

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN,	)	
	)	
Appellant,	)	Case No. M2003-01767-SC-R11-CV
	)	
vs.	)	
	)	(Court of Appeals of Tennessee,
PHIL BREDESEN (formerly Don Sundquist),	)	No. M2003-01767-COA-R3-CV)
Governor of the State of Tennessee,	)	
QUENTON WHITE (formerly Donal Campbell),	)	
Commissioner, Tenn. Dep't. of Correction,	)	(Chancery Court for Davidson County,
RICKY BELL, Warden of Riverbend Maximum	)	No. 02-2236-III)
Security Institution,	)	
VIRGINIA LEWIS, Warden, Special Needs,	)	CAPITAL CASE
TENNESSEE DEP'T OF CORRECTION	)	
	)	<u>ORAL ARGUMENT REQUESTED</u>
Appellees.	)	

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APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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## APPELLANT'S REPLY BRIEF

### INTRODUCTION

The Appellees' Response Brief ignores the fact that the Tennessee General Assembly has responded to an evolving standard of decency by prohibiting the use of Pavulon in the humane killing of animals. The Appellees' Response Brief also ignores the fact that, operating within current bounds of decency, veterinary science has devised a simple, cheap and essentially risk-free method of euthanasia that calls for a single injection of a single substance, pentobarbital. In light of these facts, Appellees' Response Brief offers no justification for the TDOC protocol.

Appellant's Rule 11 Application describes the numerous problems with the TDOC protocol demonstrated by the un rebutted proof in this case. Appellant wishes to emphasize here three of the most significant problems:

(1) Pavulon, which for good reason is strictly prohibited for animal euthanasia, serves no legitimate purpose in lethal injection, and its use is arbitrary.

(2) The TDOC protocol's reliance on sodium pentothal to avoid unnecessary pain and suffering is misplaced. This ultra short-acting drug, which is never used in animal euthanasia, is a highly unstable chemical. It has only a 24-hour shelf life when mixed and can immediately lose its potency if contaminated or mixed improperly. There are no provisions in the protocol for the handling or mixing of this Schedule II controlled substance. Even if no problems occur in the injection process, there is no assurance that the sodium pentothal will have its full potency at the time of execution.

(3) The injection process itself, which employs an overly complicated apparatus, is administered by untrained and unidentified personnel. This compounds the risks that the full

dosage of the sodium pentothal will not properly enter the condemned inmate's bloodstream or have its intended effect.

Significantly, Appellees' expert, Dr. Levy, declined to give an opinion about the TDOC protocol:

Q. Based on your knowledge of the Tennessee lethal injection protocol do you have an opinion on whether the protocol includes adequate procedures and safeguards to ensure that the lethal injection will proceed without an unreasonable risk of problems or complications?

A. I don't know.

(Trial Transcript, pp. 390-1).

Even more significantly, Dr. Levy could not rebut the testimony of Appellants' expert witnesses that the protocol's use of sodium pentothal introduces unnecessary risk that the condemned inmate will consciously experience the suffocating effects of the Pavulon and the searing pain of the potassium chloride:

Q. Can you draw any conclusions or make any opinions about whether, as a general matter, there are adequate procedures and safeguards in place under the Tennessee lethal injection protocol to ensure that the sodium pentothal will have its desired effect?

A. Not as a general matter, no.

(*Id.* at 394).

As Appellant has already pointed out, this Court set the applicable standard in *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. 2000) (copy attached to Appellees' Brief): "In fact, 'the employment of tested procedures used in the practice of medicine is consistent with the purpose behind the imposition of death by lethal injection, which is to impose death in as humane a manner as possible.'" As shown by the unrebutted proof, and as further demonstrated by the *Amicus Brief of Tennessee Medical Professionals* filed in support of Appellant's position,

the TDOC protocol fails to employ “tested procedures used in the practice of medicine,” and it fails to “impose death in as humane a manner as possible.” If this Court upholds the *Coe* standard, this Court must invalidate the TDOC protocol; and conversely, if this Court validates the TDOC protocol, this Court must repudiate the *Coe* standard. The *Coe* standard and the TDOC protocol cannot logically stand together.

### REPLY TO CERTAIN OF APPELLEES’ FACTUAL ASSERTIONS

Appellees’ Response Brief contains a number of factual assertions that are contradicted by the record. Appellant replies here to three of Appellees’ more important erroneous factual assertions, assertions around which Appellees’ arguments hinge.

1. Contrary to Appellees’ assertion, there is no legitimate purpose for the use of Pavulon in lethal injection, and its use is “arbitrary.”

Appellees are wrong when they say that there is a reason for the use of Pavulon in lethal injection, that its use is not “arbitrary.” There is no support in the record for Appellees’ assertion.

The Chancery Court was correct in making the following findings:

*Significantly, there was no proof from the State that the Pavulon is necessary to the lethal injection process. No proof was provided by the State for the use of Pavulon in its lethal injection process.* The State’s expert, Dr. Levy, on cross-examination, testified that he did not know of any legitimate purpose for the use of Pavulon in the Tennessee lethal injection process. He agreed that the injection of Pavulon without anesthesia would be a horrifying experience.

(Chancery Opinion, R. 51, p. 6) (emphasis added).

Coupled with the testimony of the paralytic effect of Pavulon is that the State failed to provide any proof of the reason for its use in the lethal injection method. There was no testimony that the purpose of Pavulon in Tennessee’s lethal injection method was to hasten death. The testimony was that Pavulon has no pain relieving properties. *Simply stated, the record is devoid of any expert testimony on behalf of the State of Tennessee to explain why Pavulon is used.*

(*Id.* at 12) (emphasis added).

[T]he fact that Pavulon has the property of creating a chemical veil raises the issue of whether there is offense to the dignity of the prisoner and the public.

(*Id.* at 13).

*But the use of Pavulon is problematic because it is unnecessary.* As stated above, the State failed to demonstrate any reason for its use. The record is devoid of proof that the Pavulon is needed. Thus, the Court concludes that ... the State's use of Pavulon is ... *arbitrary*.

(*Id.*) (emphasis added).

Contrary to the Chancery Court's findings, Appellees erroneously claim that the inclusion of Pavulon is not arbitrary because it causes death by "respiratory failure," citing testimony by Dr. Levy. (*See* Appellees' Response Brief at p. 43; Trial Transcript at p. 338). As the Chancery Court noted, however, on cross-examination the Appellees' expert, Dr. Levy, conceded that Pavulon does not serve a legitimate purpose in lethal injection. Dr. Levy, Appellees' own expert, gave the following testimony:

Q      So in the lethal injection process if it is properly performed, the real cause of death is the potassium. Correct?

A.      Yes.

...      ...      ...

Q.      To your knowledge does the use of Pavulon have any legitimate purpose in the lethal injection process?

A.      I don't know.

(Trial Transcript, pp. 395-6).

Appellees also try to argue that "there is no outright prohibition on the use of Pavulon on animals [in surgery]," and "[i]n the surgical context, Pavulon might be used in combination with sodium pentothal." Appellees' Response Brief, at p. 22. These statements are misleading.

Pavulon is strictly prohibited for the use proposed by the TDOC. It is *never* used in euthanasia. Even in a surgical context, Pavulon is *never* used only in combination with an ultra short-acting barbiturate such as Sodium Pentothal. Even in a surgical context, both Dr. Geiser and Dr. Heath testified that a neuromuscular blocking agent such as Pavulon can be used only after the patient is placed in a “surgical plane of anesthesia” with a longer-lasting anesthetic. (Trial Transcript, pp. 60-62, 64-5, 114-5, 116).

2. **There is an unreasonable risk of a torturous and horrifying execution under the TDOC protocol.**

Appellees’ entire position rests on the clearly erroneous and unfounded premise that the protocol creates a “less than remote” chance of an excruciatingly painful and horrifying execution. There is absolutely no support in the record for this premise. The record, in fact, contradicts this premise.

As Dr. Geiser explained, “The use of Pavulon could potentially produce an inhumane situation.” (Trial Transcript, p. 70). Dr. Heath, a highly qualified anesthesiologist, described in detail how the TDOC protocol creates unreasonable and unnecessary risks of botched executions creating inhumane pain and suffering. (*See, generally*, Trial Transcript, pp. 119 – 190). In a word, according to Dr. Heath’s unrebutted testimony, the TDOC protocol is “sloppy.” The various problems with the protocol, and the substantial risks the protocol creates, are outlined in Appellant’s Rule 11 Application at pp. 20-38. The Appellees’ Response Brief fails to address the various problems described by Dr. Geiser and Dr. Heath.

These problems include the substantial risks associated with the storage, handling and administration of sodium pentothal, a Schedule II controlled substance that has an extraordinarily short shelf life after mixing of 24 hours and that can immediately lose its potency if



contaminated or improperly mixed. Appellant's Rule 11 Application at pp. 27-28. Significantly, in an internal TDOC Health Services memo dated March 9, 1999, it was recommended that a qualified person from Health Services "prepare written procedures for the storage and preparation of the compounds to be used" in lethal injection. Warden Bell testified, however, that no such procedures have ever been drawn up. (Trial Transcript, pp. 275-6; Trial Exh. 11, at Tab 2, p. 0022). Elsewhere, Warden Bell testified that the person who prepares the sodium pentothal for administration could be him, the executioner (an unidentified correction officer), "or it could be a couple of other people who know how to do it." Warden Bell acknowledged that there is a potential for the mixing of the drugs that would cause the drugs to congeal or crystallize, but he never discussed that potential and what the problem might be with anyone with a medical or scientific background. (Trial Transcript, pp. 233-4).

As mentioned above, Appellees' expert, Dr. Levy, could not testify that the TDOC protocol contains reasonable safeguards against unnecessary pain and suffering. (See, Trial Transcript, pp. 390-1, 394). Dr. Levy also could not explain why the TDOC's protocol was chosen, and he could not give any justification for it.

Q. And you do not have an understanding of why the Tennessee lethal injection protocol does not involve the use of medically trained personnel in the actual carrying out of the execution?

A. Right. I do not know one way or another why the method that is chosen was chosen.

Q. And under the current protocol, as you understand it, there is a risk that the execution could result in an inhumane death?

A. There is, in any circumstance, always a risk of something going wrong and an inhumane execution might happen, yes.

(Trial Transcript, pp. 405-6).

That there is an unreasonable risk of an inhumane execution under the TDOC protocol is further supported by TDOC's own internal documents. Tellingly, a TDOC internal memorandum gives the results of research into lethal injection executions in other states which points out that "Lethal injections are also the most frequently botched means of execution – defined to include unanticipated problems or delays that caused, or could have caused, unnecessary agony for the prisoner and/or witnesses." (Trial Exh. 14, at 0054).

The Appellees' position on this point is based entirely upon a single autopsy -- Dr. Levy's autopsy of Robert Glenn Coe, the only person to date who has been executed in Tennessee by means of lethal injection. Such limited experience and data cannot support a finding of a "less than remote" chance of a botched execution. Moreover, unfortunately, because of the chemical veil created by Pavulon, it is impossible to say that Coe, or any other condemned inmate, was free from inhumane suffering at the time of execution. Dr. Levy, the Appellees' expert, admits this in his testimony:

Q. Now, Dr. Levy, we've talked about a lot of different steps in the process of lethal injection. Correct?

A. Yes, there are.

Q. And it's fair to say, isn't it, that if anything [goes] wrong at any of those stages, this could be a terrible thing both to experience and to witness. Correct?

A. Depending upon the steps you're referring to, yes, it could be.

Q. But if the Pavulon were working, it would not be such a terrible thing to witness because the patient would have the appearance of being calm and serene. Correct?

A. That is correct.

Q. Even though that might not be the case. Correct?

A. Correct.

Q. Now, Dr. Levy, isn't it true that nobody knows whether Mr. Coe in his execution felt any pain?

A. We don't as he died and is not able to tell us whether he did or not.

Q. And is it true that – it's true, isn't it, that if he felt any pain that the Pavulon may have masked that pain?

A. If it was after the time that the Pavulon was administered, yes, it would.

Q. And when I asked you that question in your deposition at Page 111, Line 21, your answer was: That is entirely possible. Correct?

A. It is.

(Trial Transcript, pp. 403-5).

3. Animal euthanasia, which absolutely prohibits the use of Pavulon, is highly regulated.

Without any support in the record, the Chancery Court erroneously stated that “animal euthanasia is carried out much more frequently in *less regulated circumstances* than the termination of human life that there is a need to outlaw the use of Pavulon in pet euthanasia.” (Memorandum and Order, p. 11) (emphasis added).

The evidence in the record is to the contrary: euthanasia of animals is highly regulated. The Nonlivestock Animal Humane Death Act, T.C.A. § 44-17-301 *et seq.*, sets forth an extensive scheme for regulating animal euthanasia. Among other things, pet euthanasia can be performed only by a licensed veterinarian, a Tennessee veterinarian medical technician, or an employee or agent such a licensed veterinarian or veterinarian medical technician provided that the employee or agent has received proper training and certification. T.C.A. § 44-17-303. *See, also*, Trial Exh. 17, *Rules of the Board of Veterinary Medical Examiners*, Rules 1730-4 and 1730-5. These provisions also specify and regulate the locations where pet euthanasia can be performed. Dr.

Geiser testified that persons certified to perform animal euthanasia must be formally educated in the procedures and chemicals used in euthanasia. (Trial Transcript, p. 69).

By contrast, there are absolutely no regulations governing the Tennessee lethal injection process. In fact, the TDOC protocol stands in violation of Tennessee laws and regulations governing the handling of controlled substances. Contrary to the rules governing euthanasia of pet animals, the TDOC protocol provides that unlicensed, uncertified, and uneducated persons will perform executions by lethal injection.

The Appellees have failed to present any policy reasons why lethal injection in Tennessee must be completely unregulated, or why lethal injection must be performed in a way that would violate the standards and regulations governing the field of veterinary medicine. Further, Appellees' position contradicts the testimony of their expert, Dr. Levy. As pointed out above, Dr. Levy testified that it would be possible to devise a lethal injection protocol in Tennessee that would involve medically trained personnel in all phases of the execution. The proof clearly demonstrates that the TDOC could devise a simpler protocol that falls within our legislatively adopted standard of decency.

## ARGUMENT

### **I. THE TDOC PROTOCOL VIOLATES THE CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT.**

#### **A. The Protocol Does Not Comport with Contemporary Standards and Norms.**

The TDOC protocol fails to comport with contemporary standards. It is especially significant in this regard that the TDOC employees who cobbled together the protocol admitted that they made no inquiry, and never even discussed, contemporary standards of decency or

C. Summary of Calculations of Father's Parenting Time.

	<u>Hours Per</u> <u>Trial Court's</u> <u>Memorandum</u>	<u>Hours Per Actual</u> <u>Calculations</u>
1. Every other weekend (Friday 6:00 p.m. until Sunday 6:00 p.m.)	1,248.0	984.0
2. Every Wednesday 3:00 p.m. to Thursday 8:00 a.m. (From September through May)	592.0	595.0
3. School Holidays (September through May)	288.0	207.5
4. Summer visitation of 6 weeks (June, July, August)	<u>1,008.0</u>	<u>1008.0</u>
<b>TOTALS</b>	<b>3,136.0</b>	<b>2,794.5</b>

STATEMENT OF THE FACTS

The Appellee agrees with the Petitioner's Statement of Facts except for his characterization of Mr. Bhalla's relationship with his children from his first marriage. Rather than setting forth a Counter-Statement of Facts, the Respondent includes them in her argument under the heading "Quality of 'Time Spent'", *infra* at p. 16.

ARGUMENT

1. Introduction.

A Supreme Court review and definition of T.C.A. § 36-6-108(c) and (d) is obviously desirable. As crucial as these provisions are to the parties who invoke them, their terms have not been adequately and consistently defined by lower courts. Definitive interpretations by this Court are a much needed antidote to individualistic and conflicting applications of these provisions, such

The Appellees attempt to ignore the Unnecessary Rigor Clause by simply stating, without explanation, that only Eighth Amendment standards apply. Appellees, therefore, would treat the Unnecessary Rigor Clause as a meaningless provision in the Tennessee Constitution. This position violates the standard rule of constitutional construction that every provision of the Constitution must be given meaning, and the interpretation of one provision cannot eliminate or nullify another provision. “In construing the Constitution, the whole instrument must be taken into consideration, and no part so construed as to impair or destroy any other part.... Every clause should be given effect. The general language of one clause should not be permitted to render ineffective the express or specific provisions of another clause.” *Vollmer v. City of Memphis*, 792 S.W.2d 446, 448 (Tenn. 1990).

**C. The Protocol Offends Human Dignity and It Inflicts Unnecessary Physical and Mental Suffering.**

The Appellees cite cases from other jurisdictions that have upheld lethal injection. However, none of those cases discuss:

- the inhumane use of Pavulon in lethal injection in light of the strict prohibition of its use in animal euthanasia in Tennessee and, under the AVMA standards, throughout the country;
- any of the issues surrounding the chemical veil created by the use of Pavulon;
- the affront to the dignity of the condemned inmate created by the stigma of putting the inmate to death with a chemical that is not fit for use with a dog or cat; or
- the kind of thorough record developed in the trial court below in this case, demonstrating the numerous problems and unnecessary risks associated with the TDOC protocol.

It cannot be said that there is any kind of judicial consensus supporting the use of Pavulon in lethal injection. As pointed out in Appellant's Supplemental Brief, courts in other jurisdictions are just now beginning to address, for the first time, the peculiar problems created by the use of Pavulon in lethal injection.

## **II. THE LETHAL INJECTION PROTOCOL VIOLATES THE STATE AND FEDERAL DUE PROCESS CLAUSES.**

The Appellees respond to Appellant's claim of Due Process violations with the argument that the TDOC protocol is not so egregious or outrageous that it may fairly be said to shock the contemporary conscience. Appellant submits that the average citizen finds it quite shocking and egregious that lethal injections in Tennessee are carried out with the arbitrary use of a chemical that is strictly prohibited for use with dogs and cats – a chemical which, by the admission of the Appellees' own expert witness, serves no legitimate purpose in an execution.

Moreover, the *ad hoc* process by which the lethal injection protocol was formulated, without legislative or public oversight, further supports Appellant's contention that the protocol fails to comply with the Law of the Land provision of the Tennessee Constitution.

## **III. THE TDOC PROTOCOL VIOLATES APPELLANT'S ACCESS TO THE COURTS.**

The Appellees' only response to Appellant's access to the courts claim is that, according to the Appellees, Appellant has failed to show "actual injury." According to the Appellees' unfounded position, an inmate's claim would become ripe at the precise moment the claim would become moot. The "actual injury" referred to by the Appellees would be the inmate's inhumane death. Under the Appellees' theory, the inmate would never have an access to the

courts claim, no matter how extreme the constitutional violation might be at the time of execution.

Appellees rely upon *Lewis v. Casey*, 518 U.S. 343 (1996), a case that is clearly distinguishable from the instant case. In *Lewis*, the issue was whether the district court erred in issuing a state-wide injunction regulating all inmates' access to library materials. In reversing the injunction, the Supreme Court pointed out that the immediate right the inmates were asserting, the right to access to library materials, was not itself a constitutional right. The Supreme Court was also clearly concerned about the district court's involvement in micromanaging the state's entire prison library system.

In Appellant's case, however, the immediate right at issue is the constitutional right not to be executed in a manner that is cruel and inhuman. The remedy to Appellant's claim, a lethal injection protocol that comports with contemporary standards of decency, would create no burden to the state. Indeed, the alternative methods of euthanasia used by veterinarians would be less expensive and less cumbersome than the irrational protocol devised by the TDOC.

In *Coe v. Bell*, 89 F.Supp.2d 962 (M.D.Tenn. 2000), *vacated as moot*, 230 F.3d 1357 (6<sup>th</sup> Cir. 2000), Judge Trauger effectively rejected the state's "actual injury" argument under *Lewis v. Casey*. Judge Trauger quoted with approval the following language from *Thaddeus-X v. Blatter*, 175 F.3d 378, 391 (6<sup>th</sup> Cir. 1999):

The right to file for legal redress in the courts is as valuable to a prisoner as to any other citizen. Indeed, for the prisoner it is more valuable. Inasmuch as one convicted of a serious crime and imprisoned usually is divested of the franchise, the right to file a court action stands ... as his most 'fundamental political right, because preservative of all rights.'

89 F.Supp.2d at 965. Judge Trauger further pointed out that, "In evaluating a claim of denial of



meaningful access to the courts. this court is to weigh the interests of the prison as an institution (in such matters as security and effective operation) with the constitutional rights retained by the inmates.” *Id.* Judge Trauger then emphasized the importance of an inmate’s constitutional right not to be subjected to cruel and inhuman punishment, and held: “Plaintiff’s right to meaningful access to the courts to assert that right requires that counsel have some access to the prisoner during the last hour before the execution and be permitted to witness his execution and have access to a telephone until [the] execution has been successfully carried out.” *Id.* at 966.

The reasoning behind Judge Trauger’s decision in *Coe* applies with equal force to Appellant’s access to the courts claim in this case. The chemical veil created by Pavulon prevents inmate’s counsel from observing the execution and any pain or suffering the inmate might be experiencing. With the use of Pavulon, the inmate is left with no remedy, and therefore no protection, against a cruel and inhumane execution.

The Appellees can cite no authority under which they are free to cut off Appellant’s right to access to the courts.

#### **IV. THE LETHAL INJECTION PROTOCOL VIOLATES STATE STATUTES AND REGULATIONS.**

In his initial Brief, Appellant fully sets forth the reasons why the rule-making provisions of the Tennessee Administrative Procedures Act must apply to the promulgation of a lethal injection protocol. Among other things, the lethal injection statute itself, T.C.A. § 40-23-114(c), provides for the promulgation of “rules and regulations” regarding lethal injection. In order to ensure that executions in Tennessee are carried out in a humane manner, consistent with contemporary community standards of decency, it is especially important that the lethal injection

protocol be formulated not on an *ad hoc* basis, as has been done by TDOC, but pursuant to procedures that permit public and legislative oversight.

Additionally, Appellees offer no effective response to Appellant's complaint that TDOC failed to adopt rules of practice as required by T.C.A. § 4-5-217. The plain language of this statute applies to TDOC as well as to all other governmental agencies in Tennessee. Appellees have cited no authority that would exempt TDOC from the clearly stated statutory requirement to adopt rules of practice; and, any adequate set of rules of practice would necessarily govern the procedures by which TDOC would perform important functions such as the development of a lethal injection protocol.

Appellees have made absolutely no response to Appellant's complaint that the TDOC protocol calls for the unlawful handling and mixing of controlled substances by unidentified, untrained, and uncertified prison employees, in violation of the statutes and regulations governing the handling of drugs.

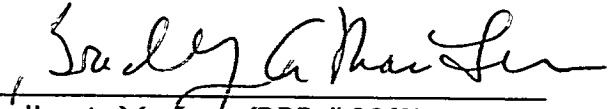
Similarly, the Appellees have offered no meaningful response to Appellant's complaint that physicians and/or other medically qualified persons should be involved in both the formulation of the lethal injection protocol and the actual performance of an execution by lethal injection. In *Coe v. Sundquist*, this Court explicitly stated that when the General Assembly enacted the lethal injection statute, it "contemplated physician involvement in the process." In language quoted by the Appellees, this Court said: "In addition, no public policy is violated by allowing physicians or anyone else to participate in carrying out a lawful sentence. In fact, 'the employment of tested procedures used in the practice of medicine is consistent with the purpose behind the imposition of death by lethal injection, which is to impose death in as humane a manner as possible.'" In light of the clear contemplation of the General Assembly, as described

and endorsed by this Court, the Appellees can offer no reason or excuse for performing executions by means of the lethal injection protocol which is fraught with the problems disclosed in the record in this case.

**CONCLUSION**

For the reasons set forth in Appellant's Rule 11 Application and in this Reply, this Court must reverse the lower Court and declare that the TDOC protocol violates the United States and Tennessee Constitutions and various provisions of Tennessee statutory and regulatory law.

Respectfully submitted,



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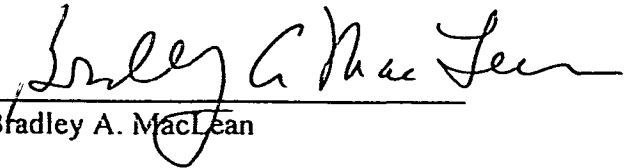
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on the following by hand-delivery on this the 13<sup>th</sup> day of May, 2005:

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\_\_\_\_\_  
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