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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT PART IV

KEVIN BURNS et al.	)	
	)	
Plaintiffs,	)	CAPITAL CASE
	)	
vs.	)	No. 25-0414-IV
	)	Chancellor Russell Perkins
	)	
FRANK STRADA, et al.	)	
	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO QUASH NOTICE OF DEPOSITION

Defendants have moved to quash Plaintiffs' Notice of Depositions and accompanying subpoenas as to the following five anonymous individuals: Drug Procurer, Special Operations Team Leader, Lethal Injection Recorder, IV Team Member 1, and IV Team Member 2. To the extent that this Court declines to quash the Notice of Deposition, Defendants request that "the Court enter a protective order requiring the deposition be conducted electronically with a black screen and voice modulation to protect the identities of the execution participants." Defs. Mem. in Supp. of Mot. to Quash at 17.

As Plaintiffs have repeatedly represented to Defendants, they are amenable to conducting the depositions of these execution participants in Defendants' proposed anonymized manner. For the reasons stated herein, however, the noticed deponents have personal knowledge that is highly relevant to Plaintiffs' Claim 1.2—which this

Court has already held, in connection with Defendants' Motion to Dismiss, states a claim that Plaintiffs are entitled to substantively pursue through ordinary litigation. As such, Plaintiffs are entitled to depose these witnesses pursuant to Tenn. R. Civ. P. 30.02 and 26.02. These depositions are proportionate to the needs of the case and do not impose an undue burden on Defendants. Defendants' opposition to these depositions is nothing more than a thinly veiled, belated motion to reconsider the Court's ruling on the Motion to Dismiss—not a dispute based on the actual principles of civil discovery.

Furthermore, the subpoenas duces tecum that Plaintiffs issued alongside their deposition notices cannot possibly be an attempt to circumvent this Court's discovery deadlines, because the subpoenas do not seek any documents that Plaintiffs have not previously requested from Defendants in their timely Requests for Production ("RFPs"). *See* Ex. 1 (Pl. RFP Nos. 1 & 27 and Def. Resp.); *see also* Pls. Mem. Ex. 9 at 9 and Pls. Mem. Ex. 3 at 10 (filed October 9, 2025). Because Defendants have been dilatory in producing the documents Plaintiffs need to prepare for the noticed depositions, Plaintiffs have propounded these subpoenas to require the deponents to bring previously requested, non-privileged, relevant documents to their depositions. In other words, because Defendants are depriving Plaintiffs' counsel of the opportunity to review responsive documents *prior* to the depositions, Plaintiffs' counsel will settle for reviewing responsive documents *during* the depositions—which will inform the questions they ask deponents. Plaintiffs are by no means trying to "circumvent[] . . . the [C]ourt's scheduling order," Defs. Mem. at 16; instead, Plaintiffs

are trying to work around Defendants' laggardly production of non-privileged, responsive documents in the weeks leading up to Plaintiffs' deadline for fact depositions on November 20, 2025. *See* Amended Sched. Order. (Sep. 22, 2025).

I. Background

On October 8, 2025, Plaintiffs noticed the following depositions, pursuant to Tenn. R. Civ. P. 26.02 and 30.02:

1. Lethal Injection Recorder, October 22, 2025, 10:00 AM
2. IV Team Member 1, October 22, 2025, 11:00 AM
3. IV Team Member 2, October 22, 2025, 1:00 PM
4. IV Team Member 3, October 22, 2025, 2:00 PM
5. IV Team Member 4, October 22, 2025, 3:00 PM
6. IV Team Member 5, October 22, 2025, 4:00 PM
7. Special Operations Team Leader, October 23, 2025, 9:00 AM
8. Drug Procurer, October 23, 2025, 11:00 AM[1]

Plaintiffs simultaneously issued subpoenas duces tecum to these anonymous execution team members, pursuant to Tenn. R. Civ. P. 45, which instructed them to bring the following items to their depositions:

> Any and all documents and/or recordings in your possession pertaining to the execution of Byron Lewis Black, DOD: 08/05/2025. Documents include any notes, memos, correspondence, emails, text messages, signal messages, WhatsApp messages, Teams posts, Slack posts, telephone messages, voicemails, bench notes, photographs, or x-rays. Recordings include any audio, video, or digital recordings.

[1] These depositions will all have to be rescheduled, pending this Court's ruling on Defendants' Motion to Quash. "Drug Procurer," in this context, refers to the individual who currently serves in this role—not the pseudonymized individual who performed that role and used that alias under the preceding protocol.

> Any and all documents and/or recordings in your possession pertaining to the execution of Oscar Franklin Smith, DOD May 22, 2025. Documents include any notes, memos, correspondence, emails, text messages, signal messages, WhatsApp messages, Teams posts, Slack posts, telephone messages, voicemails, bench notes, photographs, or x-rays. Recordings include any audio, video, or digital recordings.

Ex. 2. All of the materials referenced in Plaintiffs' subpoenas were previously requested in Plaintiffs' RFP Nos. 1 and 27, which Plaintiffs propounded on Defendants on June 2, 2025, and September 9, 2025, respectively. *See* Ex. 1 (Pl. RFP Nos. 1 & 27 and Def. Resp); *see also* Pls. Mem. Ex. 9 at 9 and Pls. Mem. Ex. 3 at 10 (filed October 9, 2025).

Upon receiving Plaintiffs' Notice of Depositions, Defendants' counsel complained that he could not accept service for Drug Procurer because no such pseudonym appears in the 2025 Protocol. *See* Ex. 3 (Email from Cody Brandon, Oct. 8, 2025). During their meet and confer with Defendants' counsel on October 13, 2025, Plaintiffs' counsel explained that "Drug Procurer" refers to the unnamed individual who is responsible for procuring pentobarbital on behalf of TDOC. Defendants' counsel thereupon agreed to accept service for that individual.

Defendants' counsel likewise complained that he could not accept service for IV Team Members 3–5, because he was unaware of their existence. *See id.* Notably, the 2025 Protocol does not specify the number of IV Team Members other than to acknowledge the existence of at least two. *See* 2025 Protocol at 11. Based on

Defendants' representation that there are only two IV Team Members, Plaintiffs' counsel affirmed their intent to depose those two individuals.[2]

During the October 13 meet and confer, Plaintiffs' counsel represented to Defendants that Plaintiffs are open to utilizing anonymous deposition procedures similar to the ones used in *King v. Parker,* No. 3:18-cv-1234 (M.D. Tenn.). *See, e.g.,* Ex. 4 (Excerpt of Anonymized Deposition of Previous Drug Procurer in *King*). In that litigation, counsel for Defendants facilitated the electronic depositions of execution team members using a black screen and voice modulation to protect the deponents' identities.

Plaintiffs' counsel likewise explained that they propounded subpoenas duces tecum because they had not yet received most of the documents they would need to adequately prepare for the execution team members' depositions. She expressed that, from Plaintiffs' perspective, Defendants' production was deficient and Defendants' efforts to search for, redact, and produce documents (rather than simply withhold documents in violation of this Court's protective order) were seriously lacking. For example, Plaintiffs pointed out that, as of the meet and confer on October 13, Defendants still had not produced copies of Mr. Smith's or Mr. Black's EKG strips—in response to Plaintiffs' RFP Nos. 1 and 27—which Plaintiffs require to effectively depose members of the execution team. Plaintiffs therefore had little choice but to issue subpoenas duces tecum to instruct deponents to bring with them any

[2] Despite the parties having reached this understanding during their meet and confer, Defendants still insisted on incorrectly stating in their Motion to Quash that "Plaintiffs have noticed deposition for eight execution participants . . .," Def. MOL at 8, rather than the five actually existing execution participants who were noticed.

non-privileged, relevant documents, which Plaintiffs previously requested, and Defendants have not produced.

A day later, Defendants responded to Plaintiffs' Third Set of Requests for Production. In response to Plaintiffs' RFP No. 27 (which mirrored RFP No. 1 and asked for all relevant documentation related to Mr. Black's execution and all executions moving forward), Defendants signaled that, because their search is ongoing, there may be responsive documents that have not yet been disclosed. They likewise stated that "reasonable investigation" has shown that copying and producing the requested EKG strips would be "expensive," and they therefore declined to do so; instead, Defendants invited Plaintiffs' counsel to inspect the paper printout of Mr. Black's EKG at Defendants' counsel's office. Defendants' invitation made no mention of inspecting Mr. Smith's EKG strip. *See* Ex. 1 (Pl. RFP Nos. 1 & 27 and Def. Resp). Plaintiffs' counsel immediately emailed Defendants' counsel and requested to inspect Mr. Black's EKG strip the next day, on October 15. Defendants' counsel was unavailable, so Plaintiffs arranged to inspect the strip on Defendants' next available date—October 20.

On the morning of October 20, members of Plaintiffs' legal team visited Defendants' counsel's office at the UBS Tower, where they inspected Mr. Black's EKG strip, in the company of members of Defendants' legal team. There, Defendants' counsel informed Plaintiffs' counsel that no print-out of Mr. Smith's EKG exists—either because the EKG machine was not loaded with paper or because of some other technical difficulty. *See* Ex. 5 (Declaration of Ben Leonard).

Upon inspecting Mr. Black's EKG strip, Plaintiffs' counsel discovered two troubling facts: First, the EKG did not begin recording until 10:33:50 AM—presumably when either the first injection of saline or pentobarbital was administered by the Special Operations Team Leader. It is unclear why Defendants did not begin recording Mr. Black's cardiac electrical activity until that time; their delay made it such that no EKG baseline was recorded prior to injections.

Second, Mr. Black's EKG shows significant cardiac electrical activity at the time the EKG was terminated at 10:44:50 AM. Time of death was declared by the Physician at 10:43 AM, a minute after the Physician entered the execution chamber. Thus, Mr. Black continued to have significant cardiac electrical activity nearly two minutes after he was declared dead.

These troubling facts make it especially important for Plaintiffs to have the opportunity to depose the IV Team Members—who are responsible for "confirm[ing] that the electrocardiograph is functioning properly" under the 2025 Protocol (at 20)—and the Special Operations Team Leader and Lethal Injection Recorder—who presumably have access to the EKG machine in the Lethal Injection Room and who are likely responsible for starting/stopping the EKG recording. *See* 2025 Protocol at 16, 21, 34–35.

II. Legal Standard

Defendants do not challenge the notice or service of the execution team members' depositions. Instead, they allege that the depositions are improper because the execution team members do not have knowledge relevant to Plaintiffs' claims,

and the depositions are therefore disproportionate to the needs of the case and impose an undue burden on Defendants.

Tenn. R. Civ. P. 26.02 governs the scope of depositions in Tennessee. According to that rule, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Tenn. R. Civ. P. 26.02(1). Discovery extends to matters "relate[d] to the claims or defenses of the party seeking discovery." *Id.* The rule emphasizes that discovery is permissible if it appears "reasonably calculated to lead to the discovery of admissible evidence[,]" even if the information itself may not be admissible at trial. *Id.*

III. Argument

A. The execution team members' personal knowledge is highly relevant to Plaintiffs' Claim 1.2.

Defendants' Motion to Quash asserts that "[t]he personal knowledge, opinions, or experiences of execution team members or other TDOC personnel has no bearing on Plaintiffs' claims." Def. Mem. at 1. That assertion is meritless. As Defendants well know, this Court denied Defendants' motion to dismiss Plaintiff's Claim 1.2, or the "Maladministration Claim," which asserts that Plaintiffs face an intolerable risk of severe suffering due to maladministration arising out of TDOC's demonstrated culture of noncompliance, recklessness, and secrecy. Compl. ¶¶ 684–94. Defendants, however, have obstinately refused to accept this Court's ruling. Consequently, Defendants make the same argument in their Motion to Quash that they did in their Response to Plaintiffs' Motion to Compel—relying again on the same misquote from *Cooey v. Strickland*, 589 F.3d 210 (2009): "'Maladministration' claims are 'all but

foreclosed by Supreme Court precedent and 'beyond the scope of [a court's] judicial authority.' *Cooey*, 589 F.3d at 225." Def. Mem. at 13.[3]

For the reasons stated in Plaintiffs' briefing and oral argument on this issue in relation to their Motion to Compel, Plaintiffs' Claim 1.2 is not based on a generic risk of negligence. Instead, Claim 1.2 concerns concrete risks demonstrated by TDOC's pervasive history of knowing and reckless wrongful conduct, combined with the opacity of the 2025 Protocol, the broad discretion embraced by that protocol, and the logistical challenges of pentobarbital-based executions. This Court recognized that distinction when denying Defendants' motion to dismiss as to Claim 1.2. Because Claim 1.2 was not dismissed, it affects the scope of relevant information obtainable through discovery pursuant to Tenn. R. Civ. P. 26.02. As such, Plaintiffs are entitled to depose the anonymous execution team members, who all have personal knowledge relevant to Claim 1.2.

i. This Court denied Defendants' Motion to Dismiss Claim 1.2, and Claim 1.2 therefore affects the scope of permissible discovery.

On April 16, 2025, Defendants filed a Motion to Dismiss in which they argued, among other things, that Claim 1.2 should be dismissed because it involves only "speculation of maladministration, which falls well short of showing an imminent constitutional violation." Def. Mem. in Supp. of Mot. to Dismiss at 26.

Plaintiffs filed a Response, in which they explained, with citations to the averments in their Complaint, that Claim 1.2 is not simply based on speculation

[3] In oral argument on October 20, with respect to Plaintiffs' Motion to Compel, Defendants' counsel admitted to their erroneous misquote of *Cooey*. However, Defendants have not yet corrected their briefing.

about the bare possibility of error, but rather on the risks posed by specific aspects of TDOC's internal culture, as demonstrated by numerous concrete, specific facts involving knowing and reckless conduct, not negligence:

> To wit: TDOC has not complied with its own procedures in any execution by lethal injection planned or performed for over a decade, spanning the last three protocols, Compl. ¶¶ 165, 171, 182; it executed Billy Ray Irick with midazolam that was not tested for potency and which was obtained from a supplier whose product routinely failed potency testing when that testing was actually performed, *id.* ¶¶ 178, 184; it taped Mr. Irick's hands down to make it impossible to tell whether he retained consciousness, *id.* ¶ 398; it used a compounding pharmacy that it knew to have misrepresented its capabilities, *id.* ¶¶ 176–80; it repeatedly misrepresented its compliance with its own safeguards in federal litigation, *id.* ¶¶ 199–200 & Ex. 15; its General Counsel had to be fired for wrongdoing related to executions, id. ¶¶ 211–12; its Inspector General had to be fired for wrongdoing related to executions, *id.* ¶¶ 213–14; its departed CFO was federally indicted for his coverup of the agency's faulty procurement practices, *id.* ¶¶ 388–91; and the review commissioned by the Governor himself found that "TDOC leadership viewed the lethal injection process through a tunnel-vision, result-oriented lens," *id.* ¶ 207 & Ex. 13 at 2, 40.

Pl. Mem. in Opp. to Mot. to Dismiss at 54.[4]

On May 15, 2025, this Court granted Defendants' motion in part and denied it in part. The request to dismiss Claim 1.2 was one of the portions it denied. In the Court's opinion, it made clear that it understood Defendants' underlying argument. Indeed, the Court acknowledged and quoted many of the passages of opinions on

[4] Two executions later, Plaintiffs' allegation that "TDOC has not complied with its own procedures in any execution by lethal injection planned or performed for over a decade," remains true.

which Defendants relied. *See* Order of May 15, 2025 at 19–20. The Court, however, concluded that, based on the allegations in the Complaint, Claim 1.2 "sufficiently states a claim that should not be summarily dismissed at this stage of the proceedings." *Id.* at 20. The Court emphasized that it was aware of the steep climb facing Eighth Amendment claims based on the risk of maladministration, but the Court concluded that the pleaded allegations were sufficient to afford Plaintiffs "the opportunity to present their case." *Id.*

When a party moves for a claim to be dismissed as insufficient as a matter of law, and a court denies that motion, the Court's ruling "unlock[s] the doors of discovery" in support of that claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, the entire structure of discovery under the Tennessee Rules is built around the question of what is pending before the Court. *See* Tenn. R. Civ. P. 26.02(1) (stating that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter *involved in the pending action*," including matters "relat[ing] to the claim or defense of the party seeking discovery"). That basic structure—the very foundation of civil litigation under the Rules—could not be maintained if a party could simply relitigate the motion to dismiss in every discovery dispute. Accordingly, courts widely recognize that "[d]iscovery . . . is not to be denied simply because it relates to a claim or defense that is being challenged as insufficient or untenable." *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, No. 5:08CV34-RS-MD, 2008 WL 1883544, at *4 (N.D. Fla. Apr. 25, 2008).

Because this Court held that Claim 1.2 was sufficiently pleaded to unlock the doors of discovery, "[t]he defendants' belief that the plaintiffs' case lacks merit is not a basis for curtailing discovery." *Lightsquared Inc. v. Deere & Co.*, No. 13 Civ. 8157 (RMB) (JCF), 2015 WL 8675377, at *4 (S.D.N.Y. Dec. 10, 2015) (citing *Alexander v. F.B.I.*, 194 F.R.D. 316, 325 (D.D.C. 2000)). Instead, Defendants' proper recourse is to assert their "entitlement to judgment as a matter of law . . . by filing a motion for summary judgment or by appropriate motion made during or after trial." *Gillman*, 2008 WL 1883544 at *4.

ii. The cases Defendants rely on to suggest that maladministration claims are totally barred actually distinguish between different types of maladministration claims; only those based on a generic risk of negligence are arguably barred.

Because Defendants' arguments are only a thinly veiled attempt to relitigate the Motion to Dismiss, there is no need for the Court to address them again. Nevertheless, insofar as it is relevant, Plaintiffs point out, once again, that even the cases Defendants cite in their Memorandum support Plaintiffs', not Defendants', position. Indeed, *Cooey* itself expressly acknowledges that there are different species of maladministration-based claims—only some of which are foreclosed by precedent. *See Cooey*, 589 F.3d at 224 ("Consequently, Biros's general claim that the possibility of maladministration of the IV could lead to severe pain is without merit. To demonstrate a likelihood of success on this ground, therefore, Biros must distinguish his maladministration claims from those rejected in *Baze*.").

The Sixth Circuit held in *Cooey* that the particular maladministration claim that the plaintiff had pleaded was not sufficiently distinguishable from a claim based

on a generic risk of negligence, because the plaintiff had primarily relied on a single prior execution in which there had been an error that the court likened to an "[a]ccident[] . . . for which no man is to blame." *Id.* (quoting *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947)).

Plaintiffs, by contrast, have specifically distinguished their claims from claims such as the one rejected in *Cooey* by pointing out knowing, wrongful, and reckless conduct in connection with multiple executions spanning more than a decade, as well as the results of a review commissioned by Tennessee's own governor finding that TDOC's errors were a result of its managerial culture.

In fact, every single case that Defendants cite to support their contention that "courts consistently hold that prior failures cannot prove an imminent Eighth Amendment violation" acknowledge that maladministration-based claims must be evaluated on the basis of the specific facts at issue, not simply some automatic bar against such claims. *See* Def. Mem. at 13–14.

Jackson v. Danberg, 594 F.3d 210 (3d Cir. 2010), for example, involved a motion for summary judgment—meaning, of course, that the issue was addressed after the parties had the opportunity to identify, develop, and present facts and evidence regarding the risk of maladministration. *See id.* at 225. There, the Third Circuit engaged in a close analysis of the evidence and concluded that the specific instances of past alleged noncompliance established by the plaintiff were not adequate to prove a sufficiently high risk of maladministration. *Id.* at 224–26. Defendants will have the opportunity to make the same exact argument if they choose

to bring their own motion for summary judgment in this case. But the fact that the Third Circuit engaged in a detailed, fact-specific analysis establishes that there is no basis for denying discovery on such a theory.

Barber v. Governor of Alabama, 73 F.4th 1306 (11th Cir. 2023), meanwhile, involved a request for preliminary injunction—which is to say that it, like *Jackson* and unlike the present motion, involved a procedural posture in which the merits of the underlying claim were specifically in dispute. There, the Eleventh Circuit—like the Third Circuit in *Jackson*—engaged in a factual analysis of the specific allegations of past error at issue and concluded that "'based on the evidence presented, the district court did not clearly err in finding that the intervening changes made by the ADOC 'have disrupted the pattern discussed in [earlier litigation],' rendering [the plaintiff's] claim that the same pattern would continue to occur purely speculative." *Id.* at 1322–23. By acknowledging that the state needed to show that its past patterns were "disrupted" in order for the plaintiff's claim of maladministration to be "purely speculative," the Eleventh Circuit was, if anything, expressly acknowledging the viability of a maladministration claim against a department of correction whose dangerous culture *has not* been sufficiently disrupted. And that is exactly what Plaintiffs' depositions seek to reveal—whether TDOC has changed its unscrupulous ways. While *Barber* might have favored Defendants' position if the Plaintiffs had sought a preliminary injunction or stay of execution based on Claim 1.2, it supports Plaintiffs' right to discovery by recognizing the factual nature of the underlying inquiry.

Finally, *Workman v. Bredesen,* 486 F.3d 896 (6th Cir. 2007)—another case about preliminary relief and therefore another instance where the merits were rightly on the table—is perhaps the least supportive of Defendants' position, because it expressly acknowledges the relevance of TDOC's administration of past executions to the viability of a forward-looking Eighth Amendment claim:

> We . . . do not have a situation where the State has any intent (or anything approaching intent) to inflict unnecessary pain; the complaint is that the State's pain-avoidance procedure may fail because the executioners may make a mistake in implementing it. *But no one has demonstrated that this problem has occurred in Tennessee in the past*, and as we have shown the State has extensive procedures in place to prevent this very thing from happening. The risk of negligence in implementing a death-penalty procedure, particularly when the risk has not come to pass in the State, does not establish a cognizable Eighth Amendment claim.

Id. at 907 (emphasis added). Defendants are trying to take advantage of a nearly two-decade-old holding that was specifically based on TDOC's supposedly unblemished record of well-managed executions. Since *Workman* was decided, TDOC's execution process has been shown to be mired in errors, compounded by coverups. Moreover, as with most of the cases Defendants have cited on this issue, the holding in *Workman* was expressly about the risk of negligence, whereas Plaintiffs have alleged a history of knowing and reckless misconduct.

Defendants obviously disagree with Plaintiffs regarding the significance of the distinctions recognized in these cases about the different types of maladministration claims. However, having lost that argument at the motion to dismiss stage, their obligation now is to comply with discovery related to the claims actually pending

before this Court; they should save their substantive arguments for summary judgment and/or trial. *See United States v. Paramedics Plus LLC*, No. 4:14-CV-00203, 2018 WL 620776, at *5 (E.D. Tex. Jan. 30, 2018) (arguing that party's substantive argument raised in connection with a discovery motion was "premature" and "an issue to be decided at a later point in time, as opposed to during a discovery dispute"). The Court has determined that Claim 1.2 is not the kind of claim "beyond the scope of . . . judicial authority," or else this Court would not be using its judicial authority to adjudicate it. As such, Defendants' assertion that Plaintiffs' Claim 1.2 is totally barred is without merit.

iii. The five execution team members that Plaintiffs noticed for depositions have highly relevant personal knowledge.

It is perhaps self-evident that the Drug Procurer, Special Operations Team Leader, Lethal Injection Recorder, and IV Team Members have personal knowledge relevant to Plaintiffs' Claim 1.2. However, in light of Defendants' suggestion that Plaintiffs need not depose these individuals because they could instead depose a TDOC-designated representative pursuant to Tenn. R. Civ. P. 30.02(6), Def. Mem. at 15, it bears briefly illustrating the type of highly relevant personal knowledge that the deponents possess.

As detailed *supra*, Defendants' counsel informed Plaintiffs' counsel on October 20, 2025, that no print-out of Mr. Smith's EKG exists—either because the EKG machine was not loaded with paper or because of some other technical difficulty, *see*

Ex. 5 (Declaration of Ben Leonard), in violation of the 2025 Protocol.[5] Moreover, Plaintiffs' counsel discovered two troubling facts, upon inspecting Mr. Black's EKG strip: (1) The EKG did not begin recording until 10:33:50 AM—presumably when either the first injection of saline or pentobarbital was delivered—and no baseline EKG data was collected; and (2) Mr. Black had significant cardiac electrical activity nearly two minutes after he was declared dead by the Physician.

In light of these revelations, Plaintiffs will seek an explanation from the IV Team Members—who, under the 2025 Protocol, are responsible for "confirm[ing] that the electrocardiograph is functioning properly," 2025 Protocol at 20—about why they failed to ensure that the EKG was loaded with paper during Mr. Smith's execution.

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[5] Plaintiffs' Interrogatory No. 15 asked Defendants to:

> Please identify any and all ways in which the preparations for, performance of, and/or post-execution activities related to the May 22, 2025 execution of Oscar Smith departed, varied, or in any other way differed from the course of action dictated by the 2025 Protocol. This request seeks all instances in which such variances occurred, regardless of Defendants' assessment of the importance of the variance. For each variance, identify and describe the process by which the decision to perform the act or omission constituting the variance occurred, regardless of whether the relevant decisionmakers knew or understood themselves to be departing from the 2025 Protocol.

Pls. Reply Ex. 1 at 21–32 (filed October 19. 2025). Defendants did not object to this interrogatory and responded only that:

> Smith's spiritual advisor was allowed to remain in the execution chamber during the course of the execution as a reasonable religious accommodation. That decision was made after receiving the request from Smith's attorney in consultation with legal counsel.

Id. Notably, Defendants made no mention of the failure to record Mr. Smith's EKG in their response, even though they were likely aware of that failure when they responded to Interrogatory No. 15 on July 2, 2025. Nor have they since supplemented their response to include this deviation from the protocol.

Likewise, Plaintiffs have a strong interest in knowing whether the Special Operations Team Leader or the Lethal Injection Recorder is the person responsible for starting/stopping the EKG recording—since presumably the EKG machine is located in the Lethal Injection Room, where these two individuals are stationed. *See* 2025 Protocol at 16, 21, 34–35. Plaintiffs will ask whether these individuals noticed that the EKG machine was not functioning during Mr. Smith's execution. They likewise have an interest in knowing why the EKG recording was started so late during Mr. Black's execution.

All of this information is known only to members of the execution team. If Plaintiffs were to depose a Rule 30.02(6) witness designated by TDOC, that witness would likely tell Plaintiffs that they do not know the answers to Plaintiffs' questions.

More broadly, the execution team members are, if anything, the most important non-expert witnesses for understanding how the 2025 Protocol actually functions. The 2025 Protocol is, as Plaintiffs have repeatedly discussed, considerably thinner than the preceding protocol—addressing many issues with general language and grants of authority, rather than comprehensive instructions. Members of the execution team will be able to explain how they understand the protocol, how they apply it, and what their experiences during the two executions performed under the 2025 Protocol have been.

As with some of the other discovery-related issues that have arisen in this case, one need only remove this issue from the obfuscating noise of death penalty litigation to see that the question it poses is an easy one. Claim 1.2 is about whether TDOC's

personnel will make errors. *Of course* it is justified to depose those very personnel. While Tennessee's confidentiality policies create some real, but manageable, logistical problems for those depositions, it does nothing to change their self-evident relevance. The Court should, therefore, allow the depositions to go forward and, in so doing, should be clear that the Court is merely applying the law of the case, as already set out in connection with the Motion to Dismiss, and that the appropriate time for Defendants to raise their substantive arguments against maladministration-based claims will be in a posture where merits are properly disputed, such as summary judgment or trial.

B. Plaintiffs have already expressed their willingness to consent to Defendants' proposed anonymous deposition procedures; as such, there is no risk that the depositions will disclose the deponents' identities.

Defendants protest that allowing Plaintiffs to depose members of the execution team would risk disclosing those individuals' identities and thereby deter participation in future executions. *See* Def. Mem. at 14. However, this concern is belied by Defendants' own proposal that these depositions could be accomplished in an anonymized fashion—via electronic video-conferencing with a black screen and voice modulation. Plaintiffs have already expressed their willingness to consent to this procedure and will not oppose a protective order to this effect.

C. It would not be unduly burdensome for the State to produce these deponents, and any costs are proportionate to the needs of the case.

Defendants have not provided any substantive reason for why producing the noticed deponents would be particularly costly or burdensome for the State.

Defendants have previously conducted anonymized depositions using the proposed anonymity procedures in the case of *King v. Parker*, No. 3:18-cv-1234 (M.D. Tenn.). *See, e.g.*, Ex. 4 (Excerpt of Anonymized Deposition of Previous Drug Procurer in *King*). Presumably then, they have access to the technology that is required to depose the execution team members in an anonymized fashion. If necessary, however, Plaintiffs are willing to assist in procuring or otherwise facilitating the operation of the required technology.

D. Insofar as Plaintiffs' subpoenas duces tecum seek information in TDOC's control, they only seek information that was previously requested in Plaintiffs' timely requests for production; as such, they do not circumvent this Court's scheduling order.

Defendants accuse Plaintiffs of attempting to use subpoenas duces tecum "to pursue evidence they should have obtained in party discovery[,] in circumvention of the court's scheduling order when the six-month window they had to serve written discovery on Defendants has come and gone." Def. Mem. at 16. Of course, insofar as the subpoena recipients' responsive documents are ones subject to TDOC's access or control,[6] Plaintiffs did not request any documents in the subpoenas that they did not

[6] Defendants are correct that an official capacity suit against the Commissioner is a suit against TDOC. *See Siler v. Scott*, 591 S.W.3d 84, 102 (2019). That does not mean, however, that it is a suit against everyone who works for TDOC, because TDOC's employees and agents are distinct from the entity itself. *See Nalco Chem. Co. v. Hydro Techs., Inc.*, 148 F.R.D. 608, 618 (E.D. Wis. 1993) (observing that employees of entity plaintiff "are *non-parties* to the present lawsuit"). Depending on the allocation of rights between an entity and its agent/employee, the agent/employee may or may not possess work-related documents over which the entity does not have a right of access or control. Insofar as the documents requested from these individuals are ones within TDOC's control, those documents are already overdue, and Plaintiffs could not possibly be seeking to circumvent the deadline for discovery requests to Defendants. Insofar as any of these individuals has responsive documents that are not

already request in RFP Nos. 1 and 27—which were propounded in a timely fashion on June 2, 2025, and September 15, 2025, respectively.[7] *See* Pls. Mem. Ex. 9 at 9 and Pls. Mem. Ex. 3 at 10 (filed October 9, 2025). Defendants are correct, however, when they say that Plaintiffs are propounding subpoenas duces tecum "to pursue evidence they should have obtained in party discovery." Indeed, Plaintiffs agree that they should have obtained the requested documents from Defendants already—well in advance of the noticed depositions. Because Defendants have been dilatory in their production of the responsive documents that Plaintiffs need to effectively depose the execution team members, Plaintiffs had no choice but to require that the deponents bring responsive, non-privileged documents with them to their depositions.

IV. Conclusion

For the reasons set out in this Response, Defendants' Motion to Quash Plaintiffs' Notice of Depositions is unsupported and should be denied.

Respectfully submitted this the 22nd day of October, 2025.

Kelley J. Henry, BPR #21113
Chief, Capital Habeas Unit

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subject to TDOC's access or control, those documents, by definition, could not be obtained through interparty discovery and, therefore, discovery of those documents is not subject to inter-party discovery deadlines.

[7] Plaintiffs' subpoenas duces tecum do not seek any documents in TDOC's control that are not already requested in Plaintiffs' timely requests for production. Defendants' assertion that Plaintiffs' "subpoenas . . . improperly command production of documents in less than the 30 days provided in Rule 34 . . . ," Def. Mem. at 16, n.5, is therefore unavailing. Defendants have had months to produce the requested documents, and Plaintiffs' subpoenas duces tecum do not restart the clock on Plaintiffs' original requests.

Amy D. Harwell, BPR #18691
First Asst. Federal Public Defender
Asst. Chief, Capital Habeas Unit

Eli Swiney, BPR #026626
Research and Writing Specialist
Katherine Dix, BPR #22778
Drew Brazer, BPR #042363
Asst. Federal Public Defender
FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF
TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265
Email: Kelley_Henry@fd.org

/s/ *Kelley J. Henry*
Kelley J. Henry, BPR #21113
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that on October 22, 2025, a true and correct copy of the foregoing was served via the Court's electronic filing system and email to opposing counsel, Cody Brandon, Asst. Attorney General.

/s/ *Kelley J. Henry*
Kelley J. Henry