

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TIMOTHY JOHNSTON,)
)
 Plaintiff,)
)
 vs.)
)
 GARY B. KEMPER, Director,)
 Missouri Department of Corrections,)
)
 DONALD P. ROPER, Superintendent,)
 Potosi Correctional Center,)
)
 JAMES PURKETT, Superintendent,)
 Eastern Reception, Diagnostic and)
 Correctional Center,)
)
 and)
)
 UNKNOWN EXECUTIONERS,)
)
 Defendants.)

FILED
 AUG 16 2004
 U. S. DISTRICT COURT
 EASTERN DISTRICT OF MO

No. **4 04 CVO** NL

**PLAINTIFF'S ORIGINAL COMPLAINT
 FOR INJUNCTIVE AND DECLARATORY RELIEF, ATTORNEY'S FEES
 AND COSTS OF SUIT PURSUANT TO 42 U.S.C. § 1983**

I. Nature of Action

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of Mr. Johnston's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Mr. Johnston seeks equitable and injunctive relief.

2. In this action, Mr. Johnston claims that defendants' current method of lethal injection can and will subject him to an unnecessary risk of unconstitutional pain and suffering. No

government within the United States can intentionally or negligently use an excruciatingly painful, arbitrary, cruel, and unreliable method of execution.

3. Defendants intend to violate Mr. Johnston's constitutional rights by executing him with drugs that include a paralyzing agent veterinarians will not use for the euthanasia of cats and dogs. This paralyzing drug can and will cast a chemical veil over the excruciatingly painful effects of death by suffocation and heart attack. Defendants' lethal injection protocol includes an unreliable ultrashort-acting anesthetic that can and will leave Mr. Johnston conscious but trapped in a paralyzed body racked with pain, suffocation and a heart attack. Defendants intend to execute Mr. Johnston with unreliable and arbitrary drugs, administered by inadequately trained personnel, who use inappropriate equipment and arbitrary drugs and methods to cause death by lethal injection.

4. Mr. Johnston seeks a permanent injunction preventing defendants from executing him by the means currently employed for carrying out an execution by lethal injection in the State of Missouri. Mr. Johnston also seeks an Order declaring that defendants' current method for conducting an execution by lethal injection violates the Eighth and Fourteenth Amendments to the United States Constitution.

II. Plaintiff

5. Timothy Johnston is a United States citizen and a resident of the State of Missouri. He is currently a death-sentenced inmate in the custody of defendants, and under the control and supervision of Missouri Department of Corrections. He is incarcerated at the Potosi Correctional Center, Route 2, Box 2222, Mineral Point, Missouri 63660, with an inmate number of CP-91.

III. Defendants

6. Defendant Gary B. Kemper is the Director of the Missouri Department of Corrections, a department of the State of Missouri created and maintained pursuant to Chapter 217, Mo.Rev.Stat. (2000). As such, defendant Kemper is charged and authorized to prescribe and direct the promulgation of rules and regulations for the Missouri Department of Corrections, including the rules and regulations for the conduct of prison operations and execution procedures. He is sued herein in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

7. Defendant Donald P. Roper is the Superintendent of the Potosi Correctional Center located in Mineral Point, Missouri, at which sentences of death have been performed in the State of Missouri. Defendant Roper is charged with the management of the Potosi Correctional Center and the oversight and conduct of operations there, including the oversight and conduct of executions. He is sued in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

8. Defendant James Purkett is the Superintendent of the Eastern Reception Diagnostic and Correctional Center located in Bonne Terre, Missouri. Upon information and belief, future executions will be performed at said facility. Defendant Purkett is charged with the management of the Eastern Reception Diagnostic and Correctional Center and the oversight and conduct of operations there, including the oversight and conduct of executions. He is sued in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

9. Defendants Unknown Executioners are employed by the Missouri Department of Corrections to make preparations for, and carry out the execution of Mr. Johnston. Mr. Johnston

does not yet know, and it is his understanding that defendants will not reveal, the identities of these persons. All of said defendants are being sued in the individual and official capacities.

10. Defendants, and each of them at all times relevant hereto, were acting in their respective official capacities with respect to all acts described herein, and were in each instance acting under the color and authority of state law. Upon information and belief, unless permanently enjoined, the defendants intend to act in their respective official capacities and under the authority of state law by executing Mr. Johnston by utilizing lethal injection methods that will violate his constitutional rights.

IV. Jurisdiction and Venue

11. Mr. Johnston brings this action to enforce and protect rights conferred by the Eighth Amendment to the United States Constitution, as incorporated to the states by the Fourteenth Amendment to the United States Constitution.

12. This Court has jurisdiction under 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state authority, of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable relief under an act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; under 28 U.S.C. § 2201(a), in that, one purpose of his action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that one purpose of this action is to secure permanent injunctive relief.

13. This Court has venue under 28 U.S.C. § 1391(b)(2) in that the events giving rise to this claim will occur within this judicial district.

V. Facts

14. Timothy Johnston is sentenced to be put to death by lethal injection. He is awaiting an execution date. Defendants are responsible for carrying out this execution.

15. Upon information and belief, defendants intend to execute Mr. Johnston by employing the same means and method of lethal injection as have been used since Missouri resumed executions in 1989: by poisoning him with a lethal combination of three chemical substances: sodium pentothal, pancuronium bromide (pavulon), and potassium chloride (KCl).¹

16. There is a reasonable likelihood and an unjustifiable risk that this particular combination of chemicals will cause Mr. Johnston to consciously suffer an excruciating painful and protracted death

17. Sodium pentothal is an ultrashort-acting barbiturate which is ordinarily used to render a surgical patient unconscious for mere minutes in the induction phase of anesthesia, specifically so that the patient may re-awaken and breath independently if any complications arise from the insertion of a breathing tube prior to surgery. Because of its brief duration, sodium pentothal may not provide a sedative effect throughout the entire execution process. There is also a probability that the sedative effect of the sodium pentothal is neutralized by the second chemical used, pancuronium bromide.

18. The second chemical involved in the lethal injection process, pancuronium bromide, or pavulon, is a derivative of curare that acts as a neuromuscular blocking agent. While pavulon paralyzes skeletal muscles, including the diaphragm, it has no effect on consciousness or the perception of pain and suffering. To the extent that the first chemical, sodium pentothal, is

¹See *Lethal Injection Machine Manual, State of Missouri* (October 15, 1988).

neutralized by the second, pavulon, the latter serves only to mask Mr. Johnston's excruciating pain and suffering.

19. The American Veterinary Medicine Association (AVMA) condemns the use of neuromuscular blocking agents such as pavulon in the euthanasia of animals. Since 1981, many states, including Missouri, have made the use of pancuronium bromide on domestic animals illegal.² Utilizing methods or chemicals to execute human beings which have been banned for use in euthanizing animals violates contemporary standards of decency.³

20. The third chemical, potassium chloride, stops the prisoner's heart and causes death by cardiac arrest. The administration of potassium chloride is extremely painful because, when administered intravenously, potassium chloride causes a severe burning sensation as it travels from the injection site through the body to the heart.

21. Instead of producing a rapid, sustained loss of consciousness and humane death, there is an unnecessary and unjustifiable risk that defendants' means and method of lethal injection can and will cause Mr. Johnston to consciously suffer an excruciating painful and protracted death.

²Texas, Tex. Health & Safety Code, § 821.052(a); Florida, Fla. Stat. §§ 828.058 and 828.065 (enacted in 1984); Georgia, Ga. Code Ann. § 4-11-5.1 (enacted in 1990); Maine, Me.Rev.Stat.Ann., Tit.17 § 1044 (enacted in 1987); Maryland, Md. Code. Ann., Criminal Law, § 10-611 (enacted in 2002); Massachusetts, Mass. Gen. Laws § 140:151A (enacted in 1985); New Jersey, N.J.S.A. 4:22-1.3 (enacted in 1987); New York, N.Y. Agric. & Mkts § 374 (enacted in 1987); Oklahoma, Okla. Stat., Tit. 4, § 501 (enacted in 1981); Tennessee, Tenn. Code Ann. § 44-17-303 (enacted in 2001). Other states have simply banned such practices. See Illinois, 510 Ill. Comp. Stat., ch. 70, § 2.09; Kansas, Kan. Stat. Ann. § 47-1718(a); Louisiana, La. Rev. Stat. Ann. § 3:2465; Missouri, 2 CSR 30-9.020(F)(5); Rhode Island, R.I. Gen. Laws § 4-1-34, Connecticut, Conn. Gen. Stat. § 22-344a; Delaware, Del. Code Ann., Tit. 3, § 8001; Kentucky, Ky.Rev.Stat. Ann. § 321.181(17) and 201 KAR 16:090, § 5(1); South Carolina, S.C.Code Ann. § 47-3-420.

³*Cf. Adkins v. Virginia*, 536 U.S. 304, 315 (2002) (Executing those with mental retardation violates contemporary standards reflected in state statutes barring same).

22. The risk of inflicting severe and unnecessary pain and suffering upon Mr. Johnston in the lethal injection process is particularly grave in Missouri because, upon information and belief, the procedures and protocols designed by defendants do not include safeguards regarding the manner in which the execution is to be carried out, do not establish the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure and do not establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures.

VI. Claim

First Claim: Eighth Amendment Violation

23. Timothy Johnston incorporates all preceding paragraphs as if fully rewritten herein.

24. Defendants, acting individually and under the color and authority of state law will violate Mr. Johnston's constitutional rights to be free from arbitrary, capricious, cruel and unusually painful punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution by executing him under the procedures utilized by the State of Missouri to execute inmates by lethal injection in the past, which are intended for use in the execution of Mr. Johnston.

VII. Prayer for Relief

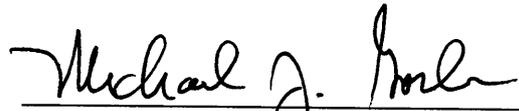
25. Mr. Johnston requests this Court grant him injunctive relief by granting a permanent injunction barring defendants from executing Mr. Johnston in the manner by which defendants currently intend to execute him, in order to prevent defendants from violating Mr. Johnston's federal constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution.

26. Mr. Johnston requests that this Court grant him declaratory relief by issuing an Order declaring that defendants' current means, methods, practices, procedures, and customs regarding

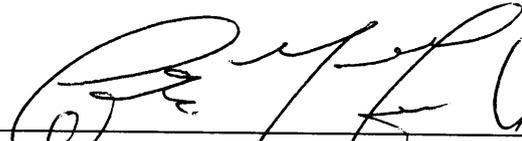
execution by lethal injection violate the Eighth and Fourteenth Amendments to the United States Constitution.

27. Mr. Johnston requests that this Court grant him reasonable attorney fees pursuant to 42 U.S.C. § 1988 and the laws of the United States as well as for costs of suit, and such further relief as this Court deems just and proper.

Respectfully submitted,



MICHAEL J. GORLA, #3251
720 Olive Street, Suite 1630
St. Louis, Missouri 63101
(314) 621-1617
(314) 621-7448 - Facsimile
E-mail: mjgorla@msn.com



Christopher E. McGraugh, #25278
Leritz, Plunkert & Bruning, P.C.
One City Center, Suite 2001
St. Louis, Missouri 63101
(314) 231-9600
(314) 231-9480 - Facsimile
E-mail: cmcgraugh@leritzlaw.com

Counsel for Plaintiff