No. _____

In the Supreme Court of the United States

BRIAN KEITH TERRELL,

Petitioner,

v.

HOMER BRYSON, Commissioner, Georgia Department of Corrections,

BRUCE CHATMAN, Warden, Georgia Diagnostic and Classification Prison, and

OTHER UNKNOWN EMPLOYEES AND AGENTS, Georgia Department of Corrections,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

Does Respondents' current source of compounded drugs – a pharmacist whose batches of drugs are demonstrably defective more than twenty percent of the time and appear to vary in composition from batch to batch – render their lethal injection procedures in violation of the Eighth Amendment?

Does Georgia's lethal injection secrecy act – a "shroud of secrecy imposed by Georgia law [that] effectively insulates the State of Georgia's source, quality, and composition of pentobarbital from any scrutiny, leaving the condemned without any meaningful notice or opportunity to be heard"[1] – violate Mr. Terrell's Fifth, Eighth and Fourteenth Amendment rights, particularly "once something has gone demonstrably wrong with the compounded pentobarbital [Georgia] has procured[?]"[2].

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[1] *Terrell v. Bryson*, Case. No. 15-15427 (Martin, J., concurring) (December 8, 2015).

[2] *Gissendaner v. Bryson*, 803 F.3d 565, 579 (Jordan, J., dissenting) (11th Cir. 2015).

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BRIAN KEITH TERRELL respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Georgia dismissing Mr. Terrell's action pursuant to 42 U.S.C. § 1983, *Terrell v. Bryson, et al.,* Civil Action No. 1:15-CV-4236-TCB (N.D. Ga. December 8, 2015), appears as Exhibit A to this petition. The decision of the Eleventh Circuit, *Terrell v. Bryson, et al.*, appears as Exhibit B to this petition.

JURISDICTION

The decision of the Eleventh Circuit was entered on December 8, 2015. Mr. Terrell invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in relevant part: "No person . . . shall be deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. art. V.

Amendment VIII to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. art. VIII.

Amendment XIV to the United States Constitution, section 1, provides, in relevant part: "Nor shall any State deprive any person of life, liberty, or property

without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. art. XIV, cl. 1.

Section 1983 of Title 28 of the United States Code states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

O.C.G.A. § 42-5-36(d) provides:

> (1) As used in this subsection, the term 'identifying information' means any records or information that reveals a name, residential or business address, residential or business telephone number, day and month of birth, social security number, or professional qualifications.
>
> (2) The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.

STATEMENT OF THE CASE

"The shroud of secrecy imposed by [Georgia's lethal injection secrecy law] effectively insulates the State of Georgia's source, quality, and composition of pentobarbital from any scrutiny, leaving the condemned without any meaningful notice or opportunity to be heard about the specific risks he faces from the State's reliance on an unidentified compounding pharmacy." *Terrell*, Case. No. 15-15427 (Martin, J., concurring) at 14. Behind this shroud, Respondents intend to execute

Petitioner Brian Keith Terrell **tonight** with compounded lethal injection drugs obtained from the same pharmacist who mixed the defective drugs that congealed into clumps on the night of March 2, 2015, and resulted in the postponement of his first scheduled execution.

Respondents attributed those botched drugs to an "isolated mishap." But documents disclosed (and not contested) by Respondents demonstrate that it was not merely one but *two* separate batches of lethal injection drugs – mixed one week apart – that coagulated and became unusable. These documents also establish that after a self-investigation largely concealed by Georgia's lethal injection secrecy act, Respondents *still* do not know why their drugs were too dangerous to use. That uncertainty, however, has not deterred Respondents from subsequently using drugs from the same source to carry out two executions, which featured such a wide disparity in how long the prisoners survived after being injected that it suggests the efficacy of the drugs varies widely from batch to batch. And even this evidence that Respondents' problems with their lethal injection were more widespread than they admitted; that Respondents still have not solved those problems; and that Respondents' problems are continuing, has not persuaded the lower courts to hold them accountable. Indeed, the courts below have affirmed the dismissal of previous litigation concerning Respondents' use of secretly-sourced compounded pentobarbital in lethal injections because they concluded that – in the absence of the information withheld by Respondents concerning the origin and true nature of

the drugs – the prisoners' allegations of a substantial risk of significant harm were speculation.[3]

In the instant case, there is no speculation. Respondents' documents and concessions below demonstrate that no less than twenty-two percent of the batches of drugs that their pharmacist has mixed for use in executions have crystallized, while the other two batches have yielded widely divergent results. In contrast to the plaintiffs in *Wellons* and *Gissendaner*, *see* note 1, *supra*, Mr. Terrell has *evidence* of an unconstitutional risk. "It is certainly fair to infer that if there is a problem with the supply of defective compounded pentobarbital . . . and Georgia has not been able to figure out what caused that problem, the problem is likely to recur." *Gissendaner v. Bryson*, 803 F.3d 565, 579 (11th Cir. 2015) (Jordan, J., dissenting). As Respondents' conduct presents an imminent and substantial risk of serious harm to Mr. Terrell in violation of his rights pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, and as Georgia's lethal injection secrecy act "depriv[es] Mr. Terrell and other condemned prisoners of any ability to subject the State's method of execution to meaningful adversarial testing before they are put to death,"[4] he respectfully petitions this Court to grant him certiorari.

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[3] *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260 (11th Cir. 2014); *Gissendaner u. Comm'r, Ga. Dep't of Corr.,* 779 F.3d 1275, 1281-82 (11th Cir. 2015) *("Gissendaner I')*; *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 803 F.3d 565, 568 (11th Cir. 2015).

[4] *Terrell*, Case. No. 15-15427 (Martin, J., concurring) at 14.

COURSE OF PROCEEDINGS

On February 27, 2015, the Superior Court of Newton County entered an order authorizing Mr. Terrell's execution during a seven-day period beginning at noon on March 10, 2015, and ending at noon on March 17, 2015. Respondents scheduled his execution for March 10, 2015, just eight days after the March 2 execution date for Kelly Renee Gissendaner.

On March 2, Respondents postponed Ms. Gissendaner's execution because the drugs that they had on hand for her execution were "cloudy." On March 3, Respondents reported that the executions of Ms. Gissendaner and Mr. Terrell would be postponed indefinitely. [5]

Following the dismissal of a Section 1983 action filed by Ms. Gissendaner in the United States District Court for the Northern District of Georgia[6], Respondents resumed executions with the same source of drugs and the same protocol as in March. Respondents executed Ms. Gissendaner on September 30, 2015. Respondents executed Marcus Ray Johnson on November 19, 2015. Pursuant to an order entered by the Superior Court of Newton County on November 23, 2015, Mr. Terrell is scheduled for execution on Tuesday, December 8, 2015.

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[5] *See* Press Release, "*Court Ordered Executions Postponed - Kelly Renee Gissendaner and Brian Keith Terrell,*" Georgia Department of Corrections, March 3, 2015 (attached as Doc. No 3-2 to Memorandum of Law).

[6] *Gissendander v. Bryson*, Case No. 1:15-CV-689 ("*Gissendaner II*").

On December 6, 2015, Mr. Terrell initiated the proceedings pursuant to 42 U.S.C. §1983 that underlie this petition (Doc. No. 1), and filed a motion for a temporary restraining order and a stay of execution (Doc. No. 3). The following day, December 7, 2015, Appellees filed a Pre-Answer Motion to Dismiss and Response to Plaintiff's Complaint and Motion for Stay. (Doc. No. 8.) The district court entered an order denying Mr. Terrell's motion for a TRO and stay of execution on December 8, 2015. Mr. Terrell appealed the dismissal of his complaint and sought a stay of execution in the Eleventh Circuit, which affirmed the District Court's orders on December 8, 2015. This petition for a writ of certiorari and motion for a stay of execution follow.

REASONS FOR GRANTING THE WRIT

I. Facts Supporting Mr. Terrell's Complaint in the Court Below

A. The Events of March 2, 2015

On March 2, 2015, both Brian Terrell and Kelly Gissendaner were scheduled for execution pursuant to Respondents' one-drug lethal injection protocol, which features a substance that purports to be "Pentobarbital," but that has been mixed from unknown ingredients and in unknown circumstances by a compounding pharmacist whose identity is concealed pursuant to Georgia's lethal injection secrecy act.[7] Ms. Gissendaner was scheduled for execution at 7:00 p.m. that evening, while Mr. Terrell's execution date was eight days later, on March 10, 2015.

[7]*See* O.C.G.A. § 42-5-36 and discussion *infra* at *27.

At 10:19 p.m. on March 2, however, Ms. Gissendaner's lawyers were notified that her execution would not proceed that evening because Respondents' compounded lethal injection drugs were defective. Declaration of Lindsay N. Bennett (Doc. No. 3-3) at ¶2. Respondents' counsel reported that the lethal injection drugs had initially appeared "fine," but that at around 9:00 p.m. they "appeared" cloudy.[8] *Id.* At approximately 10:29 p.m., Respondents' counsel called back to report that Ms. Gissendaner's execution might proceed because "there was a batch [of lethal injection drugs] *from the prior week* and a batch from '*this week*'" that "might be available to use."[9] Doc. No. 3-3 at ¶6 (emphasis added). At 10:43 p.m., Respondents' counsel telephoned again and stated that the execution would be postponed, as both the physician attending the execution and a pharmacist had "reported to [Respondents] that they did not think the drugs would be 'appropriate for medical use.' *Id.* Respondents' counsel insisted that there were no problems

[8]Respondents later released "a video of one syringe of the pentobarbital sodium solution that was prepared for use at the scheduled execution of Inmate Gissendaner." Affidavit of Robert Jones of 04/16/2015 (Doc. No. 3-4) at ¶2; *see also* Video of Precipitated Lethal Injection Drug ("Ex. 4"; see Doc. No. 7). That video shows a solution that has congealed into large clumps which, as the syringe is rotated, sink and crash into the plunger.

[9]As discussed *infra*, the Controlled Chemical Inventory Log disclosed by Respondents in response to Mr. Terrell's ORA request indeed reflects the receipt of two "batches" of lethal injection drugs within the weeks prior to Ms. Gissendaner's execution. See Doc. No. 3-5. Accordingly, the fact that Respondents' counsel stated that two batches had been checked is significant.

with their supplier; "*this* batch [of drugs] just did not come out like it was supposed to."[10] Doc. No. 3-3 at ¶ 7 (emphasis added).

On March 3, Respondents reported that the executions of Ms. Gissendaner and Mr. Terrell would be postponed indefinitely "while an analysis is conducted of the drugs planned for use in last night's scheduled execution . . . ." *See* Press Release, "*Court Ordered Executions Postponed - Kelly Renee Gissendaner and Brian Keith Terrell*," Georgia Department of Corrections, March 3, 2015 (Doc. No. 3-2). Respondents provided few details of the steps of its investigation, saying only that they might send the drugs to be analyzed by the same pharmacist who had provided them, or perhaps to "an independent lab." Affidavit of Robert Jones of 03/19/2015 (Doc. No. 3-6).

B. Respondents' Subsequent Disclosures

Following the dismissal of a Section 1983 action filed by Ms. Gissendaner in the United States District Court for the Northern District of Georgia, Respondents resumed executions with the same source of drugs and the same protocol as in March. Respondents executed Ms. Gissendaner on September 30, 2015. They executed Marcus Ray Johnson on November 19, 2015.[11]

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[10] This assertion seems questionable in light of General Counsel Jones's admission, discussed *infra*, that the "backup supply," which was likely a separate batch of pentobarbital altogether, also crystallized.

[11] Ms. Gissendaner's action was dismissed pursuant to Respondents' Rule 12(b)(6) motion. Accordingly, none of the submissions that Respondents made in

1. Two Separate Batches of Respondents' Lethal Injection Drugs Were Defective.

a. The Controlled Substance Inventory Log

In response to an Open Records Act request made on behalf of Mr. Terrell, Respondents disclosed their Controlled Chemical Inventory Log for their lethal injection drugs, which tracks their receipt and dispensation of the drugs both in advance of the March 2 execution date and in the months following. Doc. No. 3-5.[12] The log reveals that on February 17, 2015, Respondents received one batch of lethal injection drugs in the form of six syringes of what purported to be compounded pentobarbital. *Id.* at 1. Per Respondents' log, the drugs were mixed the same day that they were received. *Id.*

On February 24 – one day prior to Ms. Gissendaner's original execution date of February 25 – Respondents received another batch of six syringes, which had also been mixed on the same day that they were received. *Id.* That evening, Ms. Gissendaner's execution was postponed until March 2. Respondents' reason for obtaining the second batch is unknown.[13] On the night of March 2, however, it was

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support of their motion were considered by this Court or by the Eleventh Circuit on appeal. *See Gissendaner v. Bryson*, 803 F.3d at 579 n. 2 (Jordan, J., dissenting).

[12] Exhibits 5, 7, 19, and 20 to this appeal are excerpted from Respondents' voluminous response of November 24, 2015, to an Open Records Act request filed on Mr. Terrell's behalf. The authenticity of these documents has not been disputed, but he will provide the entirety of the correspondence upon the request of the Court.

[13]Respondents did not obtain an execution warrant for Mr. Terrell until February 27, 2015 – three days after these drugs were mixed and received.

this *February 24th* batch that Respondents took to the execution chamber for Ms. Gissendaner's attempted lethal injection. *Id.* Respondents have not given a reason for abandoning their February 17 batch unused, but – as discussed *infra* – subsequent disclosures indicate that it, too, had congealed into clumps.

b. The Affidavit of Robert Jones

In Ms. Gissendaner's litigation, Respondents submitted an affidavit from Robert Jones, their former counsel, describing the discovery of the "cloudy" drugs on the night of March 2 and Respondents' efforts to prepare a media response to Ms. Gissendaner's botched execution – an account which corroborates that two separate batches of lethal injection drugs precipitated, and that Respondents still do not know why. Doc. No. 3-6.

Mr. Jones attested that after Respondents were alerted that the supply of drugs in the execution chamber was "cloudy," he was dispatched to inspect the "*backup supply* of drugs in the [prison] pharmacy." *Id.* at ¶¶2-3 (emphasis added). That supply was similarly corrupted: it contained "small particles or crystals within the solution, which made it appear cloudy."[14] *Id.*

[14] It is unclear from Mr. Jones's affidavit whether the "backup supply" that he checked is the two syringes from the February 24 shipment that were left in the prison pharmacy or the entirety of the February 17 batch. As discussed *infra*, the likeliest explanation is both, as the evidence from Respondents' log suggests that all of the lethal injection drugs in the pharmacy that night were defective.

Mr. Jones also provided the only account of the initial stages of Respondents' self-investigation into the events of that evening. Per his affidavit, he met with Respondents' pharmacist at GDCP on March 4 so that the pharmacist could "inspect[] the drugs and collect[] a sample in order to test the 'ph' [sic] level of the drugs." *Id.* at ¶7. Mr. Jones reported that Respondents' pharmacist telephoned him "[l]ater that afternoon" and "advised that the ph [sic] was within the appropriate ranges . . . ." *Id.* Respondents' pharmacist then asserted that the pH results "indicated to him that the most likely cause of the precipitation was that the drugs had been stored at a temperature that was too cold." *Id.* Mr. Jones spoke with Respondents' pharmacist and another anonymous pharmacist on March 6 "about the most likely cause of the observed precipitation within the drugs," and concluded that "[b]ased on the available information at that time" – which appears to be nothing more than the pharmacist's representations as to the pH – it "appeared . . . not [to be] contamination, but storing the drugs at too cold a temperature, which caused the drugs to precipitate." *Id.* at ¶8.

Mr. Jones stated that "samples of the drugs" had been shipped to a "testing laboratory" on March 12, 2015, where they would be tested for the identity of the active pharmaceutical ingredient (API) and potency only. *Id.* at ¶9. He then detailed Respondents' plan to conduct a test that "should *confirm* whether the problem with the drugs that were to be used in the Gissendaner execution was that they were stored at too cold a temperature causing the precipitation within the solution, which is the current prevailing opinion." *Id.* at ¶10 (emphasis added).

> [T]he supplying pharmacist will be preparing another sample of new execution drugs within the next week. Samples of this new batch of drugs will be sent to an independent testing laboratory for analysis. Another sample of this new batch will be placed in the same refrigerator that stored the drugs that were to be used in the Gissendaner execution and stored at the same temperature, 37 degrees Fahrenheit. Another sample of the drugs will be stored in a newly purchased refrigerator that will maintain a constant temperature of approximately 50 degrees Fahrenheit. These samples will be photographed and closely monitored for seven days.

Id. at ¶10.

c. This Testing Reveals Both Batches Were Defective

Respondents also submitted a report by one NMS Laboratories in Willow Grove, Pennsylvania, which documented their receipt of "two samples" of "Pentobarbital Solution" on March 13, 2015, by UPS Next Day Air. *See* Doc. No. 3-7 at 2. The report describes the first sample as "one clear plastic syringe . . . labeled 'Sod Pentobarbital 50mg/ml Lot *022415*' containing clear pale yellow liquid *with white solid material*." *Id.* (emphasis added). The second sample is a "clear plastic syringe . . . labeled 'Sod Pentobarbital 50mg/ml Lot *021715*' containing "clear colorless liquid *with white solid material*." *Id.* (emphasis added).

When read alongside Respondents' log, this report establishes that both the February 17 and February 24 batches of lethal injection drugs were defective. The log records that on March 12, 2015 – the date given by Mr. Jones's affidavit for when the drugs were shipped to a "testing laboratory," Doc. No. 3-6 at ¶9 – Respondents removed two syringes of drugs from the prison pharmacy so that they

could be sent to the lab for testing: one syringe from the *February 17 batch* and one from the *February 24* batch. [15] Doc. No. 3-5 at 1.

2. Defendants Still Do Not Know Why Their Drugs Congealed

Respondents' submissions establish that, in addition to misrepresenting the scope of their problems with the mixing of their drugs, Respondents still have no answers for why their drugs were defective.

a. The Affidavit of Dr. Zastre

As part of Respondents' self-investigation, Mr. Jones and the Office of the Attorney General contacted Jason Zastre, Ph.D., an associate professor of pharmacy at the University of Georgia, "to provide assistance to the State of Georgia in evaluating what occurred in a sample of compounded pentobarbital sodium solution which apparently precipitated *after shipment on frozen gel packs and storage at approximately 37 degrees Fahrenheit over more than 7 days*." Doc. No. 3-15 at ¶3 (emphasis added). Dr. Zastre recommended that Respondents send samples of both the precipitated solution and the powder from which it had been prepared to a

[15] Given the inclusion of syringes from both batches of drugs in the testing, the assignment of lot numbers to the syringes that correspond with the dates that the two batches were mixed, and the fact that the contents of both syringes had precipitated, it seems incontrovertible that both the February 17 and February 24 batches had precipitated by the night of March 2, if not before. As noted *supra*, the lot numbers of the samples are evidently their dates of production. Lot Number 021715 would apply to the syringe produced on February 17, 2015, while Lot Number 022415 would apply to the syringe produced on February 24, 2015.

testing laboratory for comparison. *Id.* at ¶4. That testing was evidently initiated on March 24 and completed on April 2, 2015.[16]

Upon reviewing the test results, Dr. Zastre attested that "the solid particles remaining in the solution were two different solid forms of pentobarbital," *id.* at ¶8, which either "precipitated or fell out of solution," *ibid.* at ¶9.[17] Dr. Zastre offered two possible explanations for why Respondents' drugs had become unsafe. The first, which he considered "most likely," was "that the solution was shipped and stored at a temperature which was too low." *Id.* at ¶11. But he also noted an additional explanation: "the pharmaceutical solvent used to dissolve the pentobarbital sodium had absorbed some amount of water or evaporated during the preparation process."[18] *Id.* (emphasis added).

Dr. Zastre's affidavit clearly identifies *two* possible explanations for why Ms. Gissendaner's drugs precipitated, but only one was put forward by Respondents. On April 16 – the same day Respondents filed their motion to dismiss in Ms.

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[16]The first affidavit of William King, Chief of Special Projects for Respondents' Office of Investigations and Compliance Criminal Investigations Division, indicates that he obtained and shipped these materials on March 24 – the same day that he initiated Respondents' previously undisclosed cold-storage testing. Doc. No. 3-16.

[17]As discussed *infra*, the fact that two different forms of pentobarbital were revealed by this testing suggests to Mr. Terrell's expert that Respondents' pharmacist used the wrong active pharmaceutical ingredient in mixing Respondents' lethal injection drugs.

[18] Dr. Zastre made no reference to the testing results that call Respondents' "cold storage" theory into question, which, as detailed *infra*, were completed two weeks *before* he signed his affidavit.

Gissendaner's § 1983 action in district court – they issued a press release stating that "[t]he most likely cause of this precipitation was that the drugs were shipped and stored at a temperature, which was too low."

b. Mr. King's Affidavit and Report

Eight days later, after facing pressure from the media to disclose the cold-storage testing announced in Mr. Jones's affidavit,[19] Respondents filed a supplement to their motion to dismiss which included a second affidavit and investigative report from William King, the Chief of Special Projects for Respondents' Office of Investigations and Compliance Criminal Investigations Division. Doc. No. 3-17 at 2, ¶1. Mr. King's affidavit detailed a series of tests that he conducted from March 24 through April 2 that roughly parallel those described in Mr. Jones's March 19 affidavit. Per Mr. King, Mr. Jones contacted him on March 24, 2015, and requested his "assistance" in documenting "the condition of two newly prepared samples of pentobarbital, which would be stored at different temperatures" at the Georgia Diagnostic and Classification Prison. *Id.* at 2, ¶¶ 2-3. One sample was stored "at room temperature" while another "was stored at a colder

[19] *See* Chris McDaniel, *Georgia won't release results of experiment to determine why execution drug had pieces floating in it,* BUZZFEED NEWS (May 26, 2015), available at http://www.buzzfeed.com/chrismcdaniel/georgia-wont-release-results-of-experiment-to-determine-why#.vsx0Xrb0R (last visited December 3, 2015); *see also* Rhonda Cook, *Georgia yet to turn over results of execution drug testing*, ATLANTA JOURNAL-CONSTITUTION (May 27, 2015), available at http://www.ajc.com/news/news/local/georgia-yet-to-turn-over-results-of-execution-drug/nmPdx/ (last visited December 3, 2015).

temperature, in a refrigerator located in the same room which was used to store the pentobarbital which was prepared for the execution of Inmate Gissendaner." *Id.* Mr. King attested that he "photographed each sample, logged the date and time the photograph was taken, the temperature of each sample, and the condition of each sample once daily on March 24-27, 2015 and March 30-April 3, 2015" – a total of nine days measured over an eleven-day period.[20] *Id.* Mr. King maintained a log in which he noted "[t]he room temperature and the temperature on the inside of the small refrigerator" which indicated that the temperature of the room in which the unrefrigerated drugs were stored ranged from 67° F to 72° F, while every measure of the temperature of the refrigerator in which the "R" sample was stored was 34° F. *Id.* at 9-10.

Mr. King concluded his report with this sentence: "*No changes* were noted to either sample during the inspection periods." *Id.* at 5. A review of Mr. King's log confirms that he described each sample as "clear" for each of the days he observed them. *Id.* at 9-10. Respondents have conducted no additional testing to determine why their lethal injection drugs became defective.

II. The Cause of the Drugs' Defectiveness Remains Unknown

When Respondents initiated their self-investigation, all that was known about the drugs that they intended to use to execute Ms. Gissendaner on March 2 was that they were "cloudy" and, according to Respondents' own doctor and

[20] March 28-29 was the Easter holiday.

pharmacist, inappropriate for medical use. Nine months later, little more is known. Respondents' only proffered explanation for why two batches of their pharmacist's drugs congealed has been disproven by their own testing. Dr. Michael Jay, Petitioner's expert, has attested that the "cold-storage testing conducted by the Department of Corrections demonstrated that storage temperature was not a factor in the precipitation." Jay Aff. at 5. Respondents have not controverted that evidence save to assert that Dr. Zastre explained away the failure of their testing to fit their theory by informing them that pentobarbital does not precipitate every time it is stored too cold – although his affidavit does not say that or include any acknowledgment whatsoever of Respondents' testing. Doc. No. 8 at 21.

As the district court noted:

> [Respondents] have adopted the cold-storage theory referenced in Zastre's affidavit, and they therefore take the position that the precipitation observed on March 2 was the result of an isolated occurrence. They have *paid little heed* to the alternative explanation offered by Zastre, and they *explain away the results of their own testing*, as documented in King's log, by suggesting that pentobarbital does not precipitate every time it is stored too cold.

Doc. No. 10 at 10-11 (emphases added). In sum, Respondents cannot say why their drugs were defective. But they have wielded Georgia's lethal injection secrecy act to prevent anyone else from inquiring.

Respondents do not seriously challenge this evidence, although they characterize the two batches of aberrant drugs as "one set of drugs, albeit two batches which were prepared within days of each other in the same method and stored in the same method" – a purely semantic distinction. Doc. No. 8 at 25-26.

They also scrupulously avoid disclosing both *when* their February 17 batch of lethal injection drugs precipitated, and *why* they obtained another batch on February 24– critical facts for assessing the "deliberate indifference" of their conduct. Respondents concede that they obtained both the February 17 and 24 batches of their drugs for Ms. Gissendaner. Doc. No. 8 at 13. But they do not explain *why* they needed a replacement batch. The February 17 batch would not have expired until March 17 – more than two weeks after Ms. Gissendaner's rescheduled execution date of March 2, and, indeed, well after her warrant window closed. Doc. No. 3-5 at 1.1 Why obtain a second batch, at what was surely significant cost, unless there was something wrong with the first?

III. Respondents' Claim that their Botched Drugs Were an Isolated Mishap is Disproven.

In spite of the fact that these two separate batches of lethal injection drugs were defective, Respondents have repeatedly misrepresented to this Court and others that the precipitation of their lethal injection drugs was a one-time occurrence. A sampling of those claims follows:

- "Under no less authority than *Baze*, 'an **isolated** mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm."'" *Gissendaner v. Bryson (Gissendaner II)*, Case No. 1:15-cv-00689 (Doc. No. 9), [Respondents]' Motion to Dismiss (excerpted hereto as Doc. No 3-8) at 20 (emphasis added) (quoting *Baze*, 553 U.S. at 50 (citation omitted)).

- "The precipitation of **one** set of drugs does not mean that they will precipitate in the future **and** that [Respondents] will use those drugs." *Gissendaner v. Bryson (Gissendaner II)*, Case No. 1:15-cv-00689 (Doc. No. 34),

Defendants' Response in Opposition to Plaintiff's Motion for Reconsideration (excerpted hereto as Doc. No 3-9) at 8 (first emphasis added).[21]

- "But the precipitation does not create a 'substantial change' to the protocol. It is merely **an** event that Appellant is attempting to use to prove the protocol is in violation of the Eighth Amendment." *Gissendaner v. Bryson (Gissendaner II)*, Case No. 15-14335, Brief on Behalf of Appellee (excerpted hereto as Doc. No 3-10) at 25 (emphasis added).

- "In reality, after the inspection revealed **an** irregularity in **the** execution **drug**, officials prudently postponed the execution so that there would *not* be the potential for any 'botched' execution." Doc. No 3-8 at 22 (emphasis added).

- "The State's use of compounded drugs makes incidents like **the one** that transpired at GDC on March 2 all but unavoidable." *Id.* at 30 (emphasis added).

- "Plaintiff obscures her burden by inappropriately ridiculing [Respondents'] actions when faced with the precipitated pentobarbital **on the night of the scheduled** execution." *Gissendaner v. Bryson (Gissendaner II)*, Case No. 1:15-cv-00689 (Doc. No. 26), Defendant's [sic] Advisory Regarding *Glossip v. Gross* (excerpted hereto as Doc. No 3-12) at 9 (emphasis added).[22]

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[21] *See also Gissendaner v. Bryson (Gissendaner II)*, Case No. 15-14335, Brief on Behalf of Appellee (excerpted hereto as Doc. No. 3-10) at 26; *Gissendaner v. Bryson*, Case No. 15-6336, 15-A336, Respondent's Brief in Opposition to Certiorari Review and Motion for Stay of Execution (attached hereto as Doc. No 3-11) at 8 (emphasis added).

[22] Respondents also asserted that they "were **suddenly** confronted with drugs that did not appear viable for use in an execution they were ordered to perform" and dismissed their misrepresentations as "**initial** confusion as to how to deal with this difficult situation" – a claim that seems dubious if, as seems likely, the purchase of the February 24 batch was motivated by the precipitation of the February 17 batch. *Id.*; *see also* Doc. No 3-11 at 8. Respondents struck a self-righteous note that now rings hollow, arguing that Ms. Gissendaner "misrepresents State officials' **candor** to her counsel regarding concerns over the drug as ineptitude or worse, as **deceit** . . . ." Doc. No 3-8 at 21 (emphases added); *see also* Doc. No 3-11 at 16.

Respondents' assertions are in keeping with their previous attempts to minimize any concerns that the courts might have about the safety and efficacy of their secret drugs. Respondents have insisted that the FDA-approved pentobarbital that they formerly used and the compounded "pentobarbital" they now obtain "are the *exact* same . . . ." *Gissendaner v. Bryson ("Gissendaner I")*, Case No. 1:15-cv-523, Transcript of Motions Hearing of 02/24/2015 (attached as Doc. No 3-13) at 17. Indeed, in an action before the district court that challenged Respondents' use of compounded pentobarbital, Respondents mocked the notion that compounding drugs posed any risks:

> So you are saying that they can't take pentobarbital, which is described as a pretty easy process, you take a liquid and you take a dry powder and you put them together. I mean, *this isn't difficult, it isn't something difficult to compound* . . . .

Wellons v. Owens, Case No. 1:14-CV-1827-WBH, Transcript of Motions Hearing, of 06/16/2014 (attached as Doc. No 3-14) at 30 (emphasis added).

In *Gissendaner I*, moreover, Respondents offered an assessment of the consequences that would befall them if their representations to the district court proved inaccurate – consequences that their current behavior suggests they intend to avoid:

> [I]f we do not obtain pentobarbital that's properly compounded . . . . the minute that we do run afoul and we do something like that then we *will no longer be able to carry out any of our lawful death sentences.*

Doc. No 3-13 at 25 (emphasis added).[23]

IV. Respondents' Pharmacist Botches His Drugs "Only" Twenty Percent of the Time[24]

Respondents also make an objection that operates as a concession. They disclose – for the first time, to Mr. Terrell's knowledge – that the pharmacist who mixed the defective batches of lethal injection drugs in February also mixed the batches used to execute Marcus Wellons, Wayne Holsey, Andrew Brannan, and Warren Hill, as well as Kelly Gissendaner and Marcus Ray Johnson.[25] The point of Respondents' response appears to be that their pharmacist's unconstitutional error

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[23] Respondents have previously attempted to insulate themselves from scrutiny or responsibility with authority for "a presumption of legitimacy accorded to the Government's official conduct." *See, e.g.*, Doc. No 3-8 at 31 (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)). That presumption is not warranted here. As the adjoining sentences qualifying that presumption note, it is "perhaps . . . less a rule of evidence than a general working principle" that can be displaced with "applicable, clear evidence" such as that before this Court. Indeed, as outlined above, it has never been clearer that the "baseline assurances" Respondents have previously proffered to this Court are "*little more than hollow invocations of 'trust us.'" Owens v. Hill,* 758 S.E.2d 794, 807, (Ga. 2014) (Benham, J., dissenting) (emphasis added).

[24]Respondents mistakenly assert that "Plaintiff alleges that Respondents[sic] choice of using compounded pentobarbital subjects him to an intolerable risk of pain." Doc. 8 at 10. Plaintiff is not asserting that lethal injection using *any* compounded pentobarbital subjects him to a substantial risk of serious harm. Plaintiff's allegation is much narrower –the use of compounded pentobarbital prepared by a pharmacist who has improperly compounded the drug 22% of the time creates a substantial risk of serious harm.

[25]As Georgia's lethal injection secrecy act makes the identifying information of this pharmacist a confidential state secret, both Petitioner and this Court will have to take Respondents' word on this claim.

rate is not 50%, but *only* 22.23%. Plaintiff respectfully submits that any method of execution that fails one out of every five attempts cannot pass muster under the Eighth Amendment.

V. The Cloudiness of Respondents' Two Batches Drugs Establishes Substantial Risks of Constitutional Dimension.

While no one knows why Respondents' drugs were defective, every potential explanation implicates Mr. Terrell's Eighth Amendment rights. Mr. Terrell has consulted with Dr. Michael Jay, a professor of pharmaceutical sciences and biomedical engineering at the University of North Carolina-Chapel Hill, who explains in his attached affidavit that "compounding pharmacies may produce unpredictable, unregulated, and potentially unsafe drugs." Affidavit of Michael Jay (Doc. No 3-18) ("Jay Aff.") at 2. Producing "sterile drugs for intravenous administration is one of the most difficult and complex pharmaceutical manufacturing processes," and every "step presents an opportunity for a mistake, such as introducing dangerous cross-contaminants or microbiological contaminants, particulate matter, and/or changing the properties of a solution, e.g., pH, tonicity, etc." Jay Aff. at 3. "The potential for product contamination in compounded drugs is significantly higher than the potential for contamination in manufactured pharmaceuticals." Jay Aff. at 3. Non-FDA-regulated compounding pharmacies such as the one used by the Respondents "produce injectable drugs in circumstances that create a significant risk that the drugs will be so sub-standard that they will cause pain and suffering after injection." Jay Aff. at 7.

The fact that Georgia's lethal injection drugs were cloudy "indicates that the drugs were manufactured or handled improperly." Jay Aff. at 5. The only explanation for this defectiveness is "critical errors in the procedure by which the compounded drug was produced, transported, stored, and/or handled." Jay Aff. at 7. "In other words, there were issues with the product, personnel, procedures, or all three." Jay Aff. at 7.

According to Dr. Jay, the "cold-storage testing conducted by the Department of Corrections demonstrated that storage temperature was not a factor in the precipitation." Jay Aff. at 5. Dr. Jay proposed two likely explanations for the precipitation: (a) the pharmacy used the wrong active ingredient – pentobarbital, not pentobarbital *sodium* – to prepare the drugs, or (b) the pharmacist failed to adjust the pH solution correctly. Jay Aff. at 6.

A. Explanation 1: The Compounding Pharmacy Used the Wrong Active Ingredient.

As Dr. Jay explained, there is a good possibility that the compounding pharmacy used the *wrong* active pharmaceutical ingredient ("API") when preparing the February 17 and February 24 batches of lethal-injection drugs. The proper API for mixing an injectable pentobarbital solution is "pentobarbital *sodium*" – and not, as discussed *infra*, "pentobarbital." Jay Aff. at 6. Following the events of March 2, however, Respondents' pharmacist provided a powder sample to TriClinic Labs for testing, which revealed that the sample was *not* pure pentobarbital sodium. Jay Aff. at 6. As Dr. Jay explains in his declaration, if the Respondents' compounding pharmacist attempted to mix an injectable pentobarbital solution with an API of

pentobarbital – a substance with low water-solubility that is more difficult to keep in solution – instead of pentobarbital sodium, which is much more readily-soluble, that error could have caused the solution to congeal into the crystalline clumps seen in Respondents' video of the drugs. Jay Aff. at 6.

B. Explanation 2: The pH Level was Incorrect.

Per Dr. Jay, another likely explanation for the defectiveness of Respondents' February 17 and 24 batches of drugs is an incorrect pH level. Jay Aff. at 6. When a solution is exposed to contaminants or compounded improperly, it "can induce a change in the pH of the formulation, causing the API to fall out of solution and crystallize." Jay Aff. at 6. A faulty pH poses at least two distinct and substantial risks to a prisoner. Were the pH to cause the solution to precipitate, the injection of a solution containing particulate matter would cause excruciating pain. Jay Aff. at 7. Particulate matter can lodge itself in small blood vessels following injection. Jay Aff. at 7. The particulate could also become lodged in the person's lungs, which would be excruciatingly painful. Jay Aff. at 7. The precipitation into particulate matter could also reduce the drug's potency – in which case it might not kill the person, or it would kill him much more slowly and painfully. Jay Aff. at 7.

Further, a drug formulation's pH "must be carefully adjusted and maintained in order to ensure that the person who is being injected does not suffer pain immediately upon administration." Jay Aff. at 7. If the pH of the drug product was higher or lower than . . . if properly manufactured, *it would cause intense, burning pain upon injection*." Jay Aff. at 7 (emphasis supplied).

Accordingly, the presence of precipitate in the February 17 and 24 batches of Respondents' lethal injection drugs was both a problem and the symptom of a problem. The precipitate itself presents a substantial risk of significant pain and suffering, and it also reflects an underlying issue with the drug (contamination, improper pH level, or the wrong chemical) that presents additional, unconstitutional risks.

C. The Problem Might Not Be Detected.

Further, the next batch of Respondents' drugs would not necessarily announce its defectiveness as unmistakably as the February 17 and 24 batches did by the night of March 2. Indeed, there exists a very real possibility that the precipitate in the drugs would not be detectable to the naked eye, and that Respondents would fail to notice that something was amiss before injecting Mr. Terrell with the aberrant solution. "A compounded formulation could have a dangerous pH level or be polluted with contaminants, but would not display any outward manifestations of its internal flaws." Jay Aff. at 8; *see also Gissendaner*, 803 F.3d at 579 (Jordan, J., dissenting) (there is "no guarantee that a doctor or pharmacist will recognize the problem the next time, particularly if the compounded pentobarbital has an incorrect pH or is, despite its adulteration, only slightly cloudy.") In other words, the drug would not appear cloudy, but it would be "just as dangerous as a drug whose erroneousness was visible and obvious." Jay Aff. at 8. Were the particulate matter too small for an observer to see, it would nonetheless be akin to being injected with "very small *pieces of glass*," which would "cause

significant pain and injury when injected." Jay Aff. at 8 (emphasis supplied). By the time any of these eventualities came to pass, of course, it would be too late for this Court – or any court – to remedy the violation.

D. The Problem is Likely to Recur.

"It is certainly fair to infer that if there is a problem with the supply of defective compounded pentobarbital (which Georgia's doctor and pharmacist agreed was 'not appropriate for medical use') and Georgia has not been able to figure out what caused that problem, the problem is likely to recur." *Gissendaner*, 803 F.3d at 579 (Jordan, J., dissenting). Respondents' pharmacist has supplied defective compounded pentobarbital on at least two occasions. Given that the Respondents have failed to identify the reason that their lethal injection drugs fell out of solution but have changed nothing about how they obtain or handle them, it is only a matter of time before the drugs become defective again. Yet Respondents have provided no assurances. Quite the contrary: they have adhered to a theory of why their drugs precipitated – storage temperature – that was disproved by their own investigation. Given this recalcitrance – indeed, indifference – the use of any compounded drug from this pharmacy for Mr. Terrell's execution clearly implicates his constitutional rights.

E. Disparities in Recent Executions Suggest Faulty Mixing of Respondents' Compounded Drugs.

Respondents' recent executions of Kelly Renee Gissendaner and Marcus Ray Johnson further highlight the risks posed by Respondents' current lethal injection drugs and procedure. The execution logs received by Mr. Terrell's counsel on

November 27, 2015, pursuant to an Open Records Act request reveal that Mr. Johnson took *seven times longer to die* than Ms. Gissendaner.[26] *See* Kelly Gissendaner Execution Timeline (Doc. No 3-20); Marcus Ray Johnson Execution Timeline (Doc. No 3-21). Mr. Terrell has consulted with Dr. Joel Zivot, an anesthesiologist, who considers that outcome highly unusual and suspicious – indeed, the *opposite* of what one would expect, given Ms. Gissendaner's significantly greater weight. Affidavit of Dr. Joel Zivot (Doc. No 3-22). "Variability such as this is outside of the science of pharmacology and physiology and cannot be dismissed out of hand." Zivot Aff. at 3. Assuming the lethal injection drugs used on both prisoners were a standard concentration and quality,[27] Ms. Gissendaner's execution should have lasted longer than Mr. Johnson's. Yet Mr. Johnson took twenty-one minutes to die, where Ms. Gissendaner's actual execution was finished in three minutes.[28] Dr. Jay was also struck by this result, and posited one reason for the

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[26]Respondents assert that Plaintiff has erred in calculating that Mr. Johnson's execution took seven times longer than Ms. Gissendaner's, arguing that it took only "4.75 times . . . longer." Doc. No. 8 at 22. Mr. Terrell submits that this disparity would be troubling enough, but it is Respondents' math that is faulty. Counting from the end of the injection of the final syringe until the minute officials leave to determine if the condemned has in fact died, Mr. Johnson's execution log shows twenty-one minutes elapsing. Doc. No. 19. Ms. Gissendaner's shows three. Doc. No. 20.

[27] This is not necessarily a safe assumption, given the dearth of information about the process by which the drugs are compounded, the ingredients used in the compounding, the equipment used to compound, or the training of the personnel who compound the drugs.

[28] As explained in note 26, *supra*, counsel has measured the length of the execution from the time that the *final* injection is complete to the time that the physicians leave for the execution chamber once the prisoner's vital signs have ended.

disparity: "a lower concentration of pentobarbital in the solution administered to Mr. Johnson," suggesting that "the manufacture of these drugs is faulty." Jay Aff. at 8. Dr. Zivot concurred, suggesting that the disparity could be explained by the fact that Mr. Johnson received a different concentration, a lower dose, or a degraded formulation of pentobarbital. Zivot Aff. at 3-4.

Further, a witness to Mr. Johnson's execution observed that his eyes remained open throughout the execution. Affidavit of Charles Lawler (Doc. No 3-23). Dr. Zivot concluded that "[t]he fact that Mr. Johnson's eyes remained open is highly unusual . . . . It is a concerning and noteworthy finding." Doc. No 3-22 at 4.

F. Respondents' Observation Log Does Not Safeguard Against Defective Drugs.

Respondents argue that Plaintiff must show that 1) their drugs will be defective, and 2) that they will use those defective drugs. Respondents argue that Plaintiff can make neither showing because they now observe their drugs hourly on the day of the execution. Doc. No. 8-2.[29] The uncontroverted evidence before this Court, however, is that the defects in the means or method by which Respondents' pharmacist mixes these drugs would not always manifest themselves in a readily visible way. Jay Aff. at 8 ("a compounded formulation could have a dangerous pH level or be polluted with contaminants, but would not display any outward manifestations of its internal flaws"); *see also Gissendaner II*, 803 F.3d at 579

[29]It is unclear what relevance Respondents see in their disclosure of their observation logs to "a media outlet." Doc. No. 8, n. 12.

(Jordan, J., dissenting) (there is "no guarantee that a doctor or pharmacist will recognize the problem the next time, particularly if the compounded pentobarbital has an incorrect pH or is, despite its adulteration, only slightly cloudy.")[30] For that reason, the fact that the drugs mixed for the executions of Ms. Gissendaner on September 30 and Mr. Johnson on November 19 did not become observably cloudy is far from "*definitive proof* that [Respondents] have ascertained what caused the precipitation and have kept it from reoccurring." Doc. No. 8 at 12. As Plaintiff has argued, the disparity in their execution times is further evidence of variability in the batch-to-batch potency or efficacy of the drug, which raises serious constitutional concerns.

VI. Respondents Are Violating Mr. Terrell's Rights Pursuant to the Fifth, Eighth, and Fourteenth Amendments

A. Respondents' Current Source of Compounded Drugs Renders Their Lethal Injection Procedures Violative of The Eighth Amendment.

The Eighth Amendment's prohibition against cruel and unusual punishment forbids methods of execution that present "a substantial risk of significant harm." U.S. Const. amend. VIII; *Glossip v. Gross*, —— U.S. ——, 135 S. Ct. 2726, 2737 (2015); *Baze v. Rees*, 553 U.S. 35, 50-52 (2008) (plurality opinion); *see also in re Kemmler*, 136

[30]Mr. Terrell has not asserted that Respondents would not notice precipitation as extreme as what occurred by the night of March 2, *see* Video of Precipitated Lethal Injection Drug ("Ex. 4"; Doc. No. 3-7). Precipitation to that degree would be literally impossible to ignore.

U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death"). Where an Eighth Amendment cruel and unusual punishment claim alleges the risk of future harm, "the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Baze,* 553 U.S. at 50 (quoting *Helling v. McKinney,* 509 U.S. 25, 33, 34–35 (1993)); *see also Glossip*, 135 S. Ct. at 2737. "In the lethal injection context, this standard requires an inmate to show an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S., at 50). The controlling opinion also stated that prisoners "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Baze*, 553 U.S. at 51. Instead, prisoners must identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 52. "A stay of execution may not be granted" pursuant to a method-of-execution challenge "unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives." *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 61). A plaintiff must also show that the risk of severe pain is "substantial when compared to the known and available alternatives." *Baze,* 553 U.S. at 61. Mr. Terrell can make each of these showings.

Respondents' own records establish that two distinct batches of drugs from the same pharmacist who will mix the drugs for Mr. Terrell's execution tonight were defective. This reveals a comprehensive problem with how their drugs are mixed, as opposed to the easily-remedied, fluky occurrence to which they have attributed the events of March 2.[31] Further, Respondents have not figured out what that problem *is* and, accordingly, have done nothing to fix it. The risk to Mr. Terrell is objectively intolerable, as his experts have detailed that every explanation for the defectiveness that manifested in Respondents' February 17 and 24 batches would cause him serious illness and needless suffering, but that the defectiveness would not necessarily announce itself to Respondents as it did on March 2. Nor can Respondents be considered blameless for this risk, as they have now routinely courted *and* concealed it from Mr. Terrell and the courts – and, unless this Court intervenes, will do so again tonight. None of Mr. Terrell's allegations is based in speculation. Respondents continue to obtain their lethal injection drugs from a pharmacist whose unconstitutional error rate is – according to their own documentation –no less than 22 percent. Respondents' refusal to do so manifests a "deliberate indifference" to the substantial risk of significant harm posed by their

[31] Respondents' counsel's representation to Ms. Gissendaner's counsel on the night of March 2 that "*this* batch just didn't come out like it was supposed to," Doc. No 3-3 at ¶7 (emphasis supplied), is called into serious doubt; it would instead be accurate to say that two distinct batches of the drug, produced an entire week apart, failed to "come out like [they] were supposed to."

lethal injection practices that the Constitution should not abide. *Minneci v. Pollard*, 132 S. Ct. 617, 625 (2012).

1. This Action is not Time-Barred

The district court clearly erred in concluding that this action is time-barred. Plaintiff's claims stem from the precipitation of two batches of Respondents' lethal injection drugs between February 17, 2015, and March 2, 2015, and the disparity in executions carried out in September and November. As noted by the authority Respondents cite, a "method of execution claim accrues on the later of the date in which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed protocol." *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1263, 1264 (11th Cir. 2014). The question of whether a significant change has occurred is a fact-dependent inquiry that cannot be resolved without considering the "specific factual allegations and/or evidence presented" in each case. *Arthur v. Thomas*, 674 F.3d 1257, 1260 (11th Cir. 2012).

> Simply because no court, based on the allegations and evidence that has been presented in cases to date, has found a significant change does not mean that such evidence does not exist. To read our circuit decisions . . . as holding—no matter what new facts allege or new evidence reveals—that . . . substitutions of pentobarbital for sodium thiopental is not a significant change in . . . execution protocols is to ignore the reality that scientific and medical evidence that exists today may differ from that which new scientific and medical discoveries and research reveal tomorrow.

Id. (emphasis added). Respondents' reliance upon *Gissendaner I* as precluding a finding of a "substantial change" is unavailing. Doc. No. 8 at 10. As Judge Jordan noted in dissent in *Gissendaner II*, while the *Gissendaner I* panel had found her

previous challenge untimely, "just hours after we issued our ruling, things changed, and they changed *in a material way*." *GissendanerII*, 803 F.3d at 576 (Jordan, J., dissenting) (emphasis added). Respondents' disclosures have further evidenced these substantial changes, revealing that Respondents' problems with their lethal injection drugs were broader than Respondents represented and have yet to be solved. In light of the facts that Respondents themselves concede about their pharmacist, the notion that Plaintiff could be precluded from challenging Respondents' protocol as twelve years late would be unconscionable.

2. A "Known and Available Alternative" is Another Pharmacist

Contrary to the district court's conclusion below, moreover, Plaintiff has indeed pleaded "a known and available alternative method of execution," as required by *Glossip v. Gross*, —— U.S. ——, 135 S. Ct. 2726, 2737 (2015). Plaintiff has proposed the reasonable alternative that Respondents "obtain drugs from a compounding pharmacist who does not have such a history of mixing defective drugs . . . ." Doc. No. 3 at 29-30. As Respondents note that "MILLIONS OF AMERICANS" obtain compounded drugs, surely this pharmacist cannot be Respondents' only available source for lethal injection drugs. Doc. No. 8 at 26 (emphasis in original). Mr. Terrell respectfully submits that the district court's finding that the error rate of Respondents' pharmacist is insufficient evidence of "the existence of such a widespread problem that continued use of the same pharmacist is unreasonable" is clearly erroneous. Doc. No. 10 at 23. And these many Americans referenced would surely find it reasonable – if not essential – to

find another pharmacist if the drugs that they used for "therapeutic purposes" shared the twenty-percent error rate that Respondents admit to for their lethal injection drugs. Doc. No. 8 at 26. The district court also does not account for the uncontradicted evidence that the disparity in duration of the last two executions carried out with this pharmacist's drugs suggest that the properties of the substances that he mixes vary greatly from one batch to another.

B. The Eighth Amendment Entitles Mr. Terrell to the Information Necessary to Determine if Georgia's Method of Execution is Cruel and Unusual.

To the extent that this Court concludes that Mr. Terrell cannot make out a method of execution challenge with the evidence currently available to him, he further submits that the Constitution can no longer permit Georgia to hide behind its secrecy act and conceal every aspect of the manner in which they conduct executions, given their two instances of defective drugs.

Respondents' most critical tool in escaping accountability for the debacle of their defective drugs of February 17 and 24 has been Georgia's lethal injection secrecy act. In July 2013, O.C.G.A. § 42-5-36 – a provision that previously governed "[c]onfidential information *supplied by inmates*" – was amended to classify all "identifying information" about a "person or entity who participates in or administers the execution of a death sentence . . . [or] that *manufactures, supplies, compounds, or prescribes the drugs*, medical supplies, or medical equipment" used in an execution as a "confidential state secret" not subject to disclosure through Georgia's Open Records Act or "*judicial process*." O.C.G.A. § 42-5-36 (d) (emphases added). Respondents have

wielded this act aggressively to prevent any attempt to discern whether their lethal injection practices comport with the Constitution. *Wellons*, 754 F.3d at 1267; *see also ibid.* at 1267-68 (Wilson, J., concurring) ("I write separately to highlight the disturbing circularity problem created by Georgia's secrecy law regarding methods of execution . . . . [H]ow could [a prisoner make out an Eighth Amendment claim] when the state has passed a law prohibiting him from learning about the compound it plans to use to execute him?").

As Judge Martin noted below, Georgia's lethal injection secrecy act makes it impossible for a prisoner to ever get the information necessary to state an Eighth Amendment claim about lethal injection . . . . [or] to plead facts necessary to meet the demanding burden the law imposes on him." *Terrell*, Ex. B at 14 (Martin, J., concurring). "A defendant cannot have received due process when he must wait for a botched execution, or other mishap, in order to get sufficient information to satisfy *Glossip* and vindicate his Eighth Amendment rights." *Id.* at 15.

"Georgia can certainly choose, as a matter of state law, to keep much of its execution protocol secret, but it cannot hide behind that veil of secrecy once something has gone demonstrably wrong with the compounded pentobarbital it has procured." *Gissendaner*, 803 F.3d at 579 (Jordan, J., dissenting). A bedrock principle of our rule of law is that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *See Marbury v. Madison*, 5 U.S. 137, 163 (1803); *see also General Oil Co. v. Crain*, 209 U.S. 211, 221-30 (1908) (holding that a state court must provide a remedy for a constitutional

violation). With a right such as the Eighth Amendment, which can only be enforced prospectively, the Supreme Court has not hesitated to recognize a due process right to the information necessary to determine whether a violation is risked. In *Ford v. Wainwright*, 477 U.S. 399, 417-18 (1986), this Court held that the Eighth Amendment's prohibition against the execution of the insane entitled Mr. Ford to adequate procedures for determining his sanity. Noting that "[t]he fundamental requisite of due process of law is the opportunity to be heard," this Court faulted the Florida procedure for "its failure to include the prisoner in the truth-seeking process" in favor of an assessment conducted entirely by the executive branch. *Ford*, 477 U.S. at 413.[32]

> [C]onsistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that *precludes the prisoner or his counsel from presenting material* relevant to his [Eighth Amendment claim] or *bars consideration of that material by the factfinder* is necessarily inadequate. The minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, *an opportunity to be allowed to substantiate a claim before it is rejected.*

Id. at 414 (1986) (internal quotations omitted). Accordingly, this Court wrote:

> [T]he lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the "evidence" will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible.

Id. at 417.

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[32] Florida's practice did not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution. *Id.*

Similarly, in *Morgan v. Illinois*, this Court held that a criminal defendant's Sixth Amendment right to an impartial jury and "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment" in tandem entitled the defendant to information about whether potential jurors would automatically vote for a death sentence in every capital case, and required that the trial court afford him adequate process to conduct *voir dire* and make challenges for cause. *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992) ("the Sixth *and* Fourteenth Amendments . . . ensure the impartiality of any jury that will undertake capital sentencing"). As the Court noted, "[w]ere *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as *nugatory*." *Id.* at 733 (emphasis added).

Further, in *Brady v. Maryland*, 373 U.S. 83, 86 (1963), this Court held that due process requires the government to disclose evidence which "would tend to exculpate [the defendant] or reduce the penalty." The underlying principles of *Brady*, which recognize that the government cannot withhold information bearing upon the rights of a person whom they wish to deprive of life or liberty, apply with equal force here.

Similarly, Georgia cannot execute Mr. Terrell without first affording him due process of law. See U.S. Const. amend. V (1791) ("No person shall … be deprived of *life*, liberty, or property, without due process of law…"); U.S. Const. amend. XIV (1868) ("nor shall any State deprive any person of *life*, liberty, or property, without

due process of law"); *see also Adams v. United States ex rel. McCan*, 317 U.S. 269, 276 (1942) ("procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property.'") "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). It is clear, however, that due process entitles a person whose constitutional rights might be affected by state actions to, at minimum, both notice of those actions and an opportunity to be heard "*at a meaningful time and in a meaningful manner*." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (emphasis added) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.")

As Judge Martin wrote below, "[f]ederal courts routinely construct procedures in other areas of the law (in the grand jury setting or in proceedings involving commercial trade secrets, for example) to protect one side's legitimate privacy interests and at the same time guard the Constitutional rights of the other." *Terrell*, Case No. 15-15427, Ex. B at 16-17 (Martin, J., concurring). "The procedure that now exists in Georgia for preparing lethal injection drugs," however,

"accomplishes the former at the expense of the latter." That is an imbalance that cannot be sanctioned by the Constitution or this Court.

CONCLUSION

"[T]hings changed, and they changed in a material way" on the night of March 2, 2015. *Gissendaner,* 803 F.3d at 579 (Jordan, J. dissenting). Those events cast the Respondents' lethal injection procedures and protocol in a new light and require its reevaluation. Given that, Mr. Terrell respectfully submits that "[i]t is not asking too much to require Georgia to put on some evidence that will provide some level of confidence that its compounded pentobarbital is no longer a problem." *Id.* Until Respondents do so, Mr. Terrell's execution must not proceed.

For the foregoing reasons, Petitioner BRIAN KEITH TERRELL respectfully requests that this Court grant the writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted this, the 8th day of December, 2015.

Respectfully submitted,

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