IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN, et al.,	)	
	)	No. M2018-01385-SC-RDO-CV
Plaintiffs,	)	
	)	**Death Penalty Case**
V.	)	
	)	
TONY PARKER, et al.,	)	
	)	
Defendants.	)	

APPELLANTS' MOTION TO CONSIDER RECORDS PRODUCED BY DEFENDANTS AS PART OF THE PROCEDURES FOR EXECUTING BILLY RAY IRICK AFTER THE CHANCERY COURT ENTERERD ITS JUDGMENT

Appellants respectfully move this Court to consider documents produced by Defendants subsequent to the entry of judgment in the chancery court below. The documents are records made by Defendants pursuant to the procedures for execution by lethal injection that are at issue in this case. In addition, Appellants move this Court to consider an affidavit prepared by their expert, anesthesiologist Dr. David Lubarsky, based on publicly broadcast accounts of the execution in the hour immediately afterward. Where this Court and counsel for the Defendants, the Tennessee Attorney General, created an exceedingly restrictive and accelerated schedule for this litigation, and this Court has perpetuated that timeline in this appeal, and Plaintiffs' lives literally hang in the balance, the equities of this case make it proper for this Court to consider these records. Appellants' motion should be granted.

I. Tennessee Rule of Appellate Procedure 14(a) permits this Court to consider facts that occurred after judgment.

Under Tenn. R. App. Pro. 14(a), this Court may, in its discretion, "consider facts concerning the action that occurred after judgment." Consideration of such facts "generally will extend only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action. . . ."

In *Duncan v. Duncan*, 672 S.W.2d 765 (Tenn. 1984), this Court considered the boundaries of its power under the rule. The Court drew substantial guidance from the Kansas Supreme Court's decision in *Crawford v. Crawford*, 163 Kan. 126 (1947). *See Duncan*, 672 S.W.2d at 768 ("we regard the limitations on the use of post-judgment facts found in the language quoted in Crawford v. Crawford to be particularly valuable as a guideline in determining the scope of Rule 14.").

The Kansas court had observed that "Sometimes a document, or public record, or other item of evidence of like character, material to a proper determination of the appeal and substantially incontestible, is called for, or is examined if produced, and then is treated in the same way as an admission of the parties would be treated if found in the record.' " *Crawford v. Crawford*, 163 Kan. 126, 134-35), *quoting Hess v. Conway*, 93 Kan. 246 (1914). Relying on *Crawford*, the Court in *Duncan* found that evidence affecting the valuation of assets in a divorce that came to light after judgment fell outside the bounds of Rule 14(a). *Duncan*, 672 S.W.2d at 769 ("At the heart of the plaintiff's motion is the contention that the subsequent sale is relevant because it indicates fraud or misrepresentation.

Evidence supporting allegations of fraud or misrepresentation typically is such that differing conclusions or opinions can be formed on the basis of it.").

In *Jones v. Mulkey,* 620 S.W.2d 498 (Tenn.App.1981), the Court of Appeals reached the opposite conclusion on a Rule 14(a) motion. There, the defendant insurance company claimed that it was entitled to a credit, for the amount of liability coverage paid to the plaintiffs, who brought the action for insurance benefits covering their deceased son, by a third insurance company not a party to the lawsuit. While the appeal was pending, the non-party insurance company paid into court the amount of the coverage in discharge of its liability. Id. at 499 n. 2. The *Duncan* court observed that "This was a matter which was pertinent to the case, yet not genuinely disputed by the parties." *Duncan*, 672 S.W.2d at 768.

Thus, where the facts that a party seeks to put before the appellate court are not disputed, and aid or affect the appellate court's decision, a Rule 14(a) motion should be granted.

II. Appellants seek to introduce records produced by Defendants in the course of carrying out an execution according to the lethal injection protocol that is the subject matter of this case. The facts are not disputed and would aid this Court's decision of the appeal

A. The documents are public records

The Chancery Court entered its judgment on Appellants' claims regarding the Tennessee lethal injection protocol on July 26, 2018. That judgment relied on representations by Defendants and TDOC officials that the trial court credited.

On August 9, the State of Tennessee, through TDOC and staff of Riverbend Maximum Security Institution (RMSI), executed Billy Ray Irick by means of the

lethal injection protocol whose constitutionality Appellants, including Mr. Irick, challenged. In the course of that execution, RMSI personnel filled our forms included in the protocol manual to document the time specific procedures were completed. TDOC has now produced those records to Appellants' counsel pursuant to a Tennessee Public Records Act request. Tenn. Code. Ann. § 10-7-503. Att. A.

B. The records show that TDOC and RMSI personnel failed to adhere to the procedures prescribed by the protocol manual

The records produced by the Appellees indicate that RMSI and TDOC personnel deviated from the protocol manual in the following ways:

- Waiting until just seconds before the execution to mix and prepare the syringes of midazolam that was intended to protect Mr. Irick from being aware of the suffocation and chemical burn caused by the second and third chemicals in the lethal injection process, instead of earlier in the day as called for by the manual and as was done with the other two chemicals;
- Failing to prepare a second, back-up set of syringes of midazolam as called for by the contingency provision of the protocol manual in the event that the first set did not flow through the IV apparatus or Mr. Irick responded to the consciousness assessment after the initial administration of midazolam.

Furthermore, one document among the records appears to be instructions from the pharmacy for storing and preparing the Midazolam for injection. The first instruction on this document is "Remove 4 vials of Midazolam from the freezer and place in refrigerator 24 hours prior to use as to allow to thaw." It is unclear whether TDOC or RMSI personnel could or did store the chemical in the proper

manner because there is no indication in the manual that a freezer is available at RMSI to store frozen lethal injection chemical. Any assurance by Defendants, or judicial presumption, that they will follow the storage instructions from the pharmacist is meaningless if there are not physical facilities to adhere to those instructions. This is a source of risk of severe pain and suffering on the face of the protocol. These records therefore present the very circumstances contemplated by the Kansas Supreme Court in *Crawford*. They are a public record that is material to a proper determination of the appeal and substantially incontestable and may be treated in the same way as an admission of the Appellees would have been treated if entered in the record. *Crawford*, 163 Kan. 126 at 134-35.

As well, the import of the facts in these TDOC records for this appeal is like that in *Jones v. Mulkey*. There, the decision under review was the amount to be paid by defendants which turned on the uncertainty of an amount to be paid by a non-party. When the fact of the amount of the non-party's payment became known, it was undisputed and informed appellate review. Here, this Court will review the decision of the chancery court which turned in part on the presumption that the Appellee's would follow their protocol. The fact that the records that they produced indicate that they did not follow the protocol informs this Court's review.

Where the chancery court's dismissal of Appellants' claims relied on the presumption instructed by the Supreme Court, *see Baze v. Rees*, 553 U.S. 35 (2008), that a state – Appellees here – will follow the procedures set forth in the protocol manual, these facts, plain from the face of Appellee's own records, indicate whether

that presumption is proper in determining whether the protocol creates a substantial risk of severe pain and suffering to Appellants. This Court should grant Appellants' motion and consider the facts contained in the TDOC records of Billy Ray Irick's execution.

III. Dr. Lubarsky's affidavit regarding the import of facts recited by eyewitnesses to Billy Ray Irick's execution

Appellants also ask this Court to consider the affidavit of Dr. David Lubarsky that is based on publicized accounts of the Irick execution from impartial, non-party media eyewitnesses who were invited by Appellees to observe Mr. Irick's execution. Att. B. The affidavit should be considered under Rule 14(a) because it addresses a actual application of the Tennessee lethal injection protocol, whereas evidence offered in the court below was based on medical research and executions in other jurisdictions.

The Chancery Court accepted Dr. Lubarsky – and all of Appellants' witnesses testimony – that midazolam would likely not render a person insensate to the suffocation and chemical burn of vecuronium bromide and potassium chloride. *Abdur'Rahman v. Parker,* No. 18-183(II) (Davidson Cty. Chancery Ct.), Ruling & Order ((July 26, 2018), p. 21 (Plaintiffs' "experts established that midazolam does not elicit strong analgesic effects and the inmate being executed may be able to feel pain from the administration of the second and third drugs."). Dr. Lubarsky's affidavit relies on impartial accounts for its conclusion that the midazolam – prepared seconds before the execution began – did not protect Mr. Irick from feeling pain from the administration of the vecuronium bromide and potassium chloride.

As is the case with the TDOC documents, Dr. Lubarsky's affidavit, by relying on accounts of eyewitnesses selected by Appellees, is analogous to the public record circumstance contemplated in *Crawford*. It is distinct from the asset valuation rejected in *Jones* because it is an empirical conclusion as opposed to a subjective deduction. For this reason, This Court should grant Appellants' motion and consider the facts contained in Dr. Lubarsky's affidavit.

CONCLUSION

For all of the reasons set forth herein, where this Court has discretion and Appellants' motion is supported by the decisions of this Court, the Court should grant Appellants' motion and consider the facts related to Billy Ray Irick's execution that arose after judgment.

Respectfully Submitted,

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MIDDLE DISTRICT OF TENNESSEE

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CERTIFICATE OF SERIVCE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was electronically filed and sent to the following via email on this the 6th day of September, 2018, to:

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STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
SIXTH FLOOR RACHEL JACKSON BUILDING
320 SIXTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0465

-PRESCRIPTION FOR BILLY RAY IRICK-

DATE: July 18, 2018

PRESCRIBING PHYSICIAN: [redacted]

RX: MIDAZOLAM 50MG/ML x 5ML COMPOUNDED FOR IV ADMINISTRATION; #8 SINGLE DOSE VIALS

PRESCRIBED FOR: Billy Ray Irick
DOB: 08/26/1958
SSN: [redacted]

PRESCRIBING PHYSICIAN SIGNATURE:

[redacted]

Midazolam storage and preparation instructions

USP Chapter 797 sets the following BUDs on high-risk compounded preparations: 1) 24 hours at room temperature; 2) 3 days at cold temperature (refrigerated); and 3) 45 days frozen. Once thawed at room temperature, the preparation must be used within 24 hours and cannot be refrozen to extend that time. If thawed in refrigerator it must be used within 3 days.

Items you will need:

1. Four 5 ml midazolam 50mg/ml vials
2. Gloves
3. Alcohol swabs
4. Four 50 ml bags of normal saline 0.9%
5. Four 50 ml/cc syringes

Preparation:

1. Remove 4 vials of midazolam from the freezer and place in refrigerator 24 hours prior to use as to allow to thaw.

2. On day of use prepare the four 50ml bags of normal saline 0.9% by removing them from the outer package. Remove an alcohol wipe from the package and swipe the injection port twice with intent and friction. Repeat with an additional alcohol pad on the second bag of normal saline.

3. On the day of use, retrieve the necessary vials of Midazolam from the refrigerator and remove the blue seal from the top of each vial of midazolam.

4. Remove an alcohol wipe from the package and swipe each medication vial stopper with intent and friction with two swipes. A new alcohol wipe should be used for each vial.

5. Obtain four 50ml/cc syringes

6. Open one syringe package using aseptic technique by peeling the paper packaging at the syringe tip end until you are able to grasp the syringe outer barrel. You may then drop the packaging onto the counter. Move the syringe between your dominant ring finger and middle finger, taking special care not to contaminate the syringe tip or the area of the plunger that extends into the barrel by touching them to any surface or fingers.

7. Retrieve the needle package with your non-dominant hand. Open the needle package using aseptic technique by peeling the paper packaging at the needle hub end until you are able to grasp the outer cap. Take special care not to contaminate the needle hub by touching it to any surface or fingers. Drop the needle packaging onto the counter.

8. Using aseptic technique, connect the needle to the syringe tip. If any of the connection points are contaminated, you must obtain new supplies and start over.

9. Take the outer protective cap off the needle and place the cap onto the counter, taking care not to contaminate the point of the needle.

10. These instructions list drawing the midazolam first followed by saline but the order can be reversed and the saline may be drawn first followed by the midazolam.

11. Secure the first medication vial with your non-dominant hand and insert the needle into the soft, rubber portion of the vial.

12. While holding the vial and the syringe together, invert them and bring them to eye-level. Take special care not to contaminate the syringe tip and the needle.

13. Withdraw 5 ml from the first vial of midazolam by drawing back slowly on the syringe plunger until 5 ml is obtained, making sure that the needle tip is below the solution level at all times. There is overfill in each vial, so you may see a small amount of liquid leftover.

14. Withdraw the needle from the vial, taking care not to contaminate the needle tip. Set the vial down on the counter while holding the needle and syringe upright in the air.

15. Inspect the syringe now filled with midazolam, inspect to ensure you see no particles or discoloring (should be clear liquid and without debris).

16. With the current syringe, take one of the bags of normal saline and puncture the injection port with the syringe taking care not contaminate the tip of the needle. Do not inject the midazolam into the bag of normal saline. Draw out enough normal saline to achieve a final solution volume of 50ml/cc.

17. Remove the syringe from the bag and assess the syringe for air bubbles and the appropriate volume. If air bubbles are present, gently tap the syringe with your finger or a pen to release the air bubbles and then eject the air. Adjust needle tip to below the level of the fluid and withdraw more fluid until the desired volume is reached.

18. Replace the outer needle cap carefully by scooping the needle into the cap. And lay the syringe on the counter. The prepared syringe will have 5mg/ml midazolam in 50ml solution for a total dose of 250mg of midazolam.

19. Repeat steps 6-17 for the remaining vials until the desired quantity of solution is obtained.

20. Dispose of any wrappers or packages in the garbage. If the medication vial contains any unused medications, dispose of the medication fluid according to institutional policies. Dispose of the empty medication vial in the sharps container, according to institutional policies. Needles may be removed from syringe and disposed of in sharps containers. Syringes may be disposed of in the garbage or according to institutional policies.

TENNESSEE DEPARTMENT OF CORRECTION
INCIDENT REPORT

Institution/Field Office		Incident ID
RIVERBEND MAXIMUM SECURITY INSTITUTION		**01342689**
Type of Incident		TOMIS Incident Code
DEATH OF OFFENDER		**DEI**
Date/Time Occurred	Date/Time Reported	Date of this Report
08/09/2018- 7:48 pm	**08/09/2018- 7:48 pm**	**08/09/2018**
Vehicle Used	Type of Property Loss	Loss Value
N/A	**N/A**	**N/A**

Weapon, Tool, Force or Means Used in Incident
EXECUTION LETHAL INJECTION

Codes: V – Victim; E – Escape; R – 1st Employee Reporting; S – Suspect; W – Inmate Witness; EW – Employee Witness

Name	Code	Name	Code
INMATE BILLY IRICK	V	[redacted]	R

Narrative:
(Utilize additional pages as needed)

1) Identify additional suspects or witnesses
2) Summarize details of incident (When, Where, What, Why, What action taken?)
3) Describe physical evidence, location found and disposition.

On August 9, 2018 Inmate Billy Ray Irick TDOC #113945 was legally executed by Lethal Injection. Time of Death pronounced at 7:48 pm.

Additional Information:

NAME: Billy Ray Irick
TOMIS ID: 113945
DATE OF BIRTH: [redacted]
RACE: WHITE
SEX: MALE
SOCIAL SECURITY NUMBER: [redacted]
CHARGE: AGGRAVATED RAPE, MURDER 1
COOF: KNOX COUNTY (47)
CUSTODY LEVEL: DEATH ROW
SENTENCE: DEATH
SED: 11/03/1986
DATE ADMITTED TO RMSI: 12/05/1986
RELEASE TO CORNER: 08/09/2018

Notary Acknowledgement

On this, the 10th day of August 2018, Warden Tony Mays, appeared personally before me and known to be of lawful age and did sign and swear under penalties of law, the aforesaid incident report, in my presence.

Sworn to and subscribed before me this 10th day of August, 2018

[redacted]

[redacted]

NOTARY PUBLIC DAVIDSON COUNTY My Commission Expires NOV 3, 2020

Status (check one) ☐ Referred I.A. ☐ District Attorney
☐ Closed ☐ Other: ☐ Disciplinary Board

[redacted] | A.C. Reviewing | Commissioner

[redacted]sioner/Operations Canary – Facility/Field Office RDA 1167

CHEMICAL PREPARATION TIME SHEET

Date 8/9/18

RED

500 mg Midazolam Time

2-Syringes prepared by [redacted] at 1928.

Witnessed by [redacted]

100 mg Vecuronium Bromide

2-Syringes prepared by [redacted] at 1724.

Witnessed by [redacted]

240 mEq Potassium Chloride

2-Syringes prepared by [redacted] at 1728.

Witnessed by [redacted]

Saline

3-Syringes prepared by [redacted] at 1707.

Witnessed by [redacted]

BLUE

500 mg Midazolam Time

2-Syringes prepared by _____ at Not Used

Witnessed by _____

100 mg Vecuronium Bromide

2-Syringes prepared by [redacted] at 1752

Witnessed by [redacted]

240 mEq Potassium Chloride

2-Syringes prepared by [redacted] at 1756

Witnessed by [redacted]

Saline

3-Syringes prepared by [redacted] at 1738

Witnessed by [redacted]

Declaration of David A. Lubarsky, M.D.

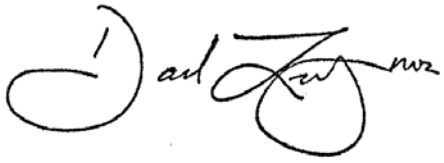
David A. Lubarsky, M.D., being of lawful age and a resident of the state of Florida, declares the following.

1. My name is David A. Lubarsky. I am a licensed medical doctor. I provided expert testimony in the case of *Abdur'Rahman, et al. v. Parker, et al.*, Case No. 18-183-III. My credentials are contained in the transcript of my testimony and curriculum vitae. The court accepted me as an expert in anesthesiology and pain management.
2. Counsel for the Abdur'Rahman plaintiffs asked me to review a video of the complete press conference conducted immediately after the execution of Billy Ray Irick on August 9, 2018, as well as published media accounts of the execution. It is my understanding that the video of the press conference was live-streamed on multiple media websites and then posted to the web. I was provided the complete unedited video.
3. The official media witnesses describe physical behavior of Mr. Irick after the drugs were administered that I recognize to be signs that Mr. Irick was not in a plane of surgical anesthesia during his execution. This is important because an inmate who is not placed in a plane of surgical anesthesia is not protected from the subsequent torturous effects of the lethal injection process. These signs and indicators include that Mr. Irick "gulped for an extended period of time" was "choking" "gasping" "coughing" and that "his stomach was moving up and down." Published media accounts report, "Irick did appear to react physically to the [vecuronium bromide]. He jolted and produced what sounded like a coughing or choking noise. He moved his head slightly and appeared to briefly strain his forearms against the restraints." Steven Hale, *The Execution of Billy Ray Irick*, Nashville Scene, August 10, 2018.
4. I also learned that Mr. Irick's hands were wrapped in tape and secured to the gurney.

5. During my testimony I discussed physical signs that indicate that a person is not in a plane of surgical anesthesia, which include hand movement. A trained observer knows that if a patient moves his fingers or hands that is a clear indicator that that they are not anesthetized.
6. The taping of Mr. Irick's hands affirmatively prevented the Warden from observing an important indicator that Mr. Irick was not anesthetized. The taping of an inmate's hands is not necessary because the inmate's wrists are restrained, which is more than sufficient to prevent the inmate from pulling out the catheter.
7. The failure to place Mr. Irick in a plane of surgical anesthesia means that he was sensate when the chemicals were introduced into his system. As Dr. Greenblatt, Dr. Stevens, and I explained in detail, this means that when Mr. Irick experienced noxious stimuli, he was roused into awareness because at most he was only sedated.
8. The noxious stimuli include the pulmonary edema caused by the pH of midazolam when injected as well as the suffocation from the vecuronium bromide and the excruciating burning pain caused by the potassium chloride.
9. Based on the review of the media accounts, I conclude to a reasonable degree of medical certainty that Mr. Irick was aware and sensate during his execution and would have experienced the feeling of choking, drowning in his own fluids, suffocating, being buried alive, and the burning sensation caused by the injection of the potassium chloride.

I declare under the laws of the United States, the State of Tennessee, and penalty of perjury, that the foregoing is true and correct to the best of my information and belief.

Dated this 2nd day of September, 2018.



David A. Lubarsky, M.D.