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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TABERON DAVE HONIE, an individual; Plaintiff, v. BRIAN REDD, Director, Utah Department of Corrections; BART MORTENSEN, Warden, Utah State Correctional Facility; RANDALL HONEY, Director of Prison Operations, Utah State Correctional Facility; DOES I through X, inclusive, in their official capacity, Defendants.	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Case No.: 240905322 Hon. Linda Jones

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INTRODUCTION

Defendants Brian Redd, Director, Utah Department of Corrections, Bart Mortensen, Warden, Utah State Correctional Facility, and Randall Honey, Director of Prison Operations, Utah State Correctional Facility ("Defendants") respectfully request that this Court deny Plaintiff Taberone Honie's ("Honie") Motion for Preliminary Injunction.

Honie is unlikely to succeed on the merits of his claims because he seeks an injunction on a matter that is now moot. Specifically, Defendants no longer intend to use the three-drug combination in Plaintiff's execution. Accordingly, all issues, claims, and relief sought surrounding the three-drug combination now fall by the wayside as moot. In short, there is no longer any use of the three-drug combination by UDC for the Court to enjoin.

Further, Plaintiff's request for so-called "meaningful access" has already been litigated and is currently on appeal. Accordingly, res judicata prevents Plaintiff from prevailing on his arguments. Regardless, Defendants are willing to facilitate limited access to a communication device for Plaintiff's counsel during the execution.

Moreover, Plaintiff does not possess a due process right to full protocol access. This issue has already been litigated, adjudicated, and decided by Judge Sanchez, wherein she determined the lack of any legal basis for such access. Nevertheless, Defendants have agreed to give Plaintiff's counsel the unredacted protocol subject to the terms of a previously entered protective order., Accordingly, this issue is also moot. For these reasons, and those discussed in more detail below, Defendants respectfully request that this Court deny Plaintiff's Motion.

STATEMENT OF RELEVANT FACTS

1. Honie has been sentenced to death for committing a heinous murder. The Utah Supreme Court upheld Plaintiff's murder conviction and death sentence on direct appeal decades ago (January 11, 2002).

(*See State v. Honie*, 2002 UT 4, ¶¶ 1, 69, 57 P.3d 977.)[1]

2. Plaintiff's execution will be carried out pursuant to Utah's Execution Protocol. This Protocol was last revised on June 10, 2010.

3. The current designated method of execution for Honie is lethal injection. (*See* Warrant of Execution, attached hereto as Exhibit 1.)

4. On or about March 23, 2023, Honie filed his original complaint in Case No. 230901995 challenging Utah's methods of execution and asserting many of the same claims pleaded by Honie in the instant matter, later amended a second time on April 14, 2023.

5. On or about December 22, 2023, Judge Coral Sanchez dismissed Honie's second amended complaint. (*See* Order Granting Defendants' Motion to Dismiss, attached as Exhibit 2.)

6. On or about January 12, 2024, Plaintiff filed a Motion for Leave to Amend with Judge Sanchez, which was subsequently denied. (*See* Motion for Leave, attached as Exhibit 3.)

7. On or about May 28, 2024, Honie filed a Notice of Appeal regarding Judge Sanchez' Order dismissing the Second Amended Complaint and Judge Sanchez's denial of the Motion for Leave to Amend. (*See* Notice of Appeal, attached hereto as Exhibit 4.)

8. On or about June 10, 2024, the Fifth Judicial District Court issued a Warrant of Execution for "judgement and sentence of death by lethal intravenous injection." (*See* Exhibit 1.)

9. Judge Wilcox established August 8, 2024, as the date of Honie's execution. *Id.*

10. On or about July 11, 2024, Plaintiff filed his Complaint for Injunctive and Declaratory Relief Due to Intended Method of Execution ("Complaint") in this Court. (*See* Complaint, on file with the Court.)

11. On or about July 12, 2024, Honie filed a Motion for Preliminary Injunction ("Motion") seeking to "maintain the status quo, order discovery followed by an evidentiary hearing, and undertake a full review

[1] The United States Supreme Court denied Honie's certiorari petition on October 7, 2002. *Honie v. Utah*, 537 U.S. 863, 123 S. Ct. 257 (2002).

of the merits of Honie's claims" (Motion at 2), thereby prohibiting "Defendants from executing him by methods that are the subject of this litigation" (*id.* at 24).

12. Plaintiff's Motion further seeks to have the Court grant Honie's counsel "meaningful access" to the Court during the execution by way of a communication device. (*Id.* at 10.)

13. On or about July 17, 2024, this Court held a scheduling conference regarding the instant Motion ("Scheduling Hearing").

14. At the Scheduling Hearing, Honie's counsel represented that Honie sought a stay as to the three-drug combination being used in his forthcoming August 8, 2024, but not as to the execution itself. (*See* Scheduling Hearing audio at :56 - 1:30.)[2]

15. Defendants are no longer going to use the three-drug combination of ketamine, fentanyl, and potassium chloride as the lethal injection method for Honie's execution. (*See* Declaration of Randall Honey ("Honey Decl."), attached hereto as Exhibit 5, at ¶¶ 15-19; *see also* Declaration of Brian Redd ("Redd Decl."), attached hereto as Exhibit 6, at ¶¶ 6-7.)

16. Instead, after diligent efforts, Defendants have procured and will use pentobarbital as the lethal injection method for Honie's execution. (*See* Honey Decl. at ¶¶ 15-19 ("UDC will have obtained the supply of pentobarbital at least three days before [Honie's execution]"); *see also* Redd Decl. at ¶ 6 (forgoing use of the three-drug combination once "pentobarbital became a feasible and readily available alternative").)

17. Honie has repeatedly identified pentobarbital as a safe, effective and constitutionally permissible alternative to the lethal injection drugs identified by UDC. (*See* Motion at 14.) Honie further identified protocols used by at least 13 other states in the administration of pentobarbital for lethal injection

[2] Transcription citations are taken from the Scheduling Hearing's audio recording file that the Court provided to Defendants' counsel after Defendants' request. Hearing transcriptions in this Opposition were not made by a certified court reporter but were done to counsel's best ability from listening to the Hearing's audio file.

executions. (*See* Plaintiff's Complaint, on file with the Court, at ¶¶ 117-121 and at Exhibits 26-29, 34-42.)

18. Among the protocols Honie identified is the Texas Protocol, which Honie states was recently updated to reflect Texas' choice to "retain pentobarbital as its only authorized method of execution." (*See* Plaintiff's Complaint, on file with the Court, at ¶¶ 117-121 and at Exhibit 34.)

19. Defendants will utilize and have adopted an execution Operations Procedure, modelled after the Texas Protocol and other protocols referenced by Plaintiff (*see* Plaintiff's Complaint at Exhibit 34) for administering pentobarbital to Honie at his execution. (*See* Honey Decl. at ¶¶ 17-19 (declaring that UDC has adopted an Operation Procedure for the administration of pentobarbital based on Texas' Protocol referenced in Plaintiff's Complaint, after reviewing protocols provided as examples by Plaintiff in his Complaint, and mirroring UDC's previously adopted procedure as applied to "one substance instead of three"); *see also* Plaintiff's Complaint at ¶¶ 117-121 and at Exhibit 34; UDC Operation Procedure, attached hereto as Exhibit 7.)

20. Defendants have provided the Operations Procedure to Honie's counsel. (*See* Honey Decl. at ¶ 16(c); *see also* Exhibit 5; July 19, 2024, letter to Honie's counsel ("Letter"), attached hereto as Exhibit 8.).)

21. Plaintiff possesses all information sought regarding the methods, process, procedure, and substance that will be used for Honie's execution that are within UDC's possession and control. (Scheduling Hearing audio at 9:25 - 10:03.)

22. Shortly after receiving the supply of pentobarbital, UDC will disclose information provided by the manufacturer of the Pentobarbital, with the exception of statutorily protected information. (Scheduling Hearing audio at 25:45 to 26:00; *see also* Utah Code §§ 64-13-27(3) and (4).)

23. Defendants have offered Plaintiff's counsel the ability to communicate with the Court during the execution. (*See* Exhibit 8.) Defendants have agreed to obtain a phone without recording capability. (*See*

id. at p. 2.) The phone will be held by a UDC designated individual standing outside the witness room in the event an urgent need for Plaintiff's counsel to communicate with the Court arises during the execution. (*See id.* at pp. 2-3.) Any calls will be made in a designated room, using speakerphone function, with UDC counsel present. (*See id.*)

LEGAL STANDARD

The Utah Supreme Court has explained that "[a]n injunction, being an extraordinary remedy, should not be lightly granted." *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983). Thus, Utah Rule of Civil Procedure 65A(e) establishes that a preliminary injunction may only issue upon a showing by the applicant of four factors:

> (1) there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim;
> (2) the applicant will suffer irreparable harm unless the order or injunction issues;
> (3) the threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; and
> (4) the order or injunction, if issued, would not be adverse to the public interest.

Utah R. Civ. P. 65A(e). Notably, the party seeking the preliminary injunction has the burden of proof and must satisfy all four elements of Rule 65A(e). *See Utah Medical Products, Inc. v. Searcy*, 958 P.2d 228, 231 (Utah 1998). Here, Honie cannot satisfy any, let alone all, of the elements necessary to secure a preliminary injunction.

ARGUMENT

I. HONIE IS UNLIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS BECAUSE HE SEEKS TO ENJOIN CONDUCT THAT IS NOW MOOT.[3]

Plaintiff seeks a preliminary injunction "to prevent Defendants from carrying out his execution" using a three-drug combination of "ketamine, fentanyl, and potassium chloride." (Motion at 1.) In effect,

[3] Defendants have also moved this Court to dismiss Honie's Complaint and therefore incorporate by reference herein the arguments raised in their motion to dismiss.

Plaintiff's requested injunction seeks to set aside the execution warrant previously issued by Judge Wilcox of the Fifth District Court for the State of Utah. Such relief is not permitted. Applying the law of the case doctrine, the Utah Supreme Court has "repeatedly indicated that one district court judge cannot overrule another district court judge of equal authority."[4] Accordingly, even if Judge Wilcox "relinquished all authority and jurisdiction in the matter," this Court could still not overrule Judge Wilcox's order.

At the July 17, 2024, scheduling conference on the Motion ("Scheduling Hearing"), this Court addressed the jurisdictional issue surrounding its inability to stay or issue an injunction on Plaintiff's entire execution proceeding. (*See* Scheduling Hearing audio at :40 - :55.) In response, Plaintiff's counsel represented that his requested relief extended only to enjoining Defendants' use of the three-drug combination. (*See id.* at :56 - 1:30.) However, Defendants no longer intend to use the three-drug combination in Plaintiff's execution. (*See* Honey Decl. at ¶¶ 15-19 ("UDC will have obtained the supply of pentobarbital at least three days before [Honie's execution]"); *see also* Redd Decl. at ¶¶ 6-7 ("UDC [will] forego use of the three-drug combination" and "UDC will not use the . . . three-drug combination . . . in any execution").) Accordingly, all issues, claims, and relief sought surrounding the three-drug combination now fall by the wayside as moot. In short, there is no longer any use of the three-drug combination by UDC for the Court to enjoin.

A. Defendants Intended Use of Pentobarbital Now Moots the Injunctive Relief Sought by Plaintiff.

"Mootness . . . presents one of the several bases that may prevent a court from reaching the merits of a case." *Timothy v. Pia, Anderson, Dorius, Reynard & Moss, LLC*, 2019 UT 69, ¶ 15, 456 P.3d 731, 735 (quoting *State v. Legg*, 2018 UT 12, 417 P.3d 592). A case is moot if "circumstances change so that

[4] *Mascaro v. Davis*, 741 P.2d 938, 946–47 (Utah 1987) (citing *In re Estate of Cassity,* 656 P.2d 1023, 1025 (Utah 1982); *see also Madsen v. Salt Lake City School Bd.,* 645 P.2d 658, 664 (Utah 1982); *State v. Bero,* 645 P.2d 44, 46 (Utah 1982); *Harris v. Tanner,* 624 P.2d 1135, 1137–38 (Utah 1981); *State v. Morgan,* 527 P.2d 225, 226 (Utah 1974); *Harward v. Harward,* 526 P.2d 1183, 1184 (Utah 1974); *Johnson v. Johnson,* 560 P.2d 1132, 1134 (Utah 1977).

the controversy is eliminated." *Timothy v. Pia, Anderson, Dorius, Reynard & Moss, LLC*, 2019 UT 69, ¶ 15, 456 P.3d 731, 735 (quoting *Salt Lake Cty. v. Holliday Water Co*., 2010 UT 45, 234 P.3d 1105) (case became moot when appeal was pending, and judgment expired). "A court may order the action for injunction be dismissed when the questions involved have become moot as when the conduct sought to be enjoined has been discontinued." 42 Am. Jur. 2d Injunctions § 253 (citing *U.S. v. W.T. Grant Co*., 345 U.S. 629 (1953)).

Here, mootness prevents this Court from reaching the merits of Plaintiff's requested injunctive relief. Indeed, the facts of this case do not require the Court to examine any constitutional issues. Given Defendants intended use of pentobarbital in Honie's execution, instead of the previously designated three-drug combination that Plaintiff seeks to enjoin, the changed circumstances have eliminated any need for injunctive relief. To extend beyond that would amount to answering hypothetical questions and issuing advisory opinions. *See Salt Lake County v. State*, 2020 UT 27, ¶ 18, 466 P.3d 158, 163-64 (stating that courts should decide actual pending controversies, not mere hypothetical questions). Accordingly, Defendants request that this Court deny Plaintiff's Motion and dismiss Plaintiff's claims involving UDC's repudiated use of the three-drug combination. "After all, if events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand not decision but dismissal." *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012).

Specifically, Plaintiff argues that use of the three-drug combination "poses a substantial risk of serious pain and unnecessary suffering in violation of Honie's rights to be free from the infliction of cruel and unusual punishment and unnecessary rigor" under the Utah Constitution. (Motion at 1-2.) Further, Plaintiff asserts that "ketamine and fentanyl do not meet the statutory requirements that "lethal injection drugs be 'equally or more effective' than sodium thiopental. . . ." (Motion at 2.)

However, issues surrounding the use of the three-drug combination argued in Plaintiff's Motion are now moot. UDC has decided not to utilize the three-drug combination in performing Honie's execution by lethal injection on August 8, 2024. (*See* Honey Decl. at ¶¶ 15-19; *see also* Redd Decl. at ¶¶ 6-7 ("UDC [will] forego use of the three-drug combination" and "UDC will not use the . . . three-drug combination . . . in any execution").) After much effort to procure, UDC will exercise its statutory right to utilize pentobarbital in Honie's execution. (*See* Honey Decl. at ¶¶ 15-19 ("UDC will have obtained the supply of pentobarbital at least three days before [Honie's execution]"); *see also* Redd Decl. at ¶ 6 (forgoing use of the three-drug combination once "pentobarbital became a feasible and readily available alternative").) Doing so comports with Utah Code § 77-19-10(2)'s requirement that a judgment of death carried out by lethal injection must be from a "lethal quantity of sodium thiopental or other equally or more effective substance. . . ."[5]

B. Defendants' Use of Pentobarbital Aligns with Plaintiff's Position.

Honie has repeatedly propounded Pentobarbital, both in this matter and prior litigation, as a safe and effective alternative method of execution "that would significantly reduce the substantial risk of severe pain [for Honie] presented by Utah's [three-drug combination]." (Complaint at ¶¶ 35, 116; *see also* Plaintiffs Motion for Leave to Amend at ¶ 180 (stating that "pentobarbital does not carry the 'same risk of pain' inherent in other lethal injection protocols").) As Honie summarily stated, pentobarbital "is a 'proven alternative method' with a 'track record of successful use.'" (Motion for Leave to Amend at ¶ 180.)

Honie points to "[a]t least ten states [that] currently authorize a single-drug pentobarbital protocol as a method of execution" and provides the protocol for each of the ten states as exhibits to the Complaint.

[5] Although the efficacy of pentobarbital is not at issue before the Court, pentobarbital satisfies the statutory requirements of being an "equally or more effective substance" than sodium thiopental. (*See* Honey Decl. at ¶¶ 15-19). And, to be clear, Defendants are not conceding that the statute of limitations for challenging UDC's execution protocol resets with the stated intent to use pentobarbital in Honie's execution.

(Complaint at ¶ 117.) Honie also asserted that 17 of the 33 executions carried out since 2023, and at least 43 since January 2020, have used "pentobarbital as the only drug." (Complaint at ¶¶ 118-19, 145-47.) With this, Honie asserts that "[t]he number of recent executions involving pentobarbital clearly demonstrates that the drug is a feasible, available, and readily implemented alternative to Utah's current 3-drug combination." (Complaint at ¶ 121.)

Further, Honie pleads that pentobarbital satisfies the requirement that "a method of execution must refrain from causing unnecessary or superadded pain or suffering," even going so far as to say it is UDC's "constitutional obligation" to use pentobarbital. (Complaint at ¶ 144; *see also* Motion at 14.) Indeed, Honie concedes that "[e]xecution by a single dose of pentobarbital has been constitutionally tested and approved by the Supreme Court of the United States." (Complaint at ¶ 150 (citing *Barr v. Lee*, 591 U.S. 979, 980 (2020)); *see also* Motion at 14.) Further, the use of pentobarbital has "repeatedly been upheld by United States Courts of Appeals." (Complaint at ¶ 150 (citing *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (per curiam); *Gissendaner v. Comm'r*, 779 F.3d 1275 (11th Cir. 2015) (per curiam)); *see also* Motion at 14.) In short, "[e]xecution by a single-drug barbiturate protocol [such as pentobarbital] 'has become a mainstay of state executions.'" (Motion for Leave to Amend at ¶ 181.)

In addition, Honie agrees that Defendants use of "manufactured"pentobarbital moots the issues in Honie's Motion. Indeed, Honie's counsel conceded at the Scheduling Hearing that if UDC obtains "manufactured pentobarbital" and uses that drug in Honie's execution, the issues in Plaintiff's Complaint are moot. (*See* Scheduling Hearing audio at 19:00 – 20:00.) And, here, Defendants confirm that they will secure "manufactured pentobarbital." (*See* Letter at p. 1; *see also* Honey Decl. at ¶ 16(a).) Although Plaintiff may raise an alleged due process concern challenging the timing of the disclosure for pentobarbital, such is not at issue before the Court..

C. Honie is Judicially Estopped from Claiming a Single Dose of Pentobarbital is Not a Safe, Effective, and Constitutionally Appropriate Method of Execution.

Given his prior position set forth in numerous court filings, Honie is judicially estopped from now taking a position against Defendants' use of pentobarbital. Specifically, the judicial estoppel doctrine "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire v. Maine*, 432 U.S. 742, 749, 121 S. Ct. 1808, 1814 (2001) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedures* § 4477, p. 782 (1981)). The purpose of the judicial estoppel doctrine is to "protect the integrity of the judicial process [and prohibit] parties from deliberately changing positions according to the exigencies of the moment." *Id.* (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 598 (C.A.6 1982) and *United States v. McCaskey*, 9 F.3d 368, 378 (C.A.5 1993)).

The Utah Supreme Court has defined judicial estoppel's elements as "(1) the prior and subsequent litigation involve the same parties or their privies; (2) the prior and subsequent litigation involve the same subject matter; (3) the prior position was successfully maintained; and (4) the party seeking judicial estoppel has relied upon the prior testimony and changed his position by reason of it." *R.O.A. Gen. Inc. v. Salt Lake City Corp.*, 2022 UT App 141, ¶ 29, 525 P.3d 100, 108, *reh'g denied* (Mar. 13, 2023) (citing *Orvis v. Johnson*, 2008 UT 2, ¶ 11, 177 P.3d 600). All of the elements are satisfied in this case. Honie previously filed a complaint against Defendants. (*See* Exhibits 2-4). Honie also petitioned the Utah Supreme Court for emergency relief, naming the State of Utah as a party. (*See* Petition for Emergency Relief, attached hereto at Exhibit 9.) Thus, he has brought claims against "the same parties or their privies."

Honie's prior filings involve the same subject matter at issue here—namely, whether Utah's methods of execution are constitutional and specifically whether the use of pentobarbital is a preferred alternative method of lethal inject execution. (*See* Order at 5-23.) Honie consistently maintained this

position throughout these prior proceedings. (*See* Exhibit 3 at ¶¶ 178-184.) And, Defendants have relied on Honie's representations and those of his designated expert witnesses by changing the method of execution from the three-drug combination to the use of pentobarbital.

D. None of the Exceptions to the Mootness Doctrine Apply in this Circumstance.

There are recognized exceptions to the mootness doctrine. Yet, none of those exceptions apply here. Particularly, the court can decide a moot issue when a litigant demonstrates that the issue will "(1) affect the public interest, (2) be likely to recur, and (3) because of the brief time that any one litigant is affected, be likely to evade review." *Widdison v. State*, 2021 UT 12, ¶ 14, 489 P.3d 158, 162 (quoting *State v. Steed*, 2015 UT 76, ¶ 7, 357 P.3d 547).

Here, however, the public interest will not be adversely impacted by Defendants switching Honie's lethal injection method to pentobarbital, a drug Plaintiff repeatedly asserts is a safe and effective alternative method of execution "that would significantly reduce the substantial risk of severe pain [for Honie] presented by Utah's [three-drug combination]." (Complaint at ¶¶ 35, 116; *see also* Motion for Leave to Amend at ¶ 180 (stating that "pentobarbital does not carry the 'same risk of pain' inherent in other lethal injection protocols").) Further, Defendants use of the three-drug combination is not likely to recur, and therefore does not warrant Court intervention on a moot issue. Indeed, Defendants do not intend to use the three-drug combination in any future lethal injection executions. (*See* Redd Decl. at ¶¶ 6-7 ("UDC will not use the . . . three-drug combination . . . in any execution").)

And, finally, it is not likely that the constitutional issues alleged by Honie surrounding the three-drug combination will evade review. First, as already stated, Defendants do not plan on using the three-drug combination in the future. Accordingly, the constitutionality of the use of the three-drug combination will not be at issue in future executions. So the issue will not arise, let alone evade review.

Second, if future litigants in Honie's situation requested similar relief, Honie's judicial path provided repeated reviews of the same legal issues, culminating with Honie's current arguments against

the three-drug combination standing at the cusp of review.[6] While executions are often necessarily conducted on tight timelines, courts consistently review the constitutionality of the methods of execution employed by the states before the condemned prisoner is put to death.[7] Honie's prodigious filings in this case and in other Utah courts prove this to be true. (*See* Complaint at ¶ 160; *see also* Motion at 15-16.)

Accordingly, because Defendants have been able to procure pentobarbital after significant effort and will be using that same drug as the lethal injection method for Honie's execution, the efficacy of the three-drug combination is no longer at issue before this Court. Plaintiff is unlikely to succeed on the merits of his claims because they are moot. Accordingly, Defendants respectfully request that this Court deny Plaintiff's requested injunctive relief.

II. PLAINTIFF CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON HIS CLAIM THAT DEFENDANTS ARE CONSTITUTIONALLY REQUIRED TO ALLOW COUNSEL ACCESS TO A COMMUNICATION DEVICE DURING THE EXECUTION.

As an initial matter, Plaintiff's request for alleged "meaningful access to counsel and the courts during his execution" is also now moot. Plaintiff's basis for this request relies on "the novel nature of the [now irrelevant] drug combination, UDC's refusal to tailor its protocol to these [now irrelevant] new drugs . . . and the likelihood that Honie will be rendered incompetent for execution after the administration of ketamine" all making such access to counsel "imperative" to Plaintiff. (Motion at 10.) However, Defendants are no longer utilizing the three-drug combination for Honie's or any execution. (*See* Honey Decl. at ¶¶ 15-19; *see also* Redd Decl. at ¶¶ 6-7.) Accordingly, there is no longer any "imperative" need for the level of access sought by Plaintiff's counsel.

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[6] Honie brought similar claims challenging the three-drug combination to the Utah Supreme Court.

[7] *See* e.g., *First Amend. Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940, 953 (D. Ariz. 2016), aff'd in part, rev'd in part and remanded, 938 F.3d 1069 (9th Cir. 2019); *Pizzuto v. Tewalt*, 997 F.3d 893, 904-06 (9th Cir. 2021); *In re Ohio Execution Protocol Litigation*, No. 2:11-cv-1016, 2018 U.S. Dist. LEXIS 209769, at *43 (S.D. Ohio Dec. 12, 2018); *Oken v. Sizer*, 321 F. Supp. 2d 658, 665 (D. Md. 2004)

Regardless, even if this Court determines that the basis for Plaintiff's request for so-called "meaningful access" does not rest on Defendants' use of the now immaterial three-drug combination, Plaintiff's Motion should be denied. This issue has already been litigated and decided before Judge Sanchez and is currently on appeal. Accordingly, the claim preclusion branch of res judicata prevents Plaintiff from relitigating, let alone prevailing on his arguments. Plaintiff's remedy does not reside with his Complaint in this Court. Rather, Plaintiff's remedy remains with the Utah Supreme Court's forthcoming decision on this issue already on appeal.

Under Utah law, "claim preclusion bars a party from prosecuting in a subsequent action a claim that has [or should have] been fully litigated previously." *Daz Mgmt., LLC v. Honnen Equip. Co.*, 2022 UT 15, ¶¶ 20-21, 508 P.3d 84, 89-90 (quoting *Brigham Young Univ. v. Tremco Consultants, Inc.*, 2005 UT 19, ¶ 26, 110 P.3d 678). This doctrine serves numerous important judicial purposes, including: "(1) preserving the integrity of the judicial system by preventing inconsistent judicial outcomes; (2) promoting judicial economy by preventing previously litigated issues from being relitigated; and (3) protecting litigants from harassment by vexatious litigation." *Id.* (quoting *Gudmundson v. Del Ozone*, 2010 UT 33, ¶ 30, 232 P.3d 1059).

The three requirements barring a claim under claim preclusion are: "First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits." *Id.* (quoting *Press Publ'g, Ltd. v. Matol Botanical Int'l, Ltd.*, 2001 UT 106, ¶19, 37 P.3d 1121).

Here, Plaintiff's claim that the three-drug combination makes it "imperative that Honie have meaningful access to counsel and the courts during his execution" is barred by claim preclusion. (Motion at 10.) Judge Sanchez adjudicated and dismissed Honie's claim. (*See* Exhibit 2.) And, Honie appealed

Judge Sanchez's final judgment dismissing this claim. (*See* Exhibit 4.)

Specifically, the complaint Honie filed in Judge Sanchez's Court involves the same parties as this case, namely Plaintiff Honie and Defendant UDC. (*See* Order at 1.) Further, in the case before Judge Sanchez, Plaintiff asserted that Utah's execution protocol fails to provide access to counsel throughout the execution in a manner consistent with the Utah Constitution. (*See* Order at 23.) In that matter, Plaintiff argued that this denial derived from Plaintiff's inability "to communicate with counsel throughout the execution proceedings." (Order at 24.) Similarly, here, Plaintiff argues that his "counsel must have the capability to ensure his client's Eighth Amendment rights are protected throughout the duration of his execution." (Motion at 20.)

Moreover, after carefully considering the parties' positions, Judge Sanchez issued her ruling dismissing Honie's claim, and that ruling resulted in a final judgment on the merits. (*See* Exhibit 4.) Judge Sanchez held that Plaintiff did not possess the "right to speak to counsel after being escorted from the observation cell" or the right to "have [his] attorney present during the setting of the IVs" under either the Utah or Federal Constitution. (Order at 25.) She further held that the 2010 protocols only prescribe or proscribe attorney behavior during the execution "to the extent an attorney is named as a witness to the execution." (Order at 24-25.) And, Judge Sanchez determined that "Utah courts have not extended the Utah Constitution's right to the assistance of counsel to the service of a person's sentence, including an execution." (Order at 25.)

Further, apart from res judicata, Plaintiff's argument that his right to access counsel extends to counsel's ability "to communicate with the courts" via "any communication devices—phones or otherwise—during his execution" (Motion at 19) also fails as a matter of law. Specifically, Plaintiff cannot "sue simply to remove a barrier [he] believes will interfere with [his] right of access to the courts, assuming a claim arises." *Coddington v. Crow*, No. 22-6100, 2022 WL 10860283, at *6 (10th Cir. Oct.

19, 2022). Plaintiff "cannot invoke [his] access-to-courts right to reform the execution protocol in anticipation of claims [he] might want to file if something goes wrong during an execution." *Id.* at *6-7. Courts have consistently held that an inmate does not have the right to counsel "during the events leading up to and during the execution" because the "right to counsel only 'extends to the first appeal of right, and no further.'" *Whitaker v. Collier*, 862 F.3d 490, 501 (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). Thus, Plaintiff cannot prevail on its right to counsel claim, even as it pertains accessing communications devices during the execution.

Honie does not have a constitutional right to the assistance of counsel during his execution. Accordingly, Honie's counsel is not constitutionally entitled to access a communication device during the execution. Nevertheless, Defendants are willing to facilitate limited access to a communication device for Plaintiff's counsel during the execution. (*See* Letter.) For example, Defendants have agreed to obtain a phone without recording capability. (*See id.* at p. 2.) The phone will be held by a UDC designated individual standing outside the witness room in the event an urgent need for Plaintiff's counsel to communicate with the Court arises during the execution. (*See id.* at pp. 2-3.) Any calls will be made in a designated room, using the speakerphone function, with UDC counsel present. (*See id.*) Accordingly, without legal obligation for doing so, Defendants have voluntarily agreed to satisfy Plaintiff's request for his counsel to have the ability to communicate with the Court during the execution—rendering Honie's claim moot.

III. PLAINTIFF DOES NOT POSSESS A LIKELIHOOD OF SUCCESS ON THE MERITS AS TO UNLIMITED ACCESS TO THE FULL PROTOCOL.

Plaintiff's Motion requests full access to the protocol prior to the execution. Plaintiff specifically contends that he "has a due process right to adequate notice of the specifics of the lethal injection procedures by which UDC intends to execute him." (Motion at 15.) Plaintiff also asserts that "[p]rocedural due process principles require that Honie be afforded an adequate notice and opportunity to

investigate and litigate UDC's [allegedly] untested protocol." (Motion at 16.) Further, at the July 17th Scheduling Hearing, this Court requested briefing on the issue of Plaintiff's access to the full execution protocol. (*See* Scheduling Hearing audio at 12:28 - 13:25)

To be clear, Plaintiff does not possess a due process right to full protocol access. This issue has already been litigated, adjudicated, and decided by Judge Sanchez, wherein she determined the lack of any legal basis for such access. Regardless, Plaintiff's counsel confirmed at the Scheduling Hearing that he had received everything requested from Defendants other than certain items that Defendants' counsel affirmed at the Hearing that they intended to provide around the time of this filing. (Scheduling Hearing audio at 9:25 - 10:03.) Therefore, Plaintiff will possess everything he requested, and this issue also becomes moot. (*See* Exhibits 5-8.)

Despite the parties' assertions at the Scheduling Hearing, res judicata applies to the issue of due process and Plaintiff's alleged protocol access. Specifically, Plaintiff already litigated, and Judge Sanchez already ruled against Plaintiff on this issue, which is the subject of a pending appeal. In the case before Judge Sanchez, Plaintiff propounded a virtually identical claim, arguing that he is deprived of due process "because the 2010 execution protocols are heavily redacted and because Defendants may alter the protocols without giving notice." (Order at 18.) Plaintiff further argued that not having full access to the protocol, as well as the alleged risk of potential changes without notice, deprives Plaintiff an opportunity to assert his rights. (*See id.*)

After reviewing the parties' submissions and carefully considering the parties' arguments, Judge Sanchez determined that the facts asserted by Honie were "insufficient to show Plaintiffs' due process rights have been or will be violated by redactions and possible changes to the execution protocols." (Order at 21.) Judge Sanchez reasoned that questions concerning "procedural due process under [both state and federal] constitutions are . . . substantially the same." (Order at 18.) Accordingly, the "Fifth,

Sixth, Eighth, and Eleventh Circuits have held that a prisoner has no due process right to receive the terms of an execution protocol."[8] The Court further determined that "[n]ot receiving an execution protocol does not prevent a prisoner from challenging a method of execution, it just makes 'it more difficult . . . to discover legal claims.'" (Order at 19 (quoting *William v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011).) In short, "'[t]here is no violation of the Due Process Clause from the uncertainty that [the state] has imposed on [the inmate] by withholding the details of its execution protocol." (Order at 19.)

Further, the Court held that "[a]ny deviations or changes to an execution protocol that do not unnecessarily increase the amount of pain a prisoner endures do not give rise to a claim under Article 1, section 9." (Order at 22.) And, Plaintiff has already repeatedly admitted that Defendant's use of pentobarbital will "not unnecessarily increase the amount of pain a prisoner endures."

Nonetheless, Defendants have extended beyond their legal duty by providing protocol details to Plaintiff. (*See* Exhibits 5-8.) Defendants have provided to Plaintiff's counsel the Operation Procedures that will be used at Plaintiff's execution, which closely mirrors the protocol for lethal injection that Honie himself has endorsed. (*See* Exhibit 7; *see also* Honey Decl. at ¶¶ 17-19 (declaring that UDC has adopted an Operation Procedure for the administration of pentobarbital based on Texas' Protocol referenced in Plaintiff's Complaint, after reviewing protocols provided as examples by Plaintiff in his Complaint, and mirroring UDC's previously adopted procedure as applied to "one substance instead of three"); Plaintiff's Complaint at ¶¶ 117-121 and Exhibit 34.)

Similarly, Defendants' decision to utilize pentobarbital instead of the three-drug combination does not violate Plaintiff's due process for multiple reasons. First, Plaintiff has championed the use of pentobarbital in numerous prior court filings and cannot now assert that Defendants' use of the same

[8] *See* Order at 18 (citing *Sepulvado v. Jindal*, 729 F.3d 413, 419 (5th Cir. 2013); *Phillips v. DeWine*, 841 F.3d 405, 420 (6th Cir. 2016); *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014)).).

somehow violates due process. In short, Plaintiff is judicially estopped from challenging pentobarbital based on due process.

Second, the use of pentobarbital has already been found to be constitutionally sound. Plaintiff himself has argued that "[e]xecution by a single dose of pentobarbital has been constitutionally tested and approved by the Supreme Court of the United States." (Complaint at ¶ 150 (citing *Barr v. Lee*, 591 U.S. 979, 980 (2020)).) Further, pentobarbital has "repeatedly been upheld by United States Courts of Appeals." (Complaint at ¶ 150 (citing *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (per curiam).)

Third, Defendants' use of pentobarbital is consistent with the statutory requirements that the lethal injection be from a "lethal quantity of sodium thiopental or other equally or more effective substance. . . ." (*See* Utah Code of Crim. P. § 77-19-10(2).) Again, although the efficacy of Pentobarbital is not at issue before the Court, Plaintiff has repeatedly asserted that pentobarbital would satisfy this statutory requirement.

Fourth, Plaintiff has consistently advocated for the simple process, minimal risk, and effectiveness of pentobarbital as an alternative method of execution. Plaintiff cannot now argue a due process violation exists based on the use of pentobarbital, even if Defendants announced the use of pentobarbital 22 days before the scheduled execution.

Even then, Defendants' procurement of pentobarbital at this stage in the proceedings is justified given the circumstance and does not constitute a procedural due process violation. Defendants diligently inquired concerning the availability of pentobarbital beginning in October 2023, ultimately reaching out to twelve states in the process. (*See* Honey Decl. at ¶¶ 3-4.) These states "either did not respond, or replied stating that due to their laws, they could not provide any information related to their supply of pentobarbital." (*Id.* at ¶ 5.) Defendants did not discover the potential availability of pentobarbital until

"[s]hortly after the June 10, 2024 Execution Warrant Hearing." (Redd Decl. at ¶ 4; *see also* Honey Decl. at ¶¶ 8-11.) Upon which, Defendants quickly "contacted the supplier, and over the past several weeks have explored the feasibility of procuring [pentobarbital] in time for the August 8, 2024 execution of Mr. Honie." (*Id.* at ¶ 5; *see also* Honey Decl. at ¶¶ 13-14.) Further, as soon as pentobarbital "became a feasible and readily available alternative," Defendants decided to "forego use of the three-drug combination and proceed with procuring pentobarbital in time for the August 8, 2024 execution." (*Id.* at ¶ 6.)

IV. THE APPLICABILITY OF THE GLOSSIP TEST UNDER UTAH LAW HAS ALREADY BEEN DECIDED BY JUDGE SANCHEZ, AND THE GLOSSIP TEST SHOULD APPLY TO PLAINTIFF'S CLAIMS.

Pursuant to this Court's request at the Scheduling Hearing, Defendants will address the applicability of the Glossip test under Utah law. In short, although the Utah Supreme Court has not adopted the Glossip test, this Court should adopt the same. And, notably, Judge Sanchez has already adopted the Glossip test as to Honie.

As an initial matter, res judicata applies here regarding application of the Glossip test as it relates to Honie's 8th Amendment arguments. In Honie's prior litigation on this very issue, Judge Sanchez held that the requirement for Plaintiff to establish an alternative method of execution that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain, applies "when challenging a method of execution under Article 1, section 9 of the Utah Constitution." (Order at 10-11.)

Further, Judge Snachez held that Plaintiff's failure to identify in the complaint a feasible alternative method of execution that is readily available and does not interfere with a legitimate penological interest was part of the reason she determined that "Plaintiffs have not alleged sufficient facts to challenge Utah's chosen method of execution under the cruel and unusual punishments clause of Article 1, section 9." (Order at 12-15.) Thus, Judge Sanchez dismissed Plaintiffs' 8th amendment claim

on the merits. (Order at 15.) Moreover, this issue is now before the Utah Supreme Court. (*See* Exhibit 4.) Accordingly, res judicata applies.[9]

V. HONIE WILL NOT SUFFER IRREPARABLE HARM BECAUSE THE ISSUES SURROUNDING THE NOW INAPPLICABLE THREE-DRUG COMBINATION ARE MOOT.

Honie will not suffer any irreparable harm if this Court does not enjoin the use of the three-drug combination because, as previously stated, Defendants are no longer using the three-drug combination in Honie's execution. Accordingly, any alleged harm from the use of the three-drug combination to Honie is now moot. For this reason, Plaintiff's Motion fails to satisfy the irreparable harm prong of the preliminary injunction analysis.

VI. HONIE HAS NOT, AND CANNOT, DEMONSTRATE THAT THIS INJUNCTION WOULD NOT BE ADVERSE TO PUBLIC INTEREST.

Honie's Motion fails to show how this granting his injunction would be in the public's best interests. On the contrary, after 25 years of review and failed challenges, the State and the families and friends of Honie's victim have a significant interest in the end of litigation and the completion of a legal and constitutional sentence. Indeed, granting an injunction that would further delay the completion of Honie's sentence is not in the public interest. Despite the varying specific arguments in the numerous challenges posed by Honie, the foundational issue for his constitutional challenges have not changed and have already been addressed by prior courts in Defendants' favor. For these reasons, Plaintiff's Motion fails to satisfy the public interest prong of the preliminary injunction analysis.

CONCLUSION

For reasons set forth herein, Defendants respectfully request that Plaintiff's Motion be denied.

[9] Even if res judicata does not apply, the Glossip test is applicable under Utah law. For full briefing on this issue, Defendants herein incorporate by reference the arguments made in Defendants' Motion to Dismiss and Reply Memorandum in support thereof, on file in the case dismissed by Judge Sanchez.

DATED this 19th day of July, 2024.

OFFICE OF THE UTAH ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that on **July 19, 2024** the foregoing **DEFENDANTS' MEMORANDUM OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was filed using the court's electronic filing system. I further certify that a true and correct copy was served, via email, to the following:

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