

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

J.W. LEDFORD, JR.,)

Plaintiff,)

v.)

Civil Action No. _____

GREGORY DOZIER, Commissioner,)
Georgia Department of Corrections;)

**EXECUTION SCHEDULED
Tuesday, May 16, 2017,
7:00 P.M.**

ERIC SELLERS, Warden,)
Georgia Diagnostic and Classification)
Prison;)

OTHER UNKNOWN EMPLOYEES)
AND AGENTS,)
Georgia Department of Corrections,)

Defendants.)

_____)

COMPLAINT

If Defendants proceed with their plan to lethally inject Plaintiff J.W. Ledford, Jr., on Tuesday, May 16, 2017, he will suffer an excruciating death. For more than a decade, Mr. Ledford has suffered from severe and chronic nerve pain. As Mr. Ledford's condition has deteriorated, he has required an ever-increasing course of gabapentin, a medication used widely for epilepsy and neuropathic pain.

His long-term exposure to this medication has changed the chemistry of his brain so that Defendants' lethal injection drug, pentobarbital, will not reliably render him unconscious and insensate. Accordingly, there is a substantial risk that Mr. Ledford will be aware and in agony as the pentobarbital attacks his respiratory system, depriving his brain, heart, and lungs of oxygen as he drowns in his own saliva.

This horrific death cannot be countenanced by the Eighth Amendment. But in order to invoke his constitutional protections, Mr. Ledford is obliged to present a "known and available" alternative method of execution. *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015). Mr. Ledford proposes that the firing squad is a readily-implemented and more reliable alternative method of execution that would *eliminate* the risks posed to him by lethal injection. The binding precedent of the Eleventh Circuit, however, restricts Mr. Ledford to proposing only those alternatives already authorized by Georgia statute.¹ As the Georgia code allows no method of execution but lethal injection, and given the broad unavailability of alternative drugs, Mr. Ledford is effectively foreclosed from meeting his burden in this action.

¹ *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016); *see also Boyd v. Warden, Holman Corr. Facility*, No. 15-14971, 2017 WL ____ (11th Cir. May 9, 2017).

Mr. Ledford’s dilemma illustrates why this standard is unworkable – a realization that has already been reached by two other circuit courts.² Mr. Ledford accordingly recognizes that the dismissal of his complaint on this ground is inevitable and notes that a prompt dismissal by this Court will allow him to expeditiously seek initial hearing *en banc* by the full Eleventh Circuit in time to prevent his unconstitutional execution.

JURISDICTION

1. Jurisdiction over this matter arises under 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 2201, and 28 U.S.C. § 2202.

VENUE

² The Sixth Circuit, now pending *en banc* review, found that the district court did not clearly err where it interpreted available as “reasonably possible.” *In re Ohio Execution Protocol*, No. 17-3076, 2017 WL 1279282, at *9 (6th Cir. Apr. 6, 2017), *vacated for reh’g en banc*, ___ F.3d ___ (6th Cir. Apr. 25, 2017). The Eighth Circuit, though disagreeing with the Sixth Circuit, expressly distanced itself from *Arthur*’s unworkable standard: “We do *not* say that an alternative method must be authorized by statute or ready to use immediately...” *McGehee v. Hutchinson*, No. 17-1804, 2017 WL 1404693, at *3 (8th Cir. Apr. 17, 2017) (emphasis added). As J. Wilson, of the Eleventh Circuit, recently noted: “These critiques of our decision in *Arthur* underscore its serious flaws. I suspect that as time passes the body of jurisprudence casting doubt on *Arthur* will only continue to grow.” *Boyd*, 2017 WL at *___.

2. Venue is appropriate in the Northern District of Georgia under 28 U.S.C § 1391(b), because at least one of the Defendants resides in this district.

THE PARTIES

3. Plaintiff J.W. Ledford, Jr. is a United States citizen and resident of the State of Georgia. He is a death-sentenced prisoner currently being held in the custody of Defendants at the Georgia Diagnostic and Classification Prison in Jackson, Georgia.

4. Defendant Gregory Dozier is the commissioner of the Georgia Department of Corrections, which is headquartered in Atlanta, Georgia. As commissioner, Defendant Dozier is responsible for the supervision of operations at the Georgia Department of Corrections. He has a duty to ensure that executions are carried out in compliance with the Eighth Amendment and departmental procedure. Defendant Dozier is sued in his official capacity as commissioner of the Georgia Department of Corrections.

5. Defendant Eric Sellers is the warden of the Georgia Diagnostic and Classification Prison in Jackson, Georgia. As warden, Defendant Sellers is responsible for the day-to-day operations of the prison. He also has a duty to ensure that executions are carried out in compliance with the Eighth Amendment

and departmental procedure. Defendant Sellers is sued in his official capacity as warden of the prison.

6. Other Unknown Employees and Agents of the Georgia Department of Corrections are involved in the implementation of the Department's execution procedures. Mr. Ledford does not yet know the identity of these persons.

7. All Defendants are being sued in their official capacities. The named Defendants are United States citizens and residents of the State of Georgia.

PROCEDURAL HISTORY

8. Mr. Ledford was convicted and sentenced to death by the Superior Court of Murray County in 1992. The Georgia Supreme Court affirmed Mr. Ledford's conviction and death sentence. *Ledford v. State*, 439 S.E.2d 917 (Ga. 1994). Mr. Ledford filed a petition for *certiorari* review in the Supreme Court of the United States, which was denied. *Ledford v. Georgia*, 513 U.S. 1085, 115 S. Ct. 740 (1995).

9. Mr. Ledford pursued state and federal habeas corpus relief. The Superior Court of Butts County denied his state habeas petition on July 27, 1999, and the Supreme Court of Georgia denied him a certificate of probable cause to appeal in 2001. After the Supreme Court of the United States denied him *certiorari* review, *Ledford v. Turpin*, 534 U.S. 1138 (2002), Mr. Ledford initiated

federal habeas proceedings pursuant to 28 U.S.C. § 2254 in this Court. In 2008, this Court denied Mr. Ledford's petition as to his intellectual disability claim. In 2014, it denied his petition as to remaining claims, including, *inter alia*, that he received the ineffective assistance of counsel. *See Ledford v. GDCP Warden*, 818 F.3d 600 (11th Cir. 2016). On March 21, 2016, the Eleventh Circuit affirmed this Court's denial of relief. *Id.* The Supreme Court of the United States denied Mr. Ledford's petition for a writ of certiorari on April 3, 2017. *Ledford v. Sellers*, 2017 WL 1199485, ___ U.S. ___ (2017).

10. On April 26, 2017, the Superior Court of Murray County entered an order authorizing Mr. Ledford's execution between May 16 and May 23, 2017. Defendants have scheduled his execution for 7:00 p.m. on May 16, 2016.

SUMMARY OF RELEVANT FACTS

11. The Georgia Code prescribes that “[a]ll persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by lethal injection.” O.C.G.A. § 17-10-38(a). Georgia law anticipates and authorizes no alternative method of execution.

12. Georgia's current lethal injection protocol calls for a lethal injection of two syringes of solution that purport to contain five (5) grams of a compounded

version of pentobarbital.³ *See* Georgia Department of Corrections, Georgia Diagnostic and Classification Prison Lethal Injection Procedures (Ex. 1).

13. Pentobarbital is a short-acting barbiturate used medically as a sedative. Declaration of Sergio Bergese, M.D. (“Bergese Decl.”) (Ex. 2) at ¶ 3. Pentobarbital “decreas[es] activity in the patient’s central nervous system . . . through its effect upon a specific neurotransmitter, which is a chemical in the brain that carries signals from one nerve cell (or “neuron”) to another.” *Id.* This neurotransmitter, which is known as *gamma*-Aminobutyric acid (or “GABA”), binds to proteins found on the surface of certain neurons, known as receptors, and inhibits their firing, “which results in drowsiness and, eventually, the depression of the patient’s” central nervous system. *Id.*

14. Pentobarbital “is a broadly effective molecule” that “works not only upon the brain, but on other organ systems, most notably the heart and lungs.” Declaration of Joel B. Zivot, M.D., FCRP(C) (“Zivot Decl.”) (Ex. 3) at ¶ 8. The lungs, in particular, are “directly affected by pentobarbital in a profound way.” *Id.* As a result, persons administered large doses of pentobarbital will experience respiratory distress as the pentobarbital acts quickly to shut down the normal

³ Defendants’ lethal injection drugs have 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. O.C.G.A. § 42-5-36.

operation of their lungs. Because breathing “is a robust and highly regulated function of physiology” that is normally experienced “as effortless and outside of our moment-to-moment awareness[,] the slightest alteration in lung function is experienced instantly and alarmingly.” *Id.* Accordingly, as “respiratory distress requires the deepest level of unresponsiveness to be endured,” pentobarbital’s “interference with respiratory drive will lead to the experience of respiratory distress in any individual with the slightest capacity of awareness.” *Id.* Further, if this interference is pronounced enough, it will “produce varying degrees of multi-organ failure that would be that would be painful for a sensate person and terrifying for a conscious one.” *Id.* at ¶ 11; *see also* discussion *infra* at ¶¶ 25-28.

15. Georgia has executed seventeen (17) persons with an injection of pentobarbital.⁴ The autopsies of fourteen (14) of those individuals reveal that each suffered a significant degree of fluid congestion in their lungs, while at least six (6)

⁴ Andrew Allen Cook (February 21, 2013) was executed with an injection of FDA-approved pentobarbital. The following prisoners were executed with an injection of compounded pentobarbital: Marcus A. Wellons (June 17, 2014); Robert Wayne Holsey (December 9, 2014); Andrew Howard Brannan (January 13, 2015); Warren Lee Hill, Jr., (January 27, 2015); Kelly Renee Gissendaner (September 30, 2015); Marcus Ray Johnson (November 19, 2015); Brian Keith Terrell (December 9, 2015); Brandon Astor Jones (February 3, 2016); Travis Hittson (February 17, 2016); Joshua Daniel Bishop (March 31, 2016); Kenneth Fults (April 12, 2016); Daniel Antony Lucas (April 27, 2016); John Wayne Connor (July 15, 2016); Gregory Paul Lawler (October 19, 2016); Steven Frederick Spears (November 16, 2016); and William Cary Sallie (December 6, 2016).

experienced acute pulmonary edema.⁵ Zivot Decl. at ¶¶ 9-10; Declaration of Mark A. Edgar, M.D. (“Edgar Decl.”) (Ex. 4) at ¶¶ 3-4; Autopsies of Executed Georgia Prisoners (Ex. 5)⁶; discussed *infra* at ¶¶ 25-27.

Mr. Ledford’s Altered Brain Chemistry

16. For at least ten years, Mr. Ledford has suffered from severe neuropathic pain in his back, hips, and legs.⁷ Zivot Decl. at ¶ 5; *see also* Excerpted Medical Records of J.W. Ledford, Jr. (Ex. 6). Defendants have treated Mr. Ledford with escalating doses of a medication known as gabapentin (commonly marketed as “Neurontin”), which is used widely in the United States for epilepsy and neuropathic pain. Zivot Decl. at ¶ 5. Mr. Ledford’s medical records indicate that he is currently taking 1,800 mg of gabapentin per day (600 mg. three times a day).

17. When taken for an extended period of time, gabapentin will alter a person’s brain chemistry by increasing the number of receptors susceptible to the

⁵ As discussed *infra* at ¶ 25, Dr. Zivot and Dr. Edgar have been able to review the autopsies of all but the three most recent executions: Mr. Lawler, Mr. Spears, and Mr. Sallie.

⁶ These reports were excerpted from records admitted into evidence during a hearing in the matter of *State v. Bell*, Superior Court of Gwinnett County, Case. No. 13B05156-7, on January 9, 2017.

⁷ Neuropathic pain is a chronic pain state associated with some injury to or dysfunction in the nerve fibers of the body. Zivot Decl. at ¶ 5.

drug and by causing those receptors to “become[] more and more tailored to that drug.” Bergese Decl. at ¶ 5. As a result, those receptors “becom[e] less responsive -- or even unresponsive -- to other drugs.” *Id.* “One analogy for this is a keyhole that, over time, conforms increasingly to one specific key, until even a duplicate can no longer turn in the lock.” *Id.*

18. Those receptors shaped by long-term administration of gabapentin become less responsive to pentobarbital. This results in what is known as a “*competitive inhibitory effect*,” which “limits pentobarbital’s ability to depress electrical activity in the brain by compromising the mechanism through which it facilitates the binding of GABA to its receptors.” *Id.* at ¶ 6. As a result, “pentobarbital’s capacity to induce [central nervous system] depression in a person taking gabapentin will be diminished.” *Id.* Its effects on the person’s respiratory system will remain undiminished. Zivot Decl. at ¶ 12.

CAUSE OF ACTION

I. The State’s Proposed Use of Compounded Pentobarbital in its Lethal Injection Protocol Creates a Substantial Risk That Mr. Ledford Will Experience Severe Pain and Suffering, in Violation of The Eighth Amendment to the United States Constitution.

19. 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*, 135 S. Ct. at 2737; *Baze v. Rees*, 553 U.S. 35, 50-52 (2008) (plurality opinion); *see also in re Kemmler*, 136

U.S. 436, 447 (1890) (“[p]unishments 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.’” *Baze*, 553 U.S. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9 (1994)); *see also Glossip*, 135 S. Ct. at 2737.

20. The controlling opinion in *Baze* 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.

21. Mr. Ledford can make each of these showings.

A. The State’s Use of Compounded Pentobarbital to Execute Mr. Ledford is Sure or Very Likely to Result in the Experience of Severe Pain and Suffering.

22. Because of Mr. Ledford's severe and chronic pain and his decade-long treatment of gabapentin, there is a substantial and constitutionally impermissible likelihood that executing him with a lethal injection of pentobarbital will cause him to suffer a torturous death.

23. Mr. Ledford has tendered the declaration of Sergio D. Bergese, M.D., a board certified anesthesiologist and a clinical professor of anesthesiology at The Ohio State University in Columbus, Ohio. Bergese Decl. at ¶ 1.⁸ Dr. Bergese has conducted a thorough survey of the scientific literature "concerning the interaction between . . . pentobarbital and gabapentin" and concluded that "it is *very likely* that the efficacy of pentobarbital will be diminished when administered to a person who has taken gabapentin for a considerable period of time, particularly if he is taking a high daily dose of gabapentin." *Id.* at ¶¶ 2, 7 (emphasis added).

24. Accordingly, if Defendants' current execution protocol is administered to Mr. Ledford, the efficacy of its pentobarbital will be significantly compromised, posing a substantial risk of serious pain and suffering. The five (5) grams of pentobarbital administered under Defendants' current protocol is intended to rapidly depress Mr. Ledford's central nervous system, rendering him unconscious as the effects of the drug bring about his death. Even assuming

⁸ Dr. Bergese's specialty is neuro-anesthesia, which is the provision of anesthesia for patients undergoing surgeries on their brain or spinal cord.

arguendo that Defendants’ compounded pentobarbital is mixed correctly,⁹ the competitive inhibitory effect from the changes that gabapentin has made to Mr. Ledford’s brain chemistry means that “[t]he pentobarbital will, by definition, *not* function as intended, as the effects of the gabapentin will interfere with the pentobarbital’s interactions with his brain.” Bergese Decl. at ¶ 8. Although the injection of five grams of pentobarbital will eventually result in Mr. Ledford’s death, the intended anesthetic function of the drug – the function most relevant to the constitutionality of his execution -- is sure or very likely to be significantly impaired. As Dr. Bergese notes, “[i]n the context of judicial lethal injection, this has several implications and presents a range of significant harms, including a prolonged and painful death process, awareness of the process of dying, an increased likelihood of seizures, and the possibility of additional paradoxical reactions.” *Id.* at ¶ 7.

25. The harms that Mr. Ledford will suffer as a result of the pentobarbital’s diminished effect upon his brain are borne out by a review of the autopsies of those prisoners executed by Defendants with a lethal injection of

⁹ Mr. Ledford emphasizes, however, that “[t]he shroud of secrecy imposed by [Georgia’s lethal injection secrecy act] 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 v. Bryson*, 807 F.3d 1276, 1281 (11th Cir. 2015) (Martin, J., concurring).

pentobarbital. Mr. Ledford has proffered the declarations of two experts who have reviewed the autopsies of fourteen such prisoners: Dr. Joel B. Zivot, an anesthesiologist, and Dr. Mark A. Edgar, a pathologist. As Dr. Zivot noted, the autopsies' citation of "pentobarbital toxicity" as the cause of death "is a euphemism and does not accurately describe how pentobarbital actually causes death." Zivot Decl. at ¶ 9. Dr. Zivot and Dr. Edgar both attest to "the uniformity of findings within the [prisoners'] lungs," with Dr. Zivot observing that "[t]he lungs of each executed inmate reveal a significant degree of fluid congestion." *Id.* Dr. Edgar observed that these "congested and heavy" lungs "would be an abnormal finding in a person who died quickly," and would typically be encountered "in a patient who had died from a slow bacterial infection or gradual cardiac failure, or otherwise suffered from labored respiration for an extended period of time." Edgar Decl. at ¶ 3. "The presence of this finding in all of the autopsies," Dr. Edgar concluded, "suggests that the pentobarbital significantly depressed the prisoners' respiratory systems during the course of their execution." *Id.*

26. These experts further observed that "in at least six (6) of the fourteen (14) cases, the airways within the inmates' lungs were filled with frothy, foamy fluid." Zivot Decl. at ¶ 10; *see also* Edgar Decl. at ¶ 4. "That finding indicated that these prisoners suffered from acute pulmonary edema, which refers to the rapid accumulation of excess fluid in the air sacs of the lungs." Edgar Decl. at ¶ 4;

see also Zivot Decl. at ¶ 10 (“In medical terminology, the presence of this fluid would be referred to as acute pulmonary edema.”). Dr. Edgar noted that acute pulmonary edema is characteristic of a natural death “only when there has been a sudden onset of cardiac failure” and is “far more common . . . in deaths resulting from drug overdose or physical injury -- such as drowning or electrocution.”

Edgar Decl. at ¶ 4.

27. All fourteen inmates executed with pentobarbital, if sensate, “would have suffered deaths that were extremely painful and far in excess of what would be considered the pain of natural dying.”¹⁰ Zivot Decl. at ¶ 11. For those who suffered acute pulmonary edema, its onset, “akin to suffocating or drowning,” would be “extremely painful and, if the person were conscious, terrifying and intolerable.” Edgar Decl. at ¶ 4. “For any inmate who was sensate . . . the experience would be akin to drowning in one’s own saliva.” Zivot Decl. at ¶ 10.

28. As an anesthesiologist, Dr. Zivot concurred that “Mr. Ledford’s prolonged exposure to gabapentin will prevent the lethal injection of pentobarbital from working as intended on his brain, but *only* his brain.” Zivot Decl. at ¶ 12

¹⁰ Mr. Ledford does not allege that any of these fourteen (14) inmates were conscious or sensate during their executions. These autopsies conclusively demonstrate, however, that if they had been conscious or sensate subsequent to the administration of the pentobarbital, as Mr. Ledford very likely will be, the effects of the pentobarbital would have been excruciatingly painful.

(emphasis added). As the gabapentin “will not immunize his lungs from serious damage and destruction[,] [a]ny attempt to execute him through the injection of pentobarbital makes it sure or very likely that he will remain sensate during his execution while the pentobarbital attacks his lungs.” *Id.* In sum, there is a substantial risk that Mr. Ledford will “experience harrowing pain as his lungs fill[] with fluid and his organs and tissues die[.]” *Id.*

29. Mr. Ledford’s history of gabapentin treatments also increases his likelihood of experiencing a seizure upon the administration of pentobarbital. As Dr. Bergese details, seizure worsening is one of the most common paradoxical manifestations of anti-epileptic drug overdosing. Bergese Decl. at ¶ 9. Indeed, even though pentobarbital is an anticonvulsant, it is typically is not used as such due to its potential for triggering paradoxical seizure activity. *Id.* Furthermore, the literature expressly cautions that pentobarbital use should be avoided in patients with chronic pain – such as Mr. Ledford – as those paradoxical reactions are more likely to occur. *Id.* Accordingly, because of his decade of gabapentin treatments, executing Mr. Ledford with a massive dose of pentobarbital places him at a significant, constitutionally impermissible risk of seizures and other paradoxical reactions.

30. There exists an objectively intolerable risk that Mr. Ledford’s chronic and severe pain, and his decade-long use of gabapentin, will lead to the diminished

efficacy of Defendants' compounded pentobarbital and result in an excruciating and torturous death. This likelihood of serious suffering is especially intolerable where there exists an alternative method of execution, both feasible and readily implemented, which will eliminate those risks altogether.

B. The Firing Squad is a Feasible, Readily Implemented Alternative That Would Eliminate Altogether the Substantial Risk of Severe Pain Arising from Mr. Ledford's Unique Medical Condition.

31. Mr. Ledford notes at the outset that no alternative method of lethal injection is available to Defendants at this time. Defendants' reliance upon their lethal injection secrecy act to protect the anonymity of the pharmacist who compounds pentobarbital for their executions is a response to the fact that the manufacturers of many of the drugs used in lethal injections in the United States have instituted distribution controls to block sales to departments of corrections for use in executions.¹¹ As illustrated by Arkansas's recent attempt to execute eight

¹¹ There are numerous examples of prominent pharmaceutical companies that manufacture midazolam, potassium chloride, sodium thiopental and other lethal injection drugs, which have publicly announced restrictions on sales to departments of correction for use in executions. For instance, Akorn, a manufacturer of midazolam, adopted a comprehensive policy in 2015 condemning the use of its products in execution protocols. It announced in a statement that "[t]o prevent the use of our products in capital punishment, Akorn will not sell any product directly to any prison or other correctional institution and we will restrict the sale of known components of lethal injection protocols to a select group of wholesalers who agree to use their best efforts to keep these products out of correctional institutions." *Akorn Adopts Comprehensive Policy to Support the Use of its Products to Promote Human Health*, March 4, 2015; see also Erik Eckholm, *Pfizer Blocks the Use of its Drugs in*

prisoners in eleven days, those states with existing supplies of those drugs are husbanding them in the hope of using them before their expiration dates pass.

32. Accordingly, Mr. Ledford has sought to identify an alternative method of execution that, per his obligations under *Glossip*, is feasible and could be readily implemented by Defendants. The method that best fits these criteria is the firing squad.

33. Execution by use of a firing squad is plainly a “known and available” alternative method under *Baze* and *Glossip*. The Supreme Court has held that the firing squad is a constitutionally permissible form of execution. *See Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1879) (upholding sentence of death by firing squad); *see also Arthur v. Dunn*, 137 S. Ct. 725 (2017) (Sotomayor, J., dissenting from denial of *certiorari*) (recognizing that condemned inmates may “find more dignity in an instantaneous death [by firing squad]”). Since 1976, Utah has carried out three executions by firing squad – most recently on July 18, 2010.¹² On March 23,

Executions, N.Y. TIMES, May 14, 2016, at A1 (announcement that Pfizer was enforcing a distribution restriction for products that had been a part of lethal injection protocols including pancuronium bromide, potassium chloride, propofol, midazolam, hydromorphone, rocuronium bromide and vecuronium bromide); Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, THE WALL STREET JOURNAL, Jan. 22, 2011 (noting that Hospira halted the manufacture of sodium thiopental altogether in order to prevent its use in capital punishment procedures).

¹² Kirk Johnson, *Double Murderer Executed by Firing Squad in Utah*, N.Y. TIMES, June 19, 2010, at A12.

2015, Utah Governor Gary Herbert signed into law an amendment providing that the firing squad will serve as the backup method of execution if lethal injection drugs are not available.¹³

34. Utah's technical manual, specifying the state's execution protocol in great detail, is publicly accessible. *See* Technical Manual of Utah Department of Corrections ("Technical Manual") (Ex. 7). Upon information and belief, Georgia could readily implement, or amend, this protocol for use in Mr. Ledford's upcoming execution. Declaration of Dr. James S. Williams ("Williams Decl.") (Ex. 8) at ¶¶ 11-12. For example, in Utah's most recent execution by firing squad, the inmate was seated in a chair set up between stacked sandbags to prevent the bullets from ricocheting. A target was pinned over the inmate's heart. Five shooters set up at a distance of 21 feet from the inmate, armed with .30-caliber Winchester rifles. One rifle was loaded with blanks so that no one knew which officer killed the inmate. The inmate was pronounced dead two minutes after he was shot. *Id.* at ¶ 12; *see also Utah Brings Back the Firing Squad, So How Does It Work?*, ASSOCIATED PRESS, Mar. 24, 2015.

35. Under Utah's protocol, the "execution team" consists of a five-person squad, plus a team leader and two alternates, chosen from a pool of volunteers.

¹³ UTAH CODE ANN. § 77-18-5.5(4) (West).

See Technical Manual at TMF 01/05.04 (B)(1). Each member selected for the squad must be a POST certified peace officer. *See id.* at TMF 01/05.04 (B)(3). Selected officers are “required to demonstrate proficiency” with the weapon designated for the execution “under conditions substantially similar to those of the execution chamber.” *Id.* at TMF 01/05.04 (B)(4). The proficiency test requires each officer, at a minimum of 21 feet, to “accurately hit[] the target of the same dimension as that which will be attached to the condemned.” *Id.* Failure to accurately hit the target with one round results in the disqualification of the officer. *Id.*

36. Upon information and belief, Georgia could easily identify qualified personnel to carry out an execution by firing squad. The training necessary to achieve “proficiency,” and thereby ensure a swift and painless death, is notably minimal. Assuming a protocol similar to Utah’s, there are *numerous* POST-certified peace officers in Georgia who currently have the training necessary to pass the proficiency test required to qualify for the firing squad. Williams Decl. at ¶ 13 (“[A]ny competent and qualified POST-certified peace officer in Georgia would *easily* be able to meet the requisite marksmanship requirements.”) (emphasis added). In Georgia, the *minimum* requirements for a peace officer include the completion of an annual firearms training and “a demonstration of proficiency in the safe and effective use of any agency issued firearm carried

and/or used by the particular officer.” *Id.*; *see* POST Rule 464-5-.03.1(b)(4).

Many Georgia peace officers would find Utah’s proficiency test, hitting a target from 21 feet, routine. Williams Decl. at ¶ 13 (noting that most police sniper qualification courses require hitting a 2-inch square target from 100 yards).

Furthermore, the built-in redundancy of multiple shooters, as opposed to a single designated shooter, eliminates the minimal risk of pain arising from an experienced shooter missing the target. *Id.* at ¶ 14.

37. Upon information and belief, Georgia will have no shortage of proficient volunteer officers willing to participate in an execution by firing squad. Utah Rep. Paul Ray, the sponsor of Utah’s 2015 firing squad bill, stated that there are always more volunteers than spots on the firing squad. The same would be true in Georgia.¹⁴ Furthermore, Georgia already has a sufficient stockpile of both the weapons and ammunition necessary to carry out an execution.¹⁵

38. Moreover, execution by firing squad is both swift and virtually painless. If performed properly, the use of a firing squad will eliminate the

¹⁴ Alternatively, the state would be able to supply trained officers to carry out the execution.

¹⁵ As Judge Kozinski of the Court of Appeals for the Ninth Circuit observed: “There are plenty of people employed by the state who can pull the trigger and have the training to aim true. The weapons and ammunition are bought by the state in massive quantities for law enforcement purposes, so it would be impossible to interdict the supply.” *Wood v. Ryan*, 759 F.3d 1076, 1102 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of rehearing *en banc*).

substantial risk of severe pain that Defendants' current execution protocol presents to Mr. Ledford. Execution by firing squad implicates none of the unique medical concerns arising from Mr. Ledford's chronic, debilitating nerve pain and his long-term gabapentin use. Because pentobarbital is sure or very likely to cause Mr. Ledford serious pain and suffering, a firing squad is the only constitutionally permissible method of execution under these circumstances.

39. The firing squad, operating in the following manner, will "result in the rapid death of [Mr. Ledford] with little or no risk of pain." Williams Decl. at ¶ 15. The location of the loudest audible heartbeat, where a prison official pins the target to the inmate, corresponds to the left ventricle, the largest chamber that pumps blood out of the heart to the body, and great vessels, the large vessels that bring blood to and from the heart. Multiple bullet holes to the heart and great vessels would immediately result in the cessation of blood flow to the brain. The cessation of blood flow to the brain would cause unconsciousness "within seconds." *Id.* at ¶ 8. Death would result in a matter of minutes. *Id.* Patients who have experienced gunshot wounds to the heart "describe the sensation as that of a severe, blunt blow to the chest" and "otherwise felt no pain." *Id.* at ¶ 10.

40. Evidence and recent experience also strongly suggest that "the firing squad is significantly more reliable" than lethal injection. *Glossip*, 135 S. Ct. at 2796 (Sotomayor, J., dissenting). Historically, the firing squad has resulted in

significantly fewer “botched”¹⁶ executions. A recent study, which analyzed the contemporaneous news reports of all executions in the United States from 1900 to 2010 found that 7.12% of the 1,054 executions by lethal injection were “botched” and *none* of the 34 executions by firing squad had been botched.¹⁷ Williams Decl. at ¶¶ 13-14 (“[E]xecution by firing squad substantially reduces the risk of a botched execution... [t]he chance of ‘operator error’ being introduced into an execution by firing squad is substantially less than any other method of execution.”). Thus, a firing squad, the most reliable method of execution for an inmate without unique health concerns, would, beyond question, significantly reduce Mr. Ledford’s substantial risk of severe pain, where his chronic pain and long-term gabapentin use is sure or very likely to result in the diminished efficacy of Defendants’ compounded pentobarbital.

CONCLUSION

¹⁶ “Botched executions are those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.” Austin Sarat, *Gruesome Spectacles: Botched Executions and America’s Death Penalty*, p. 5 (2014) (quotations omitted).

¹⁷ *Id.* at App. A, p. 177.

Mr. Ledford respectfully submits that the argument, authority, and declarations that he has proffered in and alongside this Complaint demonstrate that he can meet his burden of establishing: 1) that executing him with an injection of pentobarbital poses “a substantial risk of significant harm”; and 2) that this risk would be ameliorated by executing him with the firing squad, which is a “known and available” alternative method of execution. *Glossip*, 135 S. Ct. at 2737. Alternatively, Mr. Ledford recognizes that his particular circumstances illustrate why the Eleventh Circuit’s current precedent limiting “known and available” alternative methods to those already authorized by state statute is unworkable. If this Court finds his complaint foreclosed by panel precedent, Mr. Ledford will petition the full Circuit Court to review and correct this overly-stringent standard.

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiff J.W. Ledford, Jr. respectfully requests that this Court:

A. Enter a declaratory judgment that Defendants’ current lethal injection protocol violates Mr. Ledford’s right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

B. Grant injunctive relief to enjoin the Defendants from proceeding with the execution of Mr. Ledford by a lethal injection of pentobarbital, which will cause Mr. Ledford excruciating pain, in violation of the Eighth Amendment.

C. Grant injunctive relief to enjoin the Defendants from discontinuing Mr. Ledford's current pain medication, which will cause Mr. Ledford to suffer certain pain and subject him to a substantial risk of experiencing withdrawal symptoms, in violation of the Eighth Amendment.

D. Grant any further relief as it deems just and proper.

This, the 11th day of May, 2017.

Respectfully submitted,

/s/ Mary E. Wells

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was served upon counsel for Defendants via electronic mail on this, the 11th of May, 2017:

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