are acting deliberately indifferent to Plaintiffs' right to be free from cruel and unusual punishment.

**V. DEFENDANTS' ADOPTION OF A REVISED EXECUTION PROTOCOL VIOLATES THE ADMINISTRATIVE PROCEDURES ACT.**

50. The execution protocol is a "rule" within the meaning of the Oklahoma Administrative Procedures Act ("APA"), 75 O.S. § 250.3(17), because it is an agency statement or group of related statements of general applicability and future effect that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of the agency.

51. 75 O.S. § 303 sets forth specific procedures that a state agency must follow for providing the public with notice before adopting any rule. Section 303 further states: “No rule is valid unless adopted in substantial compliance with the provisions of this section.” 75 O.S. § 303(E). In adopting and prescribing its execution procedures, the Department has not complied with the notice, public comment, hearing, and rule impact statement requirements of 75 O.S. § 303.

52. Because Defendants have not complied with the APA's rulemaking requirements, their lethal injection rules are invalid. The Department threatens to apply its unlawfully adopted and invalid rules to inflict serious bodily injury and death upon the Plaintiffs. The Plaintiffs will be irreparably injured unless these rules are declared invalid and enjoined by this Court.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For a declaratory judgment under 12 O.S. § 1651 that the Oklahoma law challenged herein, barring the release of information relating to the source of the drug or drugs used in executions, violates Plaintiffs' rights guaranteed by the Oklahoma Constitution, that all people are entitled to due process and to be free from cruel and unusual punishment.

2. Entry of a permanent injunction enjoining enforcement of 22 O.S. § 1015(B), the Oklahoma law barring release of information about the drug and the source of drugs used in executions, pursuant to 12 O.S. §1655.

3. Temporary, preliminary and permanent injunctive relief to enjoin Defendants, their officers, agents, servants, employees and all persons acting in concert with them, from executing Plaintiffs until the details of the execution drug or drugs and the source of those drugs are disclosed to Plaintiffs and their counsel.

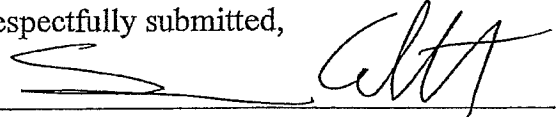
4. For a declaratory judgment under 12 O.S. § 1651 invalidating any execution protocol or other rule for carrying out lethal-injection rules, and enjoining Defendants from issuing any such rules without first complying with the APA.

5. For a declaratory judgment under 12 O.S. § 1651 ordering that Defendants that Defendants must comply with the APA in promulgating lethal-injection execution rules, including the protocol and any other statement relating to executions or lethal injection that constitute a rule under the APA, and that Plaintiffs must be permitted the opportunity to participate as members of the public in the rulemaking procedure.

6. Any attorneys' fees and costs that may be allowable under law.

7. Such other relief deemed proper.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7 day of March, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of Notice of Electronic Filing to the Following ECF registrants:

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his Official Capacity as Interim  
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of Corrections and the Oklahoma  
Department of Corrections*

  
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Seth A. Day