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

RALPH MENZIES, an individual; DOUGLAS STEWART CARTER; an individual; TROY KELL, an individual; MICHAEL ARCHULETA, an individual, TABERON HONIE, an individual Plaintiffs, vs. UTAH DEPARTMENT OF CORRECTIONS; UTAH STATE CORRECTIONAL FACILITY; BRIAN NIELSON, Director, Utah Department of Corrections; SPENCER J. COX, Governor of Utah; ROBERT POWELL, Warden, Utah State Correctional Facility; SPENCER TURLEY, Assistant Deputy Executive Director, Utah Department of Corrections; TRAVIS KNORR, Training Academy Director, Utah Department of Corrections; DOES I through X, inclusive, in their official capacity, Defendants.	**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** Case No. 230901995 Judge Coral Sanchez

Ralph Menzies, Douglas Carter, Troy Kell, Michael Archuleta, and Taberon Honie (collectively, "Plaintiffs") are all men who have been sentenced to death in Utah and had their sentences affirmed on appeal by the Utah Supreme Court. In Plaintiffs' Second Amended Complaint, Plaintiffs allege the protocols adopted by the Department of Corrections to carry out executions by both lethal intravenous injection and the firing squad violate Article 1, §§ 7, 9, 11, 12, and 15 of the Utah Constitution.

Utah Department of Corrections, Utah State Correctional Facility, Brian Nielson, Spencer J. Cox, Robert Powell, Spencer Turley, and Travis Knorr (collectively "Defendants") move to

dismiss the Second Amended Complaint because it was filed untimely and because Plaintiffs fail to state a claim upon which relief can be granted under rule 12(b)(6) of the Utah Rules of Civil Procedure. The court **GRANTS** the Motion to Dismiss.

DISCUSSION

I. THE STATUTE OF LIMITATIONS APPLIES TO PLAINTIFFS' CLAIMS

Plaintiffs raise six claims under Article 1 of the Utah Constitution. Constitutional claims "can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne,* 2012 UT 66, ¶ 52 (quoting *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983)).

Defendants argue the catch-all statute of limitations provision in the 2008 version of section 78B-3-207(3) applies to Plaintiffs' claims. Subsection -207(3) provides that any claim that is not otherwise provided for by law has a four-year statute of limitations after the claim accrues. Additionally, the Utah Supreme Court has found claims for declaratory relief are subject to the four-year statute of limitations. *See Pinder v. Duchesne County Sheriff*, 2020 UT 68, ¶ 71.

Because constitutional claims are subject to a statute of limitations pursuant to subsection -207(3) and because Plaintiffs seek declaratory relief, the Court concludes Plaintiffs had four years after their claims accrued to timely seek redress in the courts.

Plaintiffs argue that even if the four-year statute of limitations applies to their claims, there are issues of fact for when the claims accrued. Therefore, dismissal at this stage of the proceedings is inappropriate. However, "when a complaint includes all information, including salient dates, demonstrating that the action is time-based, the statute of limitations may be raised in a motion to dismiss." *State ex rel. S.O.*, 2005 UT App 393, ¶ 8. "[A] document that is 'referred

to in the complaint and is central to the plaintiff's claim' is not considered to be a matter outside the pleadings." *Young Res. Ltd. P'ship v. Promontory Landfill LLC,* 2018 UT App 99, ¶ 25 (quoting *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13).

The execution protocol attached to Plaintiffs' complaint and referenced throughout the complaint is a document not outside of the pleadings. Therefore, it can be considered when determining whether to dismiss the claims for being untimely. Furthermore, Plaintiffs' alleged facts in the Second Amended Complaint includes salient dates and provide all of the information necessary to determine when the cause of action accrued for each claim. The Court concludes it can address the timeliness of the Second Amended Complaint in a motion to dismiss.

In Utah, "a statute of limitations begins to run upon the happening of the last event necessary to complete the cause of action." *Young Res. Ltd. P'ship v. Promontory Landfill LLC*, 2018 UT App 99, ¶ 20 (citation omitted). "In other words, a cause of action accrues when a plaintiff could have first filed and prosecuted an action to successful completion." *Id.* (citation and quotation marks omitted).

All six of Plaintiffs' claims rise out of Defendants' execution protocol. Claims 1, 2, 3, 4, and 5 all challenge specific provisions of the protocol. And claims 3 and 6 challenge the redactions in the protocol or Defendants' discretion to vary from the protocol.

Plaintiffs allege that the protocols were last amended on June 10, 2010, and that each of the Plaintiffs will be executed according to the 2010 protocols. Second Am. Compl. at 3, ¶ 5. All of the facts asserted in the Second Amended Complaint existed in 2010 and each of the claims alleged in the Second Amended Complaint could have been raised in 2010. All of the legal authority governing Plaintiffs' claims existed in 2010.

Plaintiffs argue 2010 should not be the accrual date for the statute of limitations because

it is unknown whether the protocol has been amended since 2010. But Plaintiffs based their claims on the 2010 protocol, not upon a possible amendment to the protocol that came after 2010 or may come in the future.

The Court concludes the cause of action for each of Plaintiffs' claims accrued in June 2010 when the protocol underlying each of Plaintiffs' claims was created. Plaintiffs had four years after the creation of the protocol—until June 2014—to assert their claims.

Plaintiffs ask the Court to equitably toll the statute of limitations in this case, partly because it is currently unknown when Plaintiffs became aware of the 2010 execution protocol. "The doctrine of equitable tolling should not be used simply to rescue litigants who have inexcusably and unreasonably slept on their rights, but rather to prevent the expiration of claims to litigants who, through no fault of their own, have been unable to assert their rights within the limitations period." *Garza v. Burnett*, 2013 UT 66, ¶ 11. Plaintiffs "must make an initial showing that [they] did not know nor should have reasonably known the facts underlying the cause of action in time to reasonably comply with the limitations period." *Berneau v. Martino,* 2009 UT 87, ¶ 23.

The protocol attached to the Complaint is stamped with "UDC GRAMA Classified Public." A "public record" under GRAMA is "a record that is not private, controlled, or protected and that is not exempt from disclosure . . . ." Utah Code § 63G-2-103(23). GRAMA provides that "a person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours," unless the governmental entity has already provided that record to the person. Utah Code § 63G-2-201(1). Plaintiffs allege no facts that the protocol was not publicly available to them in 2010. Accordingly, Plaintiffs could have reasonably known about the protocol as early as 2010, and equitable tolling does not apply.

Because Plaintiffs waited until 2023 to assert their claims under the publicly available 2010 protocol, their claims are dismissed for being untimely.

II. PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER THE FACTS ALLEGED IN THE SECOND AMENDED COMPLAINT

Even if Plaintiffs' claims are not barred by the statute of limitations, the alleged facts fail to state a claim upon which relief can be granted under rule 12(b)(6) of the Utah Rules of Civil Procedure. "Rule 12(b)(6) concerns the sufficiency of the pleadings, not the underlying merits of a particular case." *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997). "When reviewing a rule 12(b)(6) motion to dismiss, [the court must] accept the factual allegations in the complaint as true and interpret those facts, and all reasonable inferences drawn therefrom, in a light most favorable to the plaintiff as the nonmoving party." *Val Peterson Inc. v. Tennant Metals Pty. Ltd.*, 2023 UT App 115, ¶¶ 20-21 (quoting *National Title Agency LLC v. JPMorgan Chase Bank NA*, 2018 UT App 145, ¶ 7). The Court may grant a motion to dismiss "only where it clearly appears that the plaintiff . . . would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim." *Hudgens v. Prosper, Inc*., 2010 UT 68, ¶ 14 (quoting *Franco v. Church of Jesus Christ of Latter–day Saints*, 2001 UT 25, ¶ 10). "Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal." *Miller v. W. Valley City*, 2017 UT App 65, ¶ 12 (citation omitted). "[T]he court need not accept legal conclusions or opinion couched as facts." *Id.* (citation omitted). "[D]ismissal is justified only when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim." *Capri Sunshine, LLC v. E & C Fox Invs., LLC*, 2015 UT App 231, ¶ 11 (citation omitted).

With these principles in mind, the Court examines the six claims alleged in the Second Amended Complaint. The Court accepts all factual allegations in the complaint as true, including

reasonable inferences drawn from those facts, and will reference the alleged facts when material to the court's discussion.

A. Claims 1 and 2: Cruel and Unusual Punishment

In relevant part, Article 1, section 9 of the Utah Constitution prohibits the infliction of cruel and unusual punishments. The Complaint alleges the firing squad and lethal intravenous injection protocols developed by the Department of Corrections in 2010 are "cruel and unusual punishment" because the Utah Constitution requires the State to implement and follow protocols that eliminate the risk of severe pain. Second Am. Compl. at 14. This includes implementing a method of execution that results in instantaneous death or loss of consciousness and eliminates the risk of an execution being botched. Second Am. Compl. at 14, 20. Defendants reasonably infer from Plaintiff's argument that because Plaintiffs argue an execution method must result in "instantaneous death or loss of consciousness," Plaintiffs' interpretation of Utah's prohibition on cruel and unusual punishments requires a *painless* execution, not just an execution without severe pain. Reply at 18.

Two questions are central to the parties' dispute: First, how did the people of the State of Utah in 1895 interpret the cruel and unusual punishments clause of Article 1, section 9? And second, is a plaintiff's challenge to a method of execution under Article 1, section 9's prohibition on cruel and unusual punishments informed by or the same as a challenge to a method of execution under the Eighth Amendment?

1. **Text of Article 1, section 9 and Original Intent**

When interpreting constitutional language, the court must examine the plain language and "start with the meaning of the text as understood when it was adopted." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 18. "Where doubt exists about the constitution's meaning, [the court] can

and should consider all relevant materials." *Id*. ¶ 23. This includes historical materials, historical policy, and the "shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Id.* (quoting *Neese v. Utah Board of Pardons and Parole*, 2017 UT 89, ¶ 98).

In performing an historical analysis of the cruel and unusual punishment clause of the Utah Constitution, the Court recognizes that the meaning of "cruel and unusual punishment" as used in the Eighth Amendment is not "frozen when it was originally drafted." *Roper v. Simmons*, 543 U.S. 551, 579 (2005) (Stevens, J., concurring). Rather, what constitutes a cruel and unusual punishment in the Eighth Amendment is determined by "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Before determining whether the cruel and unusual punishment clause in the Utah Constitution is also informed by evolving standards of decency equivalent to the Eighth Amendment, the Court must look to its history to determine whether there is any evidence that Utah's clause should be interpreted differently than the federal clause.

The people of the State of Utah adopted the text of Article 1, section 9 of the Utah Constitution in 1895, and the language has not undergone any amendments since that time. *See* Utah Archives, https://archives.utah.gov/research/exhibits/Statehood/1896text.htm (last visited Dec. 3, 2023). Neither party has undergone a deep historical analysis of the meaning of the cruel and unusual punishments clause in Utah's Constitution and whether it was informed at the time of its enactment by the Eighth Amendment's identical language. But facts Plaintiffs have alleged in the petition shed some light on the meaning of the phrase "cruel and unusual" as used historically in the Utah Constitution.

Plaintiffs assert facts that since 1850, the Utah Territory and the State of Utah have executed 51 men, 41 of which were executed by a firing squad. Second Am. Compl. at 9, ¶ 34. In

1878, approximately 17 years before the Utah Constitution was ratified, local newspapers published accounts of the execution by firing squad of Wallace Wilkerson, who was struck by four bullets and took 27 minutes to die. Second Am. Compl. at 10, ¶ 35. All four bullets missed the target placed over Wilkerson's heart: three hit him an inch above his heart and one hit him in his left arm. *Id.* Despite public knowledge of Wilkerson's botched and painful execution, the firing squad continued to be used in Utah, even after Utah ratified its Constitution in 1895 and officially became a state in 1896.

Plaintiffs' alleged facts show the people of the State of Utah who ratified Article 1, section 9 did not intend the prohibition on cruel and unusual punishments to apply to the firing squad as a method of execution. The historical facts also show the people of Utah did not intend to require execution methods to guarantee the immediate loss of consciousness, to eliminate the risk of severe pain (or all pain), or to eliminate the risk of a "botched" execution, such as bullets missing a target placed over a person's heart.

Plaintiffs have offered no legal precedent or historical facts to support their interpretation of the cruel and unusual punishments clause: that a method of execution must result in instantaneous death. Plaintiffs have not alleged any facts to show the *protocols* implemented to execute people during the ratification era of the Utah Constitution were more likely to eliminate pain than the protocols he now challenges, which were written in 2010.

In sum, Plaintiff's alleged facts about the history of the Territory and State of Utah fail to show or create a reasonable inference that the prohibition on cruel and unusual punishments as intended in 1895 required the State of Utah to adopt a method of execution that eliminated the risk of severe pain (or all pain), prolonged consciousness, or "botched" attempts. Thus, based upon an historical analysis of Article 1, section 9, Claims 1 and 2 of the complaint fail as a

matter of law.

2. Article 1, section 9 and the Eighth Amendment

As far as this Court is aware, no Utah appellate court has ever addressed the pleading standard to challenge a method of execution under Article 1, section 9 of the Utah Constitution. However, Utah has repeatedly looked to federal court decisions interpreting the cruel and unusual punishments language in the Eighth Amendment when analyzing whether a punishment is cruel and unusual within the meaning of Article 1, section 9. *See State v. Garcia*, 2022 UT App 77, ¶ 60 (Utah's cruel and unusual punishments provision is "[s]imilar to the Eighth Amendment standard."); *State v. Houston*, 2015 UT 40, ¶ 66 (The Utah Supreme Court "look[s] to federal decisions as a guide in determining whether a particular punishment" violates Utah's cruel and unusual punishments clause.); *State v. Andrews*, 843 P.2d 1027, 1030 (Utah 1992) (Utah's standard "does not differ in any material respect" from the Eighth Amendment standard); *State v. Bishop*, 717 P.2d 261, 267 (Utah 1986) ("[T]he Utah and the federal cruel and unusual punishment provisions apply to this case in the same fashion.").

Plaintiffs argue these cases are not controlling when applied to challenges to a method of execution under Article 1, section 9. The cases incorporating the Eighth Amendment standards into Article 1, section 9 only concern whether a specific *sentence* is cruel and unusual, such as whether the death penalty itself is unconstitutional or whether a sentence is arbitrary or disproportionate to a crime that was committed. Plaintiffs argue that because they are challenging *methods* of their executions, not their sentences of death, they should not be required to meet the same pleading standards required under the Eighth Amendment.

Plaintiffs have not explained why the Court should look to the Eighth Amendment when interpreting the cruel and unusual punishments clause in one scenario but not in another. The

overarching principle from Utah appellate court precedent is that the phrase "cruel and unusual" as used in the Eighth Amendment does not materially differ in its analysis from the same phrase used in the Utah Constitution. Indeed, the language used in Article 1, section 9 "closely approximates the language of the Eighth Amendment to the United States Constitution." *Dexter v. Bosko*, 2008 UT 29, ¶ 7. Regardless of the claim raised under the cruel and unusual punishments clause—whether it is challenging a sentence or challenging a method of execution—Utah looks to federal case law to interpret how the phrase should be applied.

In order to prevail on a challenge to a State's chosen method of execution under the Eighth Amendment, a plaintiff must prove two elements. First, the method of execution "creates a demonstrated risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 878 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)). In making this first showing, Plaintiffs must establish that an execution method presents a risk that is "'sure or very likely to cause serious illness and needless suffering,' and give[s] rise to 'sufficiently imminent dangers.'" *Baze*, 553 U.S. at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)). To prevail on such a claim, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, and n. 9 (1994)). Second, Plaintiffs must establish that there is an alternative method of execution "that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Id.* at 52. "This means the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) (citation and quotation marks omitted). Federal courts have required plaintiffs to plead these same elements to survive a motion to dismiss. *See, e.g., Whitaker v. Collier*, 862 F.3d 490,

497 (5th Cir. 2017); *Zink v. Lombardi*, 783 F.3d 1089, 1103 (8th Cir. 2015). This Court concludes the same pleading standards and principles apply when challenging a method of execution under Article 1, section 9 of the Utah Constitution.

3. Claim 1: The Firing Squad Is Cruel and Unusual

Plaintiffs allege death by firing squad will result in a person suffering for at least 15 seconds and potentially over 10 minutes. Their sternum and ribs will be fractured and potentially shattered, causing excruciating pain. And they may experience "air hunger," a sensation of being suffocated. Second Am. Compl. at 49, ¶ 180. Plaintiffs also allege that the 2010 protocols are insufficient to protect against a potentially "botched" execution by firing squad.

Even if the Court makes a reasonable inference based upon Plaintiffs' facts that the suffering involved in a firing squad execution is needless and "objectively intolerable," Plaintiffs have not identified a feasible, readily implemented alternative to the 2010 protocols that would significantly reduce a substantial risk of that pain. Plaintiffs have identified potential problems with Utah's current protocols, but have not advanced alternative protocols that would alleviate the current issues, such as a protocol about where to place a target on a person's body to reduce the risk of prolonged consciousness when being executed by a firing squad.

Plaintiffs' alleged facts do suggest some alternatives to UDC's current protocols, such as additional training of officers chosen to carry out executions by firing squad. But a plaintiff "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Baze*, 553 U.S. at 51. "[T]the law has always asked whether the punishment 'superadds' pain well beyond what's needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives." *Bucklew*, 139 S. Ct. at 1127. "Some risk of pain is inherent in any method of execution—no matter how

humane—if only from the prospect of error in following the required procedure." *Baze*, 553 U.S. at 47. "[T]he Eighth Amendment does not guarantee a prisoner a painless death." *Bucklew*, 139 S. Ct. at 1124.

Instead of advancing alternative protocols or an alternative method of execution, Plaintiffs argue *Defendants* must create and adopt new protocols that alleviate the concerns raised in the Complaint. But that is not Defendants' burden in the context of a complaint challenging a chosen method of execution. "To the contrary, the Constitution affords a measure of deference to a State's choice of execution procedures and does not authorize courts to serve as boards of inquiry charged with determining best practices for executions." *Id.* at 1125 (citations and quotation marks omitted).

Accordingly, because Plaintiffs have not alleged sufficient facts to show that execution by firing squad as described in the 2010 protocols "superadds" unnecessary pain to those being executed compared to a proposed reasonable alternative, their claim fails.

4. **Claim 2: Lethal Intravenous Injection Is Cruel and Unusual**

"When the judgement of death is to be carried out by lethal intravenous injection," section 77-19-10(2) requires "two or more persons trained in accordance with accepted medical practices" to administer a "continuous intravenous injection, one of which shall be of a lethal quantity of: (a) sodium thiopental; or (b) other equally or more effective substance sufficient to cause death."

The 2010 protocol for administering lethal injections in Utah requires personnel to administer a three-drug cocktail: 1) sodium thiopental, a barbiturate intended to render a person unconscious and insensate; 2) pancuronium bromide, a neuromuscular blocking agent, which paralyzes a person and causes suffocation; and 3) potassium chloride, which causes the feeling of

being burned alive and induces cardiac arrest. Second Am. Compl. at 27, ¶¶ 104-06. The efficacy of the first drug at rendering a person insensate and unconscious is crucial because the second and third drugs are extremely painful.

Plaintiffs allege Utah's current protocol lacks sufficient safeguards to ensure the first drug used renders a person unconscious and insensate to pain. Second Am. Compl. at 45, ¶ 162. This is especially true after the second drug is administered, which creates a "chemical curtain" that masks any visual sign of suffering a person may be undergoing. Second Am. Compl. at 46, ¶ 164. Plaintiffs point to several deficiencies in the 2010 protocol, including that the protocol does not require the Executive Director/designee nor the Warden to have training before participating in an execution. Second Am. Compl. at 28, ¶ 109. Sixty seconds after the administration of the first drug, the Warden conducts a visual inspection of the person to determine whether a person is unconscious. *Id.* at 29, 33, ¶¶ 115, 131. If a prisoner is visibly still conscious, the Warden orders a second dose of sodium thiopental, but no additional conscious check is required. *Id.* The execution team leader, who is not required to have any medical training, observes the heart monitor to inform a physician if the heart activity has ceased. *Id.* at 30, ¶ 117. The protocols are vague or redacted on the intricate mechanics of how IVs are placed, the medical team's qualifications, and other safeguards.

Plaintiffs also allege that sodium thiopental is unavailable and illegal to be used for executions in the United States, so the State will have to rely on a different drug to render a person unconscious and insensate to pain. *Id.* at 34, ¶ 135. The 2010 protocol allows the UDC director to change the protocol and administer a drug different than sodium thiopental without notice to a prisoner. Plaintiffs argue that allowing the UDC director to change the protocol to a different, unspecified drug increases the chances that experimental drugs will be used during the

execution. *Id.* at 35, ¶ 138.

Although Plaintiffs have pled facts to show Utah's protocols do not account for every possible situation that could occur during an execution by lethal intravenous injection, they have not shown that the 2010 protocols will subject an inmate to a *sufficiently imminent danger of needless suffering* as required by the United States Supreme Court. They have not shown an "objectively intolerable risk of harm" based upon the way the protocols are written. The protocols require the use of a drug that is intended to eliminate any pain a prisoner feels during the injection of the second and third drugs. The possibility that the first drug will fail to render a prisoner insensate, based upon the facts alleged, is speculative. "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of objectively intolerable risk of harm that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50.

Furthermore, Plaintiffs do not propose alternative protocols that will alleviate their concerns with Utah's 2010 protocol. A plaintiff "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Baze*, 553 U.S., at 51. "[T]the law has always asked whether the punishment 'superadds' pain well beyond what's needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives." *Bucklew*, 139 S. Ct. at 1127.

Instead of advancing alternative protocols or an alternative method of execution, Plaintiffs argue *Defendants* must create and adopt new protocols that alleviate the concerns raised in the Complaint. But that is not Defendants' burden in the context of a complaint challenging a chosen method of execution. "To the contrary, the Constitution affords a measure of deference to a State's choice of execution procedures and does not authorize courts to serve as

boards of inquiry charged with determining best practices for executions." *Id.* at 1125 (citations and quotation marks omitted).

In the Factual Background section of the Complaint, Plaintiffs allege that it is "increasingly rare for states to use a problematic three-drug combination. The majority of executions are now carried out with a single dose of a barbiturate, which does not paralyze the prisoner or mask the expression of pain and suffering." Second Am. Compl. at 26, ¶ 97.

One of the express ways a plaintiff may establish a reasonably available alternative to a State's method of execution is to identify a "well-established protocol in another State as a potentially viable option." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128-29 (2019). The court reasonably infers from Plaintiffs' reference to other states' use of a single barbiturate that other states have well-established protocols for executing people using only one drug.

But Plaintiffs have not alleged facts sufficient to support an inference that other states' protocols are easily implemented and available in Utah. They have not provided other states' protocols themselves and alleged that the alternative protocols are sufficiently detailed. And they have also not alleged facts that other states' protocols will "in fact significantly reduce[] a substantial risk of severe pain."

Accordingly, 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.

4. Claims 1 and 2: Unnecessary Rigor

Plaintiffs allege Utah's current firing squad and lethal intravenous injection protocols violate the unnecessary rigor clause of Article 1, section 9. Plaintiffs do not contest their sentences of death are unconstitutional but rather that the circumstances they will be exposed to during their executions are unconstitutional. Defendants argue Plaintiffs' claims are not governed

by the unnecessary rigor clause but more appropriately fall under the cruel and unusual punishments clause of the Utah Constitution.

There is an overlap "on a factual level" between the unnecessary rigor clause and the cruel and unusual punishment clause. *Dexter v. Bosko*, 2008 UT 29, ¶ 17. But the purposes of the two clauses are different: the cruel and unusual punishment clause is directed to the sentence imposed on a person. *Id.* ¶ 19. The prohibition on unnecessary rigor "protects persons arrested or imprisoned from the imposition of circumstances on them during their confinement that demand more of the prisoner than society is entitled to require." *Id.* When examining whether conditions constitute unnecessary rigor, the court must look to the "circumstances and nature of the process and conditions of confinement." *Id.* "A prisoner suffers from unnecessary rigor when subject to unreasonably harsh, strict, or severe treatment. This may include being unnecessarily exposed to an increased risk of serious harm." *Id.* ¶ 19.

For example, a mandate that a person sentenced to time in prison must endure "strict silence during given hours" is likely not cruel and unusual punishment. *Id.* But requiring a prisoner to endure strict silence "may impose unnecessary rigor or unduly harsh restrictions on the service of one's otherwise proper sentence." *Id.*

As far as the Court is aware, no Utah appellate court has commented on whether a challenge to a method of execution, including the protocols by which an execution is accomplished, can be brought under the unnecessary rigor clause.

The Court declines to categorically exclude challenges to a method of execution under the unnecessary rigor clause. The Court can contemplate scenarios when an otherwise proper sentence of death could be imposed in a way that is unduly harsh. For example, if an execution protocol allowed prison officials and observers to yell insults to a prisoner during the execution,

the insults may be unlikely to constitute cruel and unusual punishment. But subjecting a prisoner to insults and degrading language while being executed may be a condition of a prisoner's punishment that demands more than society is entitled to require.

The question before the Court is whether Plaintiffs have alleged sufficient facts to reasonably infer that Utah's execution protocols—the methods by which the State will impose a sentence of death—create conditions that are *unduly* or *unreasonably* harsh and *unnecessary* to the imposition of death. Plaintiffs have not met their burden.

For the same reasons Plaintiffs allege the methods of their executions are cruel and unusual, Plaintiffs allege the methods impose unnecessary rigor because they potentially cause severe pain on a prisoner. In this alleged context—where Plaintiffs are arguing a risk of severe pain during an execution—the analysis for determining whether a process of execution constitutes unnecessary rigor must be similar to determining whether a method of execution is cruel and unusual. Plaintiffs must show that specific protocols that carry a risk of pain are unreasonable and unnecessary to effectuate a death sentence. They must show an *increased* risk of serious harm compared to known and available alternatives. To do this, Plaintiffs must compare Utah's current protocols to other available methods of execution.

Because Plaintiffs have not alleged sufficient facts to produce a reasonable inference that Utah's execution protocols will unnecessarily, unreasonably, or unduly increase the risk of harm to a prisoner over alternative known and available methods of execution, Plaintiffs have failed to allege a claim for relief.

Counts 1 and 2 of the Complaint are **DISMISSED without prejudice**.

B. Claim 3: Defendants' Ability to Deviate from the Protocol Increases the Risk of Being Subjected to an Unusual or Lingering Death and Violates Plaintiffs' Rights to Due Process of Law Under Article I § 7 of the Utah Constitution

Plaintiffs claim they are deprived of due process under Article 1, section 7 of the Utah Constitution because the 2010 execution protocols are heavily redacted and because Defendants may alter the protocols without giving notice to Plaintiffs. The redactions and potential changes without notice deprive Plaintiffs the opportunity to assert their rights to be free from cruel and unusual punishment and unnecessary rigor.

As far as the Court is aware, no Utah appellate court has addressed whether a person sentenced to death has a due process right to review execution protocols, including any changes to the protocols prior to their execution. "Procedural due process guarantees minimal requirements of notice and a hearing where there are significant interests of life, liberty, or property at stake." *State v. Angilau*, 2011 UT 3, ¶ 13. "Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution. Therefore, [the] analysis of questions concerning procedural due process under [both state and federal] constitutions are also substantially the same." *Id.* (quoting *Bailey v. Bayles*, 2002 UT 58, ¶ 11 n. 2).

At least five federal circuit courts have addressed whether there is a due process right to receive execution protocols. 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. *See 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).

These federal cases rely on *Lewis v. Casey*, 518 U.S. 343, 351 (1996), which explains

that the due process clause is not meant to "enable the prisoner to *discover* grievances, and to *litigate effectively* once in court." *Id.* at 354 (emphasis in original). The right of access to the courts is satisfied if the prisoner has "the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Id.* at 356. Not 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." *William v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011).

Furthermore, prisoners in these federal cases did not show that "litigating an execution protocol first requires access to the protocol." *William v. Hobbs*, 658 F.3d at 852. "There 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. Perhaps the state's secrecy masks 'a substantial risk of serious harm," but it does not create one.'" *Sepulvado*, 729 F.3d at 420 (quoting *Baze,* 553 U.S. at 52 (plurality opinion)).

Requiring a state to provide a protocol "would frustrate 'the State's significant interest in enforcing its criminal judgments.'" *Id.* at 419 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650, (2004)). "Courts are not supposed to function as 'boards of inquiry charged with determining "best practices"'" *Baze*, 553 U.S. at 51 (plurality opinion). And an argument that a defendant may change a protocol or depart from a protocol in the future in a way that undermines a prisoner's constitutional rights is speculative. *See Williams*, 658 F.3d at 852; *Towery v. Brewer*, No. CV-12-245-PHX-NVW, 2012 WL 592749, at *17 (D. Ariz. Feb. 23, 2012), *aff'd on other grounds*, 672 F.3d 650 (9th Cir. 2012) (finding no right to notice and an opportunity to be heard as to intended placement of IV lines before an execution.).

To the extent prisoners assert "a deprivation of their life interests[, t]hey were convicted and sentenced to death after a trial in [state] court, and their convictions and sentences were

upheld on appeal." *Zink*, 783 F.3d at 1109. They received procedural due process to assert their life interests.

Thus, to establish a procedural due process violation, Plaintiffs must show that (1) they had a property or liberty interest that was interfered with by Defendants, and (2) Defendants failed to use constitutionally sufficient procedures in depriving Plaintiffs of that right. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). The Constitution does not create "a freestanding right to detailed disclosure about [a state's] execution protocol." *Zink*, 783 F.3d at 1109. A prisoner's "assertion of necessity—that [the State] must disclose its protocol so he can challenge its conformity with the Eighth Amendment—does not substitute for the identification of a cognizable liberty interest." *Sepulvado*, 729 F.3d at 419.

The Ninth Circuit left open the possibility of a due process right to execution protocols and notice of changes to those protocols, but ultimately found that a due process right was not implicated where a prisoner was given a copy of execution protocols in advance of an execution warrant, there was no indication that the state would deviate from those protocols, and no facts suggest the state's past executions caused "unduly painful deaths." *Pizzuto v. Tewalt*, 997 F.3d 893, 907 (9th Cir. 2021).

Relying on *Pizzuto*, a federal district court in the State of Nevada concluded that "pursuant to the Due Process Clause, [a prisoner] is entitled to detailed notice as to the manner of his execution." *Floyd v. Daniels*, No. 321CV00176RFBCLB, 2021 WL 2827291, at *4 (D. Nev. July 6, 2021), appeal dismissed, No. 21-16134, 2021 WL 5406851 (9th Cir. Nov. 18, 2021). This included all substantive details of the execution protocol with the exception of security details and the names of specific personnel involved with the security aspects of the protocol. *Id.* The court held that a prisoner should have at least three months' notice of the execution protocols to

have sufficient time to investigate and challenge the method of execution. *Id.*

Although the bulk of authority from federal courts has found no due process right to execution protocols, the Court declines to categorically rule that no combination of facts could give rise to a due process violation under the Utah Constitution for failure to disclose execution protocols. But the court finds the facts that have been asserted in *this* case are insufficient to show Plaintiffs' due process rights have been or will be violated by redactions and possible changes to the execution protocols.

Plaintiffs allege facts that they have a copy of the 2010 execution protocol and assert that they will be executed pursuant to the 2010 protocol unless it changes in the future. While the protocol is redacted and does not provide the details of every facet of the execution process, the protocol is sufficiently detailed that Plaintiffs were able to raise claims under both the cruel and unusual punishments and unnecessary rigor clauses of Article 1, section 9 in this case. Plaintiffs failed on those claims because they did not show any reasonable and available alternatives to Utah's execution methods—not because they did not possess sufficient information from the protocols to assert their claims. In other words, Plaintiffs own Complaint shows that they have not been deprived of their due process rights to assert their claims under Article 1, section 9.

Plaintiffs reference TMF 01/02.01(B)(3),[1] which states: The Executive Director/designee may direct variation from or adjustment to the policies and procedures in this manual at any time when necessary for the good of the Department's mission in carrying out the execution. Approval for the changes shall be documented in writing." Second Am. Compl. at 47, ¶ 169. Plaintiffs assert this provision of the 2010 protocol violates their due process rights because Defendants have broad discretion to change the protocol at any time. Furthermore, Plaintiffs

[1] The Complaint cites the relevant provision of the protocol as 01/02.02(B)(3). This is merely a clerical error, and the court has referenced the intended citation to the protocol.

assert Defendants *must* deviate from the 2010 protocol because sodium thiopental, the first drug to be administered during an execution, is not available in the United States for the purposes of executions.

Any claim that the Defendants may deviate from the protocol or change the protocol at the last hour in such a way that the Plaintiffs' constitutional rights will be implicated or violated is speculative. Any 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. "[S]ome forms of state action . . . by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 603 (2008) (examining State discretion when addressing a claim under the equal protection clause).

To the extent Defendants are *required* to change the protocol to use a drug other than sodium thiopental, Plaintiffs are on notice. Section 77-19-10 of the Utah Code requires Defendants to use sodium thiopental or an "other equally or more effective substance sufficient to cause death." Thus, a deviation from sodium thiopental is both contemplated in the statute and in the 2010 protocol.

Accordingly, because Plaintiffs have not asserted sufficient facts that their due process rights have been or will be violated in this case, Claim 3 is **DISMISSED WITHOUT PREJUDICE**.

C. Claim 4: Utah's Execution Protocol Violates Article I § 9 of the Utah Constitution by Subjecting Plaintiffs to Deliberate Indifference

Citing *Bott v. Deland*, 922 P.2d 732, 744 (Utah 1996), Plaintiffs claim that under Article 1, section 9, Utah's execution protocol will subject them to the "deliberate indifference" to their medical needs. The State argues that a claim of "deliberate indifference" is subsumed by Claims

1 and 2 because a claim of deliberate indifference is the same as a claim under the cruel and unusual punishments clause.

"[A] prisoner may not recover damages under article I, section 9 unless he shows that his injury was caused by a prison employee who acted with deliberate indifference or inflicted unnecessary abuse upon him. The deliberate indifference standard protects prisoners from cruel and unusual punishments, and the unnecessary abuse standard protects prisoners from unnecessary rigor." *Bott*, 922 P.2d at 740. An employee is deliberately indifferent if they wantonly inflict pain, medically treat prisoners with less efficacious treatments, or intentionally delay or deny access to medical treatment. *Id.*

Even if a claim of "deliberate indifference" during an execution requires a separate analysis from both the cruel and unusual and unnecessary rigor clauses, Plaintiffs have not alleged sufficient facts to support a claim that prison employees will "wantonly" inflict pain upon them beyond what is necessary to carry out the execution. Any claim that prison officials will deliberately inflict pain is speculative. Plaintiffs have not alleged that there are national or local or professional medical standards of care during an execution. And they have not shown that the current protocols fall below a medical standard of care applied to execution procedures. *See Hamilton v. Jones*, 472 F.3d 814, 816 (10th Cir.2007) ("[T]he Constitution does not require the use of execution procedures that may be medically optimal in other contexts.").

Therefore, because Plaintiffs have not asserted sufficient facts to support a claim of deliberate indifference, Claim 4 is **DISMISSED WITHOUT PREJUDICE**.

D. Claim 5: Utah's Execution Protocol Violates Article I, §§ 7, 12, and 15 of the Utah Constitution by Failing to Provide Access to Counsel Throughout the Execution Procedure

Plaintiffs allege the 2010 execution protocol denies them their right to counsel and access

to the courts because: 1) Plaintiffs will be unable to communicate with counsel throughout the execution proceedings; and 2) counsel will be unable to view the setting of the IVs during execution by lethal intravenous injection. Plaintiffs raise their claims under both the Utah and Federal Constitutions. Plaintiffs cite to TMF 01/03.06(B)(1) for the proposition that Plaintiffs will not be able to communicate with their counsel during an execution. TMF 01/03.06(B)(1) is titled "Final Sequence of Events . . . Bringing Condemned Inmate to Execution Chamber[.]" In summary, the protocol states that an inmate will be removed from an observation cell, dressed in a jumpsuit, and brought to the execution chamber. The protocol does not affirmatively state that an inmate will be given an opportunity to speak to counsel after being taken from the observation cell.

Plaintiffs do not assert any facts regarding whether an inmate's attorney can speak with the inmate anytime *prior* to being taken from the observation cell. Plaintiffs also do not allege any facts that counsel will not be able to observe the execution, except for the setting of IVs during an execution by lethal intravenous injection. The protocol states that after an IV has been placed, the Warden directs that the curtains between the execution chamber and the witness viewing area be opened. TMF 01/05.15 (I)(2)(a).

Although Plaintiffs make an argument in their opposing memorandum that the protocol prevents counsel from accessing a phone in order to raise claims with the court or to the governor to request a reprieve, Plaintiffs assert no facts to support this argument anywhere in their Second Amended Complaint. And there is nothing in the protocols that affirmatively limits an inmate's counsel from viewing the execution or from using a phone during an execution. In fact, other than giving a definition of "attorney of record" as an inmate's attorney, the 2010 protocols do not prescribe or proscribe any attorney behavior during the execution, except to the

extent an attorney is named as a witness to the execution.

In order to state a claim for relief *based upon the facts alleged* in the Second Amended Complaint, Plaintiffs must show one or more of the following: 1) that they have a right to speak to counsel after being escorted from the observation cell, or 2) that they have a right to have their attorney present during the setting of the IVs. Plaintiffs have not established either of these rights under the Utah or the Federal Constitutions.

Under the Utah Constitution, a criminal defendant has the right to the assistance of counsel "at all critical stages of his criminal proceeding." *Wagstaff v. Barnes*, 802 P.2d 774, 778 (Utah Ct.App.1990). "A critical stage is a step of a criminal proceeding that holds significant consequences for the accused." *State v. Maestas*, 2012 UT 46, ¶ 57 (cleaned up). "Determining whether a given stage of a proceeding is critical involves considering whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial, whether potential substantial prejudice to the defendant's rights inheres in the particular confrontation, and the ability of counsel to help avoid that prejudice." *Id.* (cleaned up).

Plaintiffs have provided no authority or analysis of Article 1, section 12 of the Utah Constitution to support a finding that an execution is a critical stage of a criminal proceeding. As far as this court is aware, 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. And even if there is a right under the Utah Constitution for an attorney to be present at an execution, Plaintiffs have not shown that the Utah Constitution requires an attorney to be present after the time an inmate leaves the observation cell or during the setting of an IV.

With regard to a federal right to access to counsel, Plaintiffs assert in their opposing memorandum that Plaintiffs have both a constitutional and statutory right to counsel. To the

extent Plaintiffs rely on 18 U.S.C. § 3599, the court finds the federal statutory right to counsel does not apply in state executions.

As for a right under the Federal Constitution, "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). "The Sixth Amendment right to counsel only 'extends to the first appeal of right, and no further,'" including an inmate's execution. *Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)).

At least some federal courts have found no violation of a right to counsel where an attorney could not witness the IV-placement procedure. *See Bible v. Davis*, No. 4:18-CV-1893, 2018 WL 3068804, at *11 (S.D. Tex. June 21, 2018), *aff'd*, 739 F. App'x 766 (5th Cir. 2018) (rejecting right to counsel claim where prisoner alleged that the protocol does not allow his attorney to be present as the IV is inserted); *Towery v. Brewer*, No. CV-12-00245-PHX-NVW, 2012 WL 1947051, at *1 (D. Ariz. May 30, 2012) (rejecting "claim that his right of access to counsel and the courts would be violated if counsel did not witness the IV-placement procedure."), *aff'd*, *Lopez v. Brewer*, 680 F.3d 1068, 1078 (9th Cir. 2012) (finding no abuse of discretion in denying request to "hav[e] counsel observe the IV-placement procedure.")

Under the facts alleged in the Complaint, Plaintiffs have not shown they will be constitutionally deprived of their right to counsel during the execution procedure.

Plaintiffs' alleged facts to do not state a claim for relief. Count 5 is **DISMISSED WITHOUT PREJUDICE**.

E. Claim 6: Utah's Execution Protocol Violates Plaintiffs' Rights to Access to Governmental Proceedings Under Article I, §§ 7 and 15 of the Utah Constitution

Plaintiffs allege that the 2010 execution protocol violates their right of access to

governmental proceedings because it conceals the "identification concerning the source of the drug" used, "the rationale for the selection of these drugs and their dosages," and "the qualifications and training of the persons administering them." Second Am. Compl. at 57, ¶¶ 221-22.

Plaintiffs bring their claims under Article 1, section 15 of the Utah Constitution, "which, by its terms, is somewhat broader than the federal clause." *Provo City Corp. v. Willden,* 768 P.2d 455, 456 n.2 (Utah 1989). But Plaintiffs do not provide any analysis of how Article 1, section 15 differs from its federal counterpart in its analysis.

Plaintiffs support their claim with reference to *California First Amend. Coal. v. Woodford*, a Ninth Circuit case that found the public or the press had a right to view an execution as it was taking place. *Woodford*, 299 F.3d 868, 884 (9th Cir. 2002). But a challenge to the right to view an execution is markedly different from a challenge to redacted protocols governing an execution.

The "right of access to government proceedings is not a tool for judges to pry open the doors of state and federal agencies because they believe that public access to this type of information would be a good idea." *Phillips v. DeWine*, 841 F.3d 405, 419 (6th Cir. 2016) (citation and quotation marks omitted). Details of an execution protocol "is neither information of the type filed in a government proceeding nor its functional equivalent." *Id*. at 412.

Courts have held that inmates do not have a constitutional right to information similar to that which Plaintiffs seek. "Neither the Fifth, Fourteenth, or First Amendments afford [an inmate] the broad right to know where, how, and by whom the lethal injection drugs will be manufactured, as well as the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters." *Wellons v. Comm'r, Ga. Dep't of Corr*., 754 F.3d 1260,

1267 (11th Cir. 2014) (citation and quotation marks omitted). Although *Wellons* concerned a challenge to a state law that held secret certain information about an execution and was not about a redacted protocol, the plaintiff in *Wellons* sought the information for the same purposes as Plaintiffs in this case: to receive "information necessary to determine whether his Eighth Amendment rights [were] being violated." *Id.* at 1264; *see also Phillips*, 841 F.3d at 420 (concluding the plaintiffs "failed to state a claim for a violation of their right of access to government proceedings" where state law prevented disclosure of the sources of lethal-injection drugs); *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015) (rejecting prisoners' claim of a "right to detailed disclosure about Missouri's execution protocol).

The Court concludes that the inability to discover execution protocol information is insufficient to state an access to governmental proceedings claim.

Plaintiffs also contend that "Defendants' concealment of information deprives Plaintiffs of their right to notice and an opportunity to be heard, in violation of the Due Process Clause." Second Am. Compl. at 58, ¶ 230. But there is no broad due process right to obtain every detail about a state's execution process. *See, e.g., Wellons*, 754 F.3d at 1267; *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (affirming district court's denial of procedural due process notice claim); *Sepulvado*, 729 F.3d at 419 (no due process violation "by withholding the details of [the state's] execution protocol."). A prisoner's allegation that the state "fail[ed] to provide them with the timely and adequate notice of the proposed execution method" is "thus insufficient as a matter of law to state a due process claim." *Zink*, 783 F.3d at 1108.

Plaintiffs have failed to state a claim for relief. Claim six is **DISMISSED WITHOUT PREJUDICE**.

ORDER

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**.

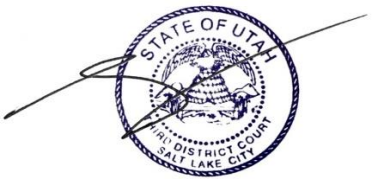
Plaintiffs have 21 days from the receipt of this order to file a Motion for Leave to Amend the Complaint, if Plaintiffs wish to do so.

Any Motion for Leave to Amend must conform to Rule 15 of the Utah Rules of Civil Procedure. Plaintiffs "must attach its proposed amended pleading to the motion to permit an amended pleading" so the court may determine whether an amendment would be futile. Utah R. Civ. P. 15(a)(2). If no motion is filed within 21 days of the receipt of this order, the case will be dismissed without prejudice.

This is the order of the Court for the matters addressed herein. No further order is needed from the parties.

DATED this 22nd day of December 2023.

BY THE COURT:



Judge Coral Sanchez
Third District Court