No. ____________

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

DERRICK SONNIER,

Relator-Petitioner,

vs.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Institutional Division (TDCJ-ID) and all TDCJ-ID
personnel under the authority of Nathaniel Quarterman with
respect to the process of administering a
death sentence,

Respondents.

PETITION FOR WRIT OF PROHIBITION

MR. SONNIER IS SCHEDULED TO BE EXECUTED
TODAY, JUNE 3, 2008, SOMETIME AFTER 6:00 P.M.

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PETITION FOR WRIT OF PROHIBITION

TO THE HONORABLE JUDGES OF THE TEXAS COURT OF CRIMINAL APPEALS:

Derrick Sonnier, Relator-Petitioner, by and through undersigned attorneys, respectfully requests that this Court issue a writ of prohibition directing Nathaniel Quarterman, Director of the Texas Department of Criminal Justice Institutional Division (TDCJ-ID), and any TDCJ-ID personnel under the authority of Mr. Quarterman, to refrain immediately from complying any further with the Warrant of Execution issued by the presiding judge of the 179th District Court of Harris County, Texas.[1] Because the protocol by which the State intends to execute Mr. Sonnier

[1] The extraordinary writ requested by Mr. Sonnier is appropriate. A writ of prohibition is required to prevent the State of Texas from complying with Mr. Sonnier's Warrant of Execution. *See State ex. rel. Wade v. Mays*, 689 S.W.2d 893, 897 (Tex. Crim. App. 1985) ("The essential difference between the writ of prohibition and the writ of mandamus is that the former issues to prevent the commission of a future act whereas the latter operates to undo or

appears to be in flux, and because this Court has not finalized its determination of the constitutionality of Texas' lethal injection protocol (at least as it existed in September, 2007), Mr. Sonnier requests that this Court grant him a writ of prohibition prohibiting defendants from executing him by lethal injection until such time as the merits of the dispute have been resolved. In support thereof, Mr. Sonnier would show the following:

I. Procedural Background.

Relator, Derrick Sonnier, is a prisoner on death row confined in the Polunsky Unit of the Texas Department of Criminal Justice, Institutional Division, in Livingston, Texas. Mr. Sonnier was indicted for capital murder in Cause No. 648197 in the 179th District Court of Harris County, Texas. He was found guilty of capital murder and sentenced to death. The Court of Criminal Appeals ("CCA") affirmed the conviction and sentence, *Sonnier v. State*, 913 S.W. 2d 511 (Tex. Crim. App. 1995), and denied his petition for a writ of habeas corpus. *Ex parte Sonnier*, No. 57,256-01 (Tex. Crim. App. Nov. 5, 2003) (unpublished).

Mr. Sonnier thereafter filed a petition for writ of habeas corpus in federal court, which was denied January 24, 2006. The denial was affirmed by the Fifth Circuit Court of Appeals, *Sonnier v. Quarterman*, 476 F.3d 349 (5th Cir. 2007), and a petition for rehearing was denied. *Sonnier v. Quarterman*, 481 F.3d 288 (5th Cir. 2007)

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nullify an act already performed; the former will not be granted when the act sought to be prevented is already done, but will lie when such act is not a full, complete and accomplished judicial act.").

If, however, this Court entertains any doubt as to the appropriate relief in the instant proceedings, it is not limited by the denomination of the instant petition. *Id*. ("In determining the specific nature of the extraordinary relief sought, this Court will not be limited by the denomination of petitioner's pleadings, but will look to the essence of the pleadings, including the prayers, as well as the record before us.").

II. Mr. Sonnier Is Entitled to a Writ of Prohibition Barring Compliance with the Warrant of Execution.

The standard governing the extraordinary relief Mr. Sonnier seeks, a writ of prohibition, is well-established. Pursuant to Article V, section 5 of the Texas Constitution, and Article 4.04 of the Texas Code of Criminal Procedure, this Court should issue a writ of prohibition if: (1) the act sought to be compelled is purely ministerial or the relator has a clear right to the relief sought; and, (2) the relator has no adequate remedy at law. *See State ex rel. Hill v. Court of Appeals For The Fifth District*, 34 S.W.2d 924, 926-28 (Tex. Crim. App. 2001); *Curry v. Wilson*, 853 S.W.2d 40, 43-44 (Tex. Crim. App. 1993); *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 392 (Tex. Crim. App. 1994).

A. Mr. Sonnier Has a Clear Right to the Relief He Seeks.

Mr. Sonnier has a clear right to the relief he seeks, which is to his right to be free from "cruel and unusual punishment" under the Eighth Amendment. *See In re Kemmler*, 136 U.S. 436, 447 (1890) (the Eighth Amendment prohibits "something more than the mere extinguishment of life," such as "torture or a lingering death"); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (a punishment is cruel and unusual when it is "purposeless and needless," and the Eighth Amendment "forbids the infliction of unnecessary pain in the execution of the death sentence"). In *Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520 (2008), a plurality of the Supreme Court held that execution by lethal injection violates the Eighth Amendment if there exists "substantial risk of serious harm." *Baze*, 128 S.Ct. at 1532 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). Mr. Sonnier further has a right to be administered his sentence of death in a manner in which "[n]o torture, or ill treatment, or

unnecessary pain, shall be inflicted upon [him as] a prisoner to be executed under the sentence of the law." Tex. Code Crim. Proc. art. 43.24.

Mr. Sonnier submits that such a risk exists in his case. Moreover, he submits that he cannot be constitutionally executed while this Court is in the midst of evaluating the constitutionality of Texas' lethal injection protocol in two other cases pending before it. Finally, Mr. Sonnier submits that just five days ago the Texas Department of Criminal Justice ("TDCJ") substantially revised its lethal injection protocol. *See* Exhibit 1. To undersigned counsel's knowledge – who only found out yesterday about the revised protocol – no court or legal entity in Texas has evaluated (or even read) this revised protocol. As such, Mr. Sonnier's execution cannot and should not proceed.

1. The Post-Baze Legal Standard

In *Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520 (2008), a majority of the Supreme Court voted to uphold Kentucky's lethal injection protocol. Chief Justice Roberts announced the judgment of Court and wrote an opinion in which two other Justices—Justice Kennedy and Justice Alito—joined. The plurality held that the Eighth Amendment is violated where there is a "substantial risk of serious harm." *Baze*, 128 S.Ct. at 1532 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). The Court explained,

> To qualify [as a procedure that imposes a substantial risk of serious harm], the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.
>
> *Id*.

2. Respondent's Lethal Injection Protocol.

The first question that must be asked here is: what is Respondent's lethal injection protocol?[2] Exhibit 1 evinces that Texas' protocol changed as recently as five days ago. Yet, there is some indication that Exhibit 1 may not be the final protocol, but may change yet again.

Based on the protocol adopted by TDCJ in April, 2005[3], Respondents will execute Mr. Sonnier as follows.

The death-sentenced person is first escorted into the execution chamber and secured on a gurney. A "medically trained individual" then inserts intravenous (IV) catheters into a "suitable vein" of the person, connects an IV administration set, and starts a neutral saline solution flow. Only after this is accomplished are witnesses brought into the viewing area. *See* Exhibit 2 at 14 (Defendants' Responses to Plaintiff's First Request for Production in *Raby v. Livingston*, No. 4:06-cv-00818 (S.D. Tex. Mar. 24, 2006)).[4]

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[2] Under Texas law, Respondent has the authority and duty to establish and administer a lethal injection protocol. The Texas Code of Criminal Procedure provides:

> Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the institutional division of the Texas Department of Criminal Justice.

Tex. Code Crim. Proc. art. 43.14 (Vernon Supp. 2004-2005). No other specifics of the procedure are provided; however, the legislature did constrain the Respondent's discretion by providing, "No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law." *Id*. art. 43.24.

[3] As it is unclear what protocol is currently in force, or will be in force at the time of Mr. Sonnier's scheduled execution, a discussion of the adequacy of the applicable protocol presents a unique challenge, and one that underscores the need for the relief requested. Mr. Sonnier here discusses the April 2005 protocol, with footnoted notations of the ways in which the May 30, 2008 protocol – if it remains in its current form – differs, if at all.

[4] The May 30, 2008 protocol further specifies the type of training and qualifications such "medically trained individuals' shall have, *See* Exhibit 1 at IV.A, and that "each new member of the drug team" shall receive training which "shall consist of following the drug team through at least two executions, receiving step-by-step instructions from existing team members. *Id*. at IV.B. The new protocol also specifies that the "drug team shall prepare a back up set of the normal saline syringes and the lethal injection drugs in case unforeseen events make their use necessary." *Id*. at VI.C. Finally, the May 30, 2008 protocol states that "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 . . . The second line is started as a precaution and is used only if a potential problem is identified with the primary line." Moreover, the

After the order to proceed is given and the death-sentenced person is given the opportunity to make a last statement, the Huntsville Unit Warden (or designee) instructs "staff" to "induce, by syringe, substances necessary to cause death." *See id*. at 15. When this order is given, the executioners, from a separate room and behind a one way mirror, remotely administer drugs to the conscious inmate. The saline solution flow which had been previously started is discontinued, and the first drug, three grams of sodium pentothal in solution, is injected by syringe into the line. The line is then "flushed" with an injection of saline solution.[5] Then the next drug, 100 milligrams of pancuronium bromide in solution, is injected by syringe into the line. The line is again flushed with a saline solution. Finally, the last drug, 140 milliequivalents of potassium chloride in solution, is injected by syringe into the line. Upon completion of the injections, the Warden directs a physician to enter the execution chamber to pronounce death.

3. The Chemicals.

The first drug administered to Mr. Sonnier will be sodium pentothal. It is an ultra-short acting barbiturate that is ordinarily used to render a surgical patient unconscious for mere minutes, only in the induction phase of anesthesia, specifically so that the patient may re-awaken and breathe on his own power if any complications arise in inserting a breathing tube. *See* Exhibit 3 at 9 (Declaration of Dr. Mark Heath, *Raby v. Livingston,* No. 4:06-cv-00818 (S.D.Tex. filed June 21, 2006)).

The second chemical involved in the lethal injection process, pancuronium bromide, also known as Pavulon, is a derivative of curare that acts as a neuromuscular blocking agent.

CI Division Director, the Huntsville Unit Warden, and the "medically trained individual" shall "observe the IV to ensure that the rate of flow is uninterrupted. *Id*. at VII.C.

[5] The May 30, 2008 protocol also makes the CI Division Director and the Huntsville Unit Warden responsible for observing the "appearance" of the inmate to see if he is "awake." If such observers deem him to still be awake, then a second lethal dose of Sodium Pentothal is administered through the "backup IV." Exhibit 1 at VI.J.

Pancuronium bromide paralyzes all voluntary muscles, but "is not an anesthetic or sedative drug, and it does not affect consciousness." *Id*. at 6. According to Dr. Heath, Assistant Professor of Clinical Anesthesia at Columbia University:

> Pancuronium bromide is a neuromuscular blocking agent. Its effect is to render the muscles unable to contract but it does not affect the brain or the nerves. It is used in surgery to ensure that there is no movement and that the patient is securely paralyzed so that surgery can be performed without contraction of the muscles. In surgery, pancuronium bromide is not administered until the patient is adequately anesthetized. The anesthetic drugs must first be administered so that the patient is unconscious and does not feel, see, or perceive the procedure. The reason that a surgical patient must be adequately anesthetized prior to administration of pancuronium bromide is that a patient would otherwise experience intense pain and suffering from the paralyzing effects of the pancuronium bromide.

Exhibit 3 at 7.

The third drug injected is potassium chloride. Potassium chloride is a salt solution that induces cardiac arrest if injected in sufficiently high concentration. Like pancuronium bromide, potassium chloride has no anesthetic or sedative effect.

4. Potential Complications.

a. Effect of Lethal Injection on Conscious Person.

If, for reasons that will be described below, an inmate is not rendered unconscious for the duration of the lethal injection by the first injection of sodium pentothal, the inmate will experience excruciating pain and torture as the second and third drugs are administered.

As described above, the second drug, pancuronium bromide, will act to paralyze the inmate while having no effect on the inmate's consciousness or awareness. According to Dr. Mark Heath:

> If administered alone, a lethal dose of pancuronium bromide would not immediately cause a person to lose consciousness. It would totally immobilize the person by paralyzing all voluntary muscles including the diaphragm, causing

> the person to suffocate to death while experiencing an intense, conscious desire to inhale. Ultimately, consciousness would be lost, but it would not be lost as an immediate and direct result of the pancuronium bromide. Rather, the loss of consciousness would be due to suffocation, and would be preceded by the torment and agony caused by suffocation. This period of torturous suffocation would be expected to last at least several minutes and would only be relieved by the onset of suffocation-induced unconsciousness.

Exhibit 3 at 22.

In short, an injection of pancuronium bromide in a conscious person will result in the person experiencing suffocation while, due to the paralysis, being unable to express his inability to breathe or show his pain and fear in any other manner.

The intravenous injection of concentrated potassium chloride, the third drug, in an unanesthetized person causes extreme agony. This is because "[t]he vessel walls of veins are richly supplied with sensory nerve fibers that are highly sensitive to potassium ions." Exhibit 3 at 8. Thus, the mere coursing of the chemical through the veins causes excruciating pain and discomfort. *Id*. The ultimate effect of the chemical, cardiac arrest, would also be painful in a conscious person. Due to the prior administration of pancuronium bromide, however, an inmate would be unable to express the pain felt as the chemical courses through his veins to his heart and induces arrest.

The sum effect, therefore, of intravenously injecting massive dosages of pancuronium bromide and potassium chloride into an unanesthetized person is that the person will experience suffocation, followed by the excruciating pain of potassium chloride coursing through his veins, and, finally, cardiac arrest. Due to the paralytic nature of pancuronium bromide, however, the inmate will be forced into a chemical straightjacket, unable to express the fact of his suffocation while he consciously experiences the third chemical ravaging his internal organs.

b. The Likelihood a Person Will Not Be Rendered Unconscious.

Generally, if successfully delivered into the circulation in sufficient quantities, three grams of sodium thiopental causes sufficient depression of the nervous system to permit otherwise excruciatingly painful procedures to be performed without causing discomfort or distress. Exhibit 3 at 8. There are many reasons, however, why an inmate may not be rendered unconscious by the first injection of sodium thiopental. These reasons have to do with (1) the characteristics of the drug; (2) human and mechanical error that are likely to occur during the administration of the lethal injection; and (3) the qualifications, training, and expertise of the persons administering the injections and monitoring the inmate for anesthetic depth.

Due to its short shelf-life in liquid form, sodium pentothal is distributed in powder form. *Id*. at 9. As a result, sodium pentothal must be mixed into a liquid solution before it can be intravenously injected. *Id*. According to Dr. Heath, "This preparation requires the correct application of pharmaceutical knowledge and familiarity with terminology and abbreviations. Calculations are also required, particularly if the protocol requires the use of a concentration of drug that differs from that which is normally used." *Id*. According to the protocol Defendants intend to use, however, it is not specified what qualifications or expertise is required to achieve this end, nor are there protocols governing the actual preparation of the anesthetic. Under Section IV, titled "Pre-execution Procedures," the protocol provides that "designated staff on the Huntsville Unit" are to be responsible for "ensuring the purchase, storage, and control of all chemicals used in lethal injection executions for the State of Texas." Exhibit 2 at 7. It further states that "the drug team" must obtain "all of the equipment and supplies necessary to perform the lethal injection from the designated storage area." *Id*. With respect to the actual preparation of the solutions that are finally injected, the protocol states merely:

B. Syringes for each of the lethal injection drugs shall be prepared as follows:

1. Sodium Pentothal – 30 milliliters of sodium containing 3 grams of thiopental sodium.

2. Pancuronium Bromide – 50 milliliters of solution containing 100 milligrams of pancuronium bromide.

3. Potassium Chloride – 70 milliliters of solution containing 140 milliequivalents (mEq) of potassium chloride.

Exhibit 2 at 8. Mr. Sonnier does not know the qualifications of the "designated staff" that must ensure the integrity of the chemicals, and the protocol is completely silent with respect to who actually "prepares" the syringes for each injection and how they are prepared.

Human error with respect to establishing adequate venous access, properly setting up and maintaining functioning equipment throughout the procedure, and physically pushing the plungers of the syringes can also cause a failure to successfully deliver the intended dosage into the inmate's circulation. Dr. Mark Heath explains several of these potential errors in his declaration. One such possibility relevant to the Respondent's protocol concerns the integrity of the equipment, specifically, the IV administration set. This set consists of multiple components that are assembled by hand prior to use. According to Dr. Heath

> If the personnel who are injecting the drugs are not at the bedside but are instead in a different room or part of the room, as is the case in the Texas lethal injection procedure, multiple IV extension sets need to be inserted between the inmate and the administration site. Any of these connections may loosen and leak. In clinical practice, it is important to maintain visual surveillance of the full extent of IV tubing so that such leaks may be detected. The configuration of the death chamber and the relative positions of the executioners and the inmate may hinder or preclude such surveillance, thereby causing a failure to detect a leak.

Exhibit 3 at 9-10.[6]

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[6] Although the May 30, 2008 protocol states that the CI Division Director, the Huntsville Unit Warden, and the "medically trained individual" shall "observe the IV to ensure that the rate of flow is uninterrupted, Exhibit 1 at VII.C, many of the mishaps that may occur will only be observable to the trained eye. Moreover, the observer has to

Another cause of insufficient administration of anesthetic concerns the integrity of the connection between the IV administration set and the inmate's veins at the catheter. A failure to properly insert the catheter into a vein will cause the sodium thiopental that is administered to enter the surrounding tissue rather than the vein. In that event, the drug will not be delivered to the central nervous system. According to Dr. Heath, "This condition, known as infiltration, occurs with regularity in the clinical setting. Recognition of infiltration requires continued surveillance of the IV site during the injection, and that surveillance should be performed by the individual who is performing the injection so as to permit correlation between visual observation and tactile feedback from the plunger of the syringe." *Id*. at 10. Even if a catheter has initially been properly inserted into a vein, the catheter tip may migrate in the time between its insertion and the injection of the drugs, which would again result in infiltration. *Id*. The Defendants' protocol requires the catheter to be inserted prior to the witnesses to the execution entering the gallery and prior to the condemned's last statements, leaving ample time for the catheter tip to migrate, particularly if the person struggles on the gurney.

Additionally, insertion of the catheter can cause perforation of the wall of the vein. *Id*. In this event, some or the entire injected drug leaves the vein through the perforation or rupture and enters the surrounding tissue, again leading to infiltration.[7] *Id*. And according to Dr. Heath, "The likelihood of rupture occurring is increased if too much pressure is applied to the plunger of the syringe during injection, because a high pressure injection results in a high velocity jet of drug in the vein that can penetrate or tear the vessel wall." *Id*. However, even without any prior

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be able to see the full length of the IV line. For fundamental reasons – including the places in which such observers are standing, and where the IV lines run (particularly if the only IV line that can be obtained is in the right arm, which is a not uncommon occurrence), the view of the IV lines is often obstructed.

[7] The likelihood of this occurring is greatly increased where an inmate's veins are compromised for whatever reason, including a history of intravenous drug abuse.

damage or perforation occurring to the vein wall during insertion of the catheter, rupture, and hence infiltration, can be caused by excessive pressure on the syringe plunger during the injection. *Id*.

Other reasons why an insufficient delivery of the anesthetic first drug could occur during a lethal injection pursuant to Defendants' protocol include: (1) failure to maintain the security of the catheter; (2) failure to properly administer the flush solutions between injections of chemicals; (3) failure to properly loosen or remove the tourniquet from the arm or leg after placement of the catheter; and (4) impaired delivery due to the restraining straps on the gurney that may act as a tourniquet.[8] Exhibit 3 at 10-11.

c. Evidence That Persons Have Not Been Rendered Unconscious

There is ample evidence, from prior lethal injections administered both by Respondents and other death penalty states, that the conditions under which the preparation and administration of the anesthetic drug occurs are less than ideal and that inmates who have undergone lethal injection were not rendered unconscious or sufficiently anesthetized.

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[8] According to Dr. Heath, these risks, present to some degree in all clinical administrations of anesthesia, are amplified when considered in the context of the Respondent's lethal injection protocol, including:

(a) the fact that EMTs or nurses insert the IV lines without supervision by an anesthesiologists or Certified Registered Nurse Anesthetists (CRNA);
(b) the fact that the IV lines run into a separate room;
(c) the fact that the persons who insert the IV lines leave the execution chamber and have no further role in the execution process;
(d) the fact that the persons who "push" the lethal drugs have no medical training whatsoever;
(e) the fact that the persons who "push" the lethal drugs do so remotely;
(f) the fact that no attempt is made to assess anesthetic depth during the induction of general anesthesia;
(g) the fact that no personnel are present who possess the requisite training and experience to assess anesthetic depth; and
(i) the fact that the protocol lacks measures for increasing the depth of anesthesia in the event that anesthetic depth is determined to be insufficient for the administration of potassium chloride.

Id. at 11.

On December 13, 2006, the State of Florida, the execution protocol of which is nearly identical to Respondent's protocol,[9] encountered a problem during the administration of a lethal injection when Angel Diaz required a second administration of the three-drug chemical cocktail and took, in all, approximately 37 minutes to die. A postmortem examination of Diaz's body by the county medical examiner discovered that improper catheter insertion led to the chemicals being injected into soft tissue surrounding his vein rather than into the blood vessel itself, known in the clinical setting as infiltration. *See* Exhibit 4 at 1-2 (Postmortem Examination of the Body of Angel Diaz, ME 06-589, Dec. 14, 2006). The medical examiner also observed large chemical burns on Diaz's arms, encompassing a 60-square-inch area on his right and 77-square-inch area on his left. *Id*. at 1. Consequently, Florida Governor Jeb Bush issued an executive order on December 15, 2006, establishing a commission to review Florida's lethal injection protocol, stating, "WHEREAS, the significantly lengthier death process for Mr. Diaz compared to that of other inmates who previously have been executed by lethal injection in Florida, including, according to witness accounts, a longer period of time during which Mr. Diaz lay conscious, should be considered…." Exhibit 5 (Fla. Exec. Order No. 06-260 (Dec. 15, 2006)).

Witnesses to the Diaz execution, including Diaz's lawyer and reporters, observed that Mr. Diaz appeared to be in pain during the procedure. Neal Dupree, Mr. Diaz's lawyer who was present in the execution chamber "approximately six (6) to seven (7) feet from Mr. Diaz," observed in a declaration:

> 5. Within a few minutes, Mr. Diaz became agitated, and it appeared to me that he was speaking to the members of the Department of Corrections staff. They did not appear to respond to him and I was unable to hear his part of the conversation because the intercom between the execution chamber and the

[9] Like the Defendants' protocol, Florida used the three chemical cocktail: sodium pentothal, pancuronium bromide, and potassium chloride. The Florida protocol, however, calls for the use of 5 grams of the anesthetic sodium pentothal compared to the Defendants' 3 grams of sodium pentothal.

observation room had been turned off. During the time Mr. Diaz appeared to be speaking, it was my observation that he was in pain. His face was contorted, and he grimaced on several occasions. His Adams Apple bobbed up and down continually, and his jaw was clenched.

6. I could observe some type of fluid flowing through the intravenous tube, and Mr. Diaz head rolled to the right. A strap had been placed across his forehead, and a member of the DOC staff held the strap. I observed Mr. Diaz' right eye to close, but his left eye remained open. His mouth opened, and Mr. Diaz appeared to be gasping for air for at least 10-12 minutes. It was apparent that the complete drug cycle had been given to Mr. Diaz, however, on several occasions over the next twenty minutes I observed movement from Mr. Diaz, and he continued to gasp heavily for air.

7. Approximately twenty minutes into the procedure, I observed two members of the DOC staff, one large black male, and a slightly smaller white male have several conversations into two separate phones. The black male had been on one phone since the initiation of the procedure, and I observed him hand that phone to the white male two times. After speaking into the first phone, the white male picked up a second phone, and had another conversation. It was apparent that something was wrong, and it was my observation that the other DOC staff members in the room looked uncomfortable at that time.

8. After a total of 25-30 minutes, Mr. Diaz' breathing appeared to get shallower. His face became slack, and his skin had a grayish pallor. During the last 5-6 minutes, both of his eyes opened and his Adam's apple slowly stopped bobbing.

Exhibit 6 (Declaration of Neal A. Dupree)Similarly, reporters who observed Diaz's execution also reported their observations of Mr. Diaz's apparent pain. A St. Petersburg Times reporter observed Diaz "moving for 24 minutes, sometimes appearing in pain. He grimaced, coughed, tried to talk and licked his lips. His head eventually slipped to the right, but he kept breathing heavy, his chin bobbing and his mouth flexing like a fish out of water." Chris Tisch, *Bush Orders In-Depth Look at Diaz Execution*, ST. PETERSBURG TIMES, Dec. 15, 2006, at 1A. A Gainesville Sun reporter noted that "Diaz's execution would appear to contradict" the state's claim that "the process is designed to ensure inmates are unconscious after the first drug is administered." Nathan Crabbe, *Inmate Takes 34 Minutes to Die*, GAINESVILLE SUN, Dec. 14,

2006, available at http://www.gainesville.com/apps/pbcs.dll/article?AID=/20061214/LOCAL/612140361 (last checked Sep. 26, 2007). The reporter observed, "After making his last statement at 6 p.m., Diaz appeared to wince and mouth words. Over the course of 10 minutes, he grimaced and shuddered at several junctures. He then moved his mouth in a way that made it appear he was gasping for air." *Id*.

5. Expert Opinion.

Dr. Mark Heath has reviewed the defendants' lethal injection protocol in another case and "conclude[s] to a reasonable degree of medical certainty that the Texas lethal injection procedure creates an unnecessary and medically unacceptable risk that an inmate will experience excruciating pain and suffering during the lethal injection due to the use of two execution chemicals [pancuronium bromide and potassium chloride] that are unnecessary to cause death but that cause excruciating pain and suffering." *See* Exhibit 3 at 1-2.

B. The Record before this Court Provides Cause for Grave Concern, yet is Also Inadequate To Make a Determination of the Constitutionality of Texas' Lethal Injection Practice.

This Court does not have an adequate record on which to evaluate the adequacy of Texas' lethal injection process. In *Baze*, "the [state] trial court held extensive hearings and entered detailed Findings of Fact and Conclusions of Law" relating to the state's lethal injection protocol and practice. *Baze*, 128 S.Ct. at 1526. Only "[a]fter a 7-day bench trial during which the trial court received the testimony of approximately 20 witnesses, including numerous experts," did the state courts in *Baze* decide the Eighth Amendment question. *Id*. at 1529. Here, there has been no hearing, no testimony from any expert, no cross-examination and no weighing of

evidence by an appropriate fact finder. In fact, it is unclear what protocol the State intends to employ in executing Mr. Sonnier.

Development of the record is essential for this Court to decide the constitutional question presented. Given that *Baze* was decided on the particular and unique facts related to Kentucky's lethal injection protocol and practice as it was adduced during a trial, it is impossible for this Court, without any factual development, to extrapolate from *Baze* an answer to the question whether *Texas's* lethal injection protocol and practice satisfy the Eighth Amendment.

Chief Justice Roberts relied heavily on these differences between Kentucky's and TDCJ-CID's protocols in upholding the Kentucky protocol. He wrote,

> Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner. The most significant of these is the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population. Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers. In addition, the protocol calls for the IV team to establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences. These redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected.
>
> The IV team has one hour to establish both the primary and backup IVs, a length of time the trial court found to be "not excessive but rather necessary," contrary to petitioners' claim that using an IV inserted after any "more than ten or fifteen minutes of unsuccessful attempts is dangerous because the IV is almost certain to be unreliable," And, in any event, merely because the protocol gives the IV team one hour to establish intravenous access does not mean that team members are required to spend the entire hour in a futile attempt to do so. The qualifications of the IV team also substantially reduce the risk of IV infiltration.

> In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration. Three of the Commonwealth's medical experts testified that identifying signs of infiltration would be "very obvious," even to the average person, because of the swelling that would result. Kentucky's protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds. ***In light of these safeguards***, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.

Baze, 128 S.Ct. at 1533-34 (citations omitted & emphasis supplied). Similar safeguards are completely lacking in TDCJ-CID's lethal injection protocol.

Another significant aspect of Kentucky's lethal injection protocol that is markedly different from Texas' is its contemplation of contingency plans for when the procedure does not go as intended. Kentucky's protocol provides, for example, that "[i]f the IV team cannot secure one (1) or more [insertion] sites within one (1) hour, the Governor's Office shall be contacted by the Commissioner and a request shall be made that the execution be scheduled for a later date." *Id*. at 976. Texas' 2005 protocol states only that "The individual shall not use a 'cut-down' procedure to access a suitable vein." Exhibit 2 at VI.C. Nowhere does the Texas protocol inform the individual what to do if a suitable vein cannot be found. The 2008 protocol states that "the medically trained individual shall take as much time as is needed to properly insert the IV lines," but also prohibits cut downs, and fails to specify what should be done if a vein cannot be found.

Kentucky's protocol also requires the use of "one (1) primary IV line and one (1) backup IV line." *Baze* at 976. Texas' 2005 protocol does not require the establishment of a backup IV line. The May 30, 2008 protocol does require a back-up line, but does not specify what is to be done if that back up line cannot be established. In this regard, it is crucial to note that in many Texas executions, only one line has been able to be established, often with difficulty. *See, e.g.*

Execution Logs of Stephen Morin (took 40 minutes to obtain access to one vein in the right arm only); Raymond Kinnamon (both IV's in left arm; lethal dose not begun until one hour after IV's started); Ronald Allridge (only one IV obtained, in right arm); James Briddle (IV in left hand only one obtained); Ricky Green (only one IV line, in right arm); Bruce Callins (unable to get solution flowing in left arm); Jerry Hogue (IV in right arm only); James Means (IV in left side of neck); Joseph Cannon (Vein "blew out" and IV removed; IV in right arm only); Claude Jones (One IV, in left leg); Jeffrey Dillingham ("no flow" noted for IV in right arm); Jermarr Anold (only one IV, in left arm); Johnny Martinez (only 1 IV, in right arm); Randall Hafdahl (No IV in left side; IV in right leg only) (all attached hereto as Exhibit 7).

Finally, the Kentucky protocol requires that the condemned be monitored for consciousness before the injection of the second and third drugs—the drugs that have the potential to cause torture: "If it appears to the Warden [t]hat the condemned is not unconscious within 60 seconds of his command to 'proceed', the Warden shall stop the flow of Sodium Thiopental in the primary site and order that the backup IV be used with a new flow of Sodium Thiopental." *Baze* at 979. TDCJ-CID's 2005 protocol has no comparable monitoring provision. The May 30, 2008 protocol specifies that the CI Division Director (who is standing behind the two way mirror in a separate room) and the Huntsville Warden shall observe the inmate to see if he is awake. Exhibit 1 at VII.J.

Not only are "awake" and "unconscious" far different states, but the inmate's state is assessed by two lay persons in dubious positions (literally and figuratively) for making the assessment. Moreover, the backup plan (i.e., the plan to administer a second dose of Sodium Pentothal through the backup IV if the inmate is thought to be "awake") depends on the establishment of a backup IV in the first place. Because the substantiality of the risk turns on the

likelihood of consciousness at the time the second and third drugs are delivered, this difference between Kentucky and TDCJ-CID is crucial.

Moreover, the absence of adequately articulated procedures and safeguards, or a deliberative process that might provide any assurances regarding the adequacy of the procedure used to execute more men than any other state, are the hallmarks of Texas' lethal injection process. Recent interviews with personnel involved in Texas executions in the past reveal that Texas' lethal injection practice is one that relies not on any written protocol, but on word of mouth and experiential training, informed primarily by tradition *un*informed by the potential problems that have been revealed in the near past. The written protocol is effectively irrelevant to execution practice.

A meeting between Louisiana correctional officials and the warden of the Walls Unit is telling. In 1991, officials from Louisiana, in the midst of changing their method of execution from electrocution to lethal injection, visited officials in a number of states, including Texas, who had lethal injection experience. Annette Viator, then chief legal counsel for the Louisiana Department of Corrections, recounts her visit with the warden of Texas' Walls Unit (where executions take place):

> This warden had been in the Texas Department of Corrections 30, 40 years, worked his way up . . . he told us as soon as we walked in that he apologized for putting us to so much trouble to come all the way to Texas, but that he didn't say things on the phone that he would rather say in person. He asked us if any of us had tape recorders, if any of us were wired. And, basically, he pretty much told us in blunt terms that he didn't really have so much of a policy about it, as he did just sort of – they did whatever worked at the time. He pretty much told us that he didn't have a strict policy. And when we asked him – which we were very concerned about the medical portion of it.
>
> Again, he surprised us by telling us that the only thing that mattered was that the guy ended up dead and that he wasn't worried too much about the amount of medicine. He had certainly used the same types of medicine, but that he wasn't totally concerned about the amounts or what it may or may not do. They ended up dead, and that's all that he was worried about.

> The rest of our conversation with him tracked that same thing. He was not terribly concerned about policy, procedure, or who did what, when, where. Just so the right result happened.
>
> . . . .
>
> And you know, remember, the warden of Texas was not real forthcoming. If he had a policy, if he had amounts, we were not privy to them. He never indicated that to us that he had them, and he certainly indicated to us that nothing was written down at that point. . . . .
>
> We were shocked. I think our impression – let me speak for myself. My impression of that visit was I was going to do what Texas wasn't doing. I was not going to follow – we did not use, to my knowledge, anything we learned in Texas to implement lethal injection in Louisiana. We went the opposite direction.

Code v. Cain, No. 138,860-A, 1st Judicial District Court, Parish of Caddo, Louisiana, Special Hearing, Vol. II, Feb. 11, 2003, pp. 32-35.

Far from being a model, Texas' lethal injection "practice" is highly questionable. Changes in the written protocol do not change that.

C. Mr. Sonnier Has No Adequate Remedy at Law.

Mr. Sonnier has no other adequate remedy at law. This proceeding is not instituted to bring a new challenge to Mr. Sonnier's death sentence. This Court currently has before it the question whether a challenge of this nature to Respondent's lethal injection protocol is cognizable in habeas corpus. Order, *Ex parte Alba*, No. AP-75,510 (Tex. Crim. App. Sep. 20, 2006). Contemporaneously with this petition, Mr. Sonnier has filed a petition for writ of habeas corpus. If this Court does not believe Mr. Sonnier's right to remain free from cruel and unusual punishment is enforceable in habeas corpus, then the writ of prohibition is the sole vehicle available to Mr. Sonnier by which to enforce his constitutional right.

CONCLUSION

Mr. Sonnier has a clear right under the Eighth Amendment to be free from "cruel and unusual punishment" and under Texas law to be free from torture, ill treatment, or unnecessary

pain. The Respondent's lethal injection procedure creates a substantial risk that he will experience excruciating pain and suffering, in violation of these rights. Mr. Sonnier requests that this Court grant him a writ of prohibition prohibiting defendants from administering a lethal injection to him in the manner currently intended.

PRAYER FOR RELIEF

For the foregoing reasons, Mr. Sonnier respectfully requests that this Court:

1. Issue a writ of prohibition barring Respondent Quarterman and his agents from administering a lethal injection to Mr. Sonnier in accordance with their protocol that violates Mr. Sonnier's clear rights.

2. Issue a stay of execution pending a determination of the constitutionality of Texas' lethal injection procedure.

Respectfully Submitted,

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