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IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

FILED

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JAMES BONINI, CLERK
COLUMBUS, OHIO

ADREMY DENNIS
Inmate Number 306-133
Post Office Box 788
Mansfield Correctional Inst.
Mansfield, Ohio 44091,

and

RICHARD W. COOEY, II,
Inmate Number 194-016
Post Office Box 788
Mansfield Correctional Inst.
Mansfield, Ohio 44091,

Plaintiffs,

vs.

ROBERT TAFT, Governor
State of Ohio
77 South High Street, 30th Floor
Columbus, Ohio 43215,

and

REGINALD A. WILKINSON, Director
Ohio Dept. of Rehabilitation & Correction
1050 Freeway Drive North
Columbus, Ohio 43229,

and

JAMES HAVILAND, Warden
Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

Defendants.

Case Number **02-04-532**

Judge

JUDGE FROST

Magistrate Judge

MAGISTRATE JUDGE ABEL

**Plaintiffs' Original Complaint for
Injunctive and Declaratory Relief,
Attorney Fees, and Costs of Suit
Pursuant to 42 U.S.C. § 1983**

COMPLAINT

I. Nature of Action

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of Plaintiffs' rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution, and Plaintiffs' rights to be free from violations of their substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution. Plaintiffs seek equitable, injunctive, and declaratory relief.
2. In this action, Plaintiffs claim that Defendants' current method of lethal injection can and will, in effect, cause them to be tortured to death. No government within the United States can intentionally or negligently use an arbitrary, cruel, and/or unreliable method of execution.
3. Defendants intend to violate Plaintiffs' constitutional rights by executing them 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 Plaintiffs conscious but trapped in a paralyzed body wracked with the pain of suffocation and a heart attack. Defendants intend to execute Plaintiffs with unreliable and arbitrary drugs, administered by inadequately trained personnel, who use inappropriate equipment and methods to cause death by lethal injection.
4. The claims in this complaint are cognizable under 42 U.S.C. § 1983; they need not be brought in a habeas action. This lawsuit is not and should not be treated as being a successor habeas corpus petition. See Nelson v. Campbell, 541 U.S. ___, 2004 U.S. LEXIS 3680 (2004). Plaintiffs are not challenging their underlying capital convictions or death sentences in this

present action; nor are they saying that Defendants could never execute them. Plaintiffs could be executed if (1) no separate legal challenge overturns their capital convictions or death sentences; (2) they are not granted executive clemency; and (3) Defendants design a constitutionally acceptable method for executing them.

5. Plaintiffs seek a preliminary and permanent injunction preventing Defendants from executing them by the means currently employed for carrying out an execution by lethal injection in the State of Ohio. Plaintiffs also seek an Order declaring that Defendants' current methods for conducting an execution by lethal injection violates the Eighth and Fourteenth Amendments to the United States Constitution.

II. Plaintiffs

6. Adremy Dennis is a United States citizen and a resident of the State of Ohio. He is currently a death-sentenced inmate in the custody of Defendants, and under the control and supervision of the State of Ohio Department of Rehabilitation and Correction, who have him incarcerated in the Mansfield Correctional Institution in Mansfield, Ohio, under Inmate #306-133. If Plaintiff Dennis's capital conviction and/or death sentence is not overturned in another judicial proceeding or through executive clemency, then Defendants will execute him. Upon information and belief, it is the intention of Defendants, acting in concert with other state officials not named as defendants herein, to use the lethal injection methods described herein to execute Adremy Dennis in the death house located on the grounds of the Southern Ohio Correctional Facility, which is operated and controlled by the Defendants.
7. Richard W. Cooley, II, is a United States citizen and a resident of the State of Ohio. He is currently a death-sentenced inmate in the custody of Defendants, and under the control and

supervision of the State of Ohio Department of Rehabilitation and Correction, who have him incarcerated in the Mansfield Correctional Institution in Mansfield, Ohio, under Inmate #194-016. If Plaintiff Cooley's capital conviction and/or death sentence is not overturned in another judicial proceeding or through executive clemency, then Defendants will execute him. Upon information and belief, it is the intention of Defendants, acting in concert with other state officials not named as defendants herein, to use the lethal injection methods described herein to execute Richard W. Cooley, II, in the death house located on the grounds of the Southern Ohio Correctional Facility, which is operated and controlled by the Defendants.

III. Defendants

8. Defendant Robert Taft is, and at all times relevant was, the Governor of the State of Ohio. He is the final executive authority in the state, statutorily and constitutionally responsible for the execution of all sentences of death in Ohio and the manner in which those sentences are executed.
9. Defendant Reginald A. Wilkinson is, and at all times relevant was, the Director of the State of Ohio Department of Rehabilitation and Correction ("DRC"), a department of the State of Ohio that was created and is maintained pursuant to Ohio Revised Code Section 5120. As such, Defendant Wilkinson is charged and authorized under Ohio Revised Code Section 5120.01 to prescribe and direct the promulgation of rules and regulations for the DRC, including the rules and regulations for the conduct of prison operations and execution procedures. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

10. Defendant James Haviland is, and at all times relevant was, Warden of the Southern Ohio Correctional Facility at Lucasville ("SOCF"), a correctional institution of the DRC that was created and is maintained pursuant to Ohio Revised Code Section 5120.05, and which is the prison at which sentences of death are executed in the State of Ohio. Pursuant to Ohio Revised Code Section 5120.38, Defendant Haviland, as the Warden of SOCF, is charged with management of SOCF and the oversight and conduct of operations there, including the oversight and conduct of executions carried out there. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.
11. 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 preliminarily and permanently enjoined, the Defendants, and each of them, intend to act in their respective official capacities and under the authority of state law by executing Plaintiffs by utilizing lethal injection methods that will violate their constitutional rights.

IV. Jurisdiction and Venue

12. Plaintiffs bring this action to enforce and protect rights conferred by the Eighth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment to the United States Constitution, and to enforce and protect rights conferred by the Fourteenth Amendment to the United States Constitution.
13. This Court has jurisdiction over this matter pursuant to 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 this action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that one purpose of this action is to secure preliminary and permanent injunctive relief.

14. This Court has supplemental jurisdiction over any state statutory claim asserted by Plaintiffs pursuant 28 U.S.C. § 1367, in that, the state and federal claims are derived from a common nucleus of operative facts.
15. This Court has venue under 28 U.S.C. § 1391(b)(1) in that all of the Defendants are situated within the State of Ohio and each of them resides within the Southern District of Ohio, and under 28 U.S.C. § 1391(b)(2) in that all of the events described herein have and will transpire (absent judicial relief) within this judicial district. Defendant Taft exercises his final authority over the other Defendants in the seat of Ohio's government, located in Franklin County, Ohio; the lethal injection execution procedures were promulgated by Defendant Wilkinson in Franklin County, Ohio; and Warden Haviland has executed other Ohio inmates and intends to execute Plaintiffs in Scioto County, Ohio, by the method of lethal injection described herein.

V. Facts Common to All Claims and Relief Sought

16. Plaintiffs incorporate by reference all facts and allegations described throughout this complaint as if fully re-written herein.
17. If Plaintiffs' capital convictions and/or death sentences are not overturned in another judicial proceeding or through executive clemency, then Defendants will execute Plaintiffs on a date yet to be fixed by the Ohio Supreme Court.

18. Defendants intend to execute Plaintiffs by employing the same means and methods of lethal injection as have been used since Ohio resumed executions in 1999. As of 2001, Ohio's sole means of execution has been lethal injection.
19. According to a letter written by Defendant Haviland dated April 19, 2002 (Exhibit 1), and two letters written by Vince Lagana, one dated May 30, 2002 (Exhibit 2(A)), the other dated January 30, 2004 (Exhibit 2(B)), a staff attorney for the Ohio Department of Rehabilitation and Correction, Defendants have executed others and, upon information and belief, Defendants intend to execute Plaintiffs by the following means. Three drugs will be administered: two grams of thiopental sodium in normal saline concentration; one hundred milligrams of pancuronium bromide in normal saline concentration; and 100 milliequivalents of potassium chloride in normal saline concentration. At least the following equipment will be utilized: Angiocath Abbocath-T; primary IV Set No. 1820 (70 inch); and 0.9% sodium chloride, 1000 ml.
20. According to the letter dated May 30, 2002 authored by attorney Lagana (Exhibit 2(A)), Defendants contend that they do not have to release all information descriptive of the lethal injection procedures, including but not limited to information regarding any other equipment used; the personnel involved in the execution procedures; the education, training, expertise and experience of the personnel involved; or any other details surrounding this procedure.
21. Upon information and belief, neither Defendants nor their agents have publicly disclosed all material and relevant details surrounding the process by which Defendants chose the method of lethal injection they use; nor have Defendants or their agents publicly disclosed all material and relevant details pertaining to the personnel involved in the lethal injection execution

procedure, including but not limited to any education, credentials, training, expertise, or other factors that qualify or disqualify them from being involved in Ohio's lethal injection execution procedures.

22. Upon information and belief, Defendants and/or their agents simply copied lethal injection procedures from another state or other states without investing meaningful and independent efforts designed to ensure that Ohio's lethal injection execution procedures comply with contemporary medical standards and long-standing constitutional standards that forbid the infliction of excruciating, cruel, and unusual pain and punishment.
23. Upon information and belief, Defendants' intended means of executing Plaintiffs are inadequate, unreliable, and arbitrary; and Defendants' lethal injection execution procedures will cause Plaintiffs to suffer excruciating pain and cruel and unusual punishment.

Expert Opinion on Ohio's Lethal Injection Drugs

24. According to the attached affidavit of Mark J.S. Heath (Exhibit 3), a medical doctor board certified in anesthesiology, Defendants' lethal injection execution procedure will, upon information and belief, violate Plaintiffs' constitutional rights. Dr. Heath's affidavit was prepared for previous litigation wherein two Ohio death row inmates (Lewis Williams and John Glenn Roe) filed a complaint similar to the instant complaint to challenge the constitutionality of Ohio's execution procedures. That earlier lawsuit pre-dated the United States Supreme Court's decision in Nelson v. Campbell (decided May 24, 2004). As a result, that lawsuit was treated as a successor habeas petition and dismissed; and Defendants executed Mr. Williams and Mr. Roe. Upon information and belief, Dr. Heath's position as set forth in his attached affidavit remains substantially the same; and he or a similarly qualified expert can and will

provide testimony in support of the instant lawsuit by providing expert testimony to show that Defendants' execution procedures violate Plaintiffs' constitutional rights for reasons that include but are not limited to the following:

A) The letters by Warden Haviland and attorney Lagana state that as part of its protocol for lethal injection Ohio uses the drugs sodium thiopental (also know as "thiopental sodium" and "pentothal"), pancuronium bromide (also know as "pancuronium" and "Pavulon"), and potassium chloride (also known as "KCl"). Heath Affidavit ¶ 6.

B) A major concern about the protocol relates to the use of the drug pancuronium bromide. Pancuronium paralyzes all voluntary muscles, but does not affect sensation, consciousness, cognition, or the ability to feel pain and suffocation. If the thiopental and potassium are to be given in doses sufficient to cause death, then it is my opinion held to a reasonable degree of medical certainty that there would be no rational or medically justifiable place in the protocol for pancuronium. Heath Affidavit ¶ 8.

C) If thiopental is not properly administered in a dose sufficient to cause death or at least the loss of consciousness for the duration of the execution procedure, then it is my opinion held to a reasonable degree of medical certainty that the use of pancuronium places the condemned inmate at risk for consciously experiencing paralysis, suffocation, and the excruciating pain of the intravenous injection of high dose potassium chloride. Heath Affidavit ¶ 9.

D) Based on the information available to me, it is my opinion held to a reasonable degree of medical certainty that Ohio's lethal injection protocol creates an unacceptable risk that the inmate will not be anesthetized to the point of being unconscious and unaware of pain for the duration of the execution procedure. If the inmate is not first successfully anesthetized, then it is my opinion to a reasonable degree of medical certainty that the pancuronium will paralyze all voluntary muscles and mask external, physical indications of the excruciating pain being experienced by the inmate during the process of suffocating (caused by the pancuronium) and having a cardiac arrest (caused by the potassium chloride). Heath Affidavit ¶ 10.

E) If administered alone, a lethal dose of pancuronium would not immediately cause a condemned inmate to lose consciousness. It would totally immobilize the inmate by paralyzing all voluntary muscles and the diaphragm, causing the inmate to suffocate to death while experiencing an intense, conscious desire to inhale. Ultimately, consciousness would be lost, but it would not be lost as an immediate and direct result of the pancuronium. Rather, the loss of consciousness would be due to

suffocation, and would be preceded by the torment and agony caused by suffocation. Heath Affidavit ¶ 11.

F) It is my understanding that Ohio's execution protocol requires the presence of media witnesses to the execution, and permits the presence of witness chosen by the inmate and chosen by the victim's surviving family members. It is my opinion based on a reasonable degree of medical certainty that the use of pancuronium effectively nullifies the ability of witnesses to discern whether or not the condemned prisoner is experiencing a peaceful or agonizing death. Regardless of the experience of the condemned prisoner, whether he or she is deeply unconscious or experiencing the excruciation of suffocation, paralysis, and potassium injection, he or she will appear to witnesses to be serene and peaceful due to the relaxation and immobilization of the facial and other skeletal muscles. Heath Affidavit ¶ 13.

G) Based on my research into issues related to lethal execution, I know that there was a time when pancuronium was an acceptable drug for use by veterinarians in the euthanasia of household pets such as dogs and cats; but that the use of pancuronium is now prohibited by many veterinary guidelines in this and other countries for precisely the reasons outlined above. Veterinary standards forbid creating the risk that household pets would die while pancuronium masks the type of excruciating pain human beings are exposed to in Ohio's execution protocol. The use of pancuronium fails to comport with the evolving "standard of decency" regarding the ending of life in household pets. In my medical opinion, based on a reasonable degree of medical certainty, the use of pancuronium in the lethal injection protocol for executing human beings violates standards of decency designed to prevent the infliction of excruciating pain and suffering on human beings. Heath Affidavit ¶ 14.

H) Another major concern I have based on what I know about Ohio's lethal injection protocol relates to the use of sodium thiopental. Sodium thiopental is an ultrashort-acting barbiturate with a very short shelf life in liquid form. Thiopental is distributed in powder form to increase its shelf life; it must be mixed into a liquid solution by trained personal before it can be injected. Heath Affidavit ¶ 15.

I) When anesthesiologists use sodium thiopental, we do so for the purposes of temporarily anesthetizing patients for sufficient time to intubate the trachea and institute mechanical support of ventilation and respiration. Once this has been achieved, additional drugs are administered to maintain a "surgical depth" or "surgical plane" of anesthesia (*i.e.*, a level of anesthesia deep enough to ensure that a surgical patient feels no pain and is unconscious for the duration of the surgical procedure). The medical utility of thiopental derives from its ultrashort-acting properties: if unanticipated obstacles hinder or prevent successful intubation, patients will quickly regain consciousness and will resume ventilation and respiration on their own. Heath Affidavit ¶ 16.

J) The benefits of thiopental in the operating room engender serious risks in the execution chamber. Based on the information I have available to me concerning Ohio's execution protocol, a two (2) gram dose of sodium thiopental is apparently administered in a single injection from a single syringe. By contrast, based on my research and the research of others into the procedures for executing human beings by means of lethal injection, the original design of the lethal injection protocol called for the **continuous** intravenous administration of an ultrashort-acting barbiturate. Based on my research and the research of others, the central elements of the lethal-injection procedure used in Ohio is similar to the one adopted many years ago in Oklahoma (which, it appears, many states used as a model without substantive independent research). Oklahoma requires the "continuous intravenous administration of an ultrashort-acting barbiturate" (Oklahoma Statutes, Title 22 Criminal Procedure, Chapter 17 part 1014 A). It does not appear that Ohio's protocol includes this "continuous" requirement. The use of a continuous administration of the ultrashort-acting barbiturate is essential to ensure continued and sustained unconsciousness during the administration of pancuronium and potassium chloride. It is my opinion based on a reasonable degree of medical certainty that the failure to require a continuous infusion of thiopental places the condemned inmate at a needless and significant risk for the conscious experience of paralysis during the excruciating pain of both suffocation and the intravenous injection of potassium chloride. Heath Affidavit ¶ 17.

K) Based on my research into lethal injection, the dose of pentothal described in the Ohio protocol, 2 grams, is considerably lower than the doses described in the protocols of many states and the Federal Government. It is my opinion based on a reasonable degree of medical certainty that Ohio's relatively low dose of thiopental amplifies the concern relating to the single injection (as opposed to continuous infusion) of this ultrashort-acting barbiturate, thereby further elevating the risk that the condemned person will suffer excruciating pain masked by the pancuronium. Heath Affidavit ¶ 18.

L) Above and beyond my concerns stated above about the drugs used in Ohio, the details of Ohio's lethal injection protocol that I have been made aware of do not account for procedures designed to ensure the proper preparation of the drugs used. I have not seen details regarding the credentials, certification, experience, or proficiency of the personnel who will be responsible for the mixing of the thiopental from powder form, or for the drawing up of the drugs into the syringes. Preparation of drugs, particularly for intravenous use, is a technical task requiring significant training in pharmaceutical concepts and calculations. It is my opinion based on a reasonable degree of medical certainty, and based on my review of lethal execution procedures in states that have disclosed more detailed information that what I have seen about Ohio's procedures, that there exist many risks associated with drug

preparation that, if not properly accounted for, further elevate the risk that an inmate will consciously experience excruciating pain during the lethal injection procedures. Heath Affidavit ¶ 20.

M) The information available to me provides inadequate detail regarding the training, credentials, certification, experience, or proficiency of any prison employee, nurse or paramedic who performs the execution procedure. The absence of such detail raises critical questions about the degree to which condemned inmates risk suffering excruciating pain during the lethal injection procedure. It is my opinion based on a reasonable degree of medical certainty that the correct and safe management of intravenous drug and fluid administration requires a significant level of professional acumen, and can not be adequately performed by personnel lacking the requisite training and experience. The great majority of nurses are not trained in the use of ultrashort-acting barbiturates; indeed, this class of drugs is essentially only used by nurses who have significant experience in intensive care units and as nurse anesthetists. Very few paramedics are trained or experienced in the use of ultrashort-acting barbiturates. Based on my medical training and experience, and based upon my research of lethal injection procedures and practices, inadequacies in these areas elevate the risk that the lethal injection procedure will cause the condemned to suffer excruciating pain during the execution process. Heath Affidavit ¶ 22.

N) Based on my research into methods of lethal injection used by various states and the federal government, and based on my training and experience as a medical doctor specializing in anesthesiology, it is my opinion based on a reasonable degree of medical certainty that, given the apparent absence of a central role for a properly trained medical or veterinary professional in Ohio's execution procedure, it can and should be presumed that the lethal injection procedure Ohio employees creates medically unacceptable risks of infliction excruciating pain and suffering on inmates during the lethal injection procedure. Heath Affidavit ¶ 26.

Firsthand Account of Adverse Effects of Drug Failure

25. Dr. Heath's opinions and observations are corroborated by the experience of persons like eye-surgery patient Carol Wehrer. During Ms. Wehrer's surgery, the sedative she received was ineffectual, leaving Ms. Wehrer conscious during her surgery. Due to the administration of a neuromuscular blocking agent like pancuronium bromide, however, she was unable to tell her doctors she was awake and in terrible pain: "I therefore experienced what has come to be known as Anesthesia Awareness, in which I was able to think lucidly, hear, perceive and feel

everything that was going on during the surgery, but I was unable to move. It burnt like the fires of hell. It was the most terrifying, torturous experience you can imagine. The experience was worse than death.” (Exhibit 4.) The paralytic agent made Ms. Wehrer appear sedated even though she was experiencing intense pain as the doctors removed her eyeball. The combination of the kinds of chemicals Defendants use during Ohio’s lethal injection procedures resulted in this horrifying experience.

26. Defendants cannot rule out the possibility that the thiopental sodium (the short-acting sedative, which is the first drug administered during the lethal injection procedure) will fail to adequately sedate Plaintiffs.
27. Defendants’ lethal injection protocol fails to require that a person with adequate medical training be present to witness the execution, to employ the medical monitoring equipment necessary to detect failures in the procedure, and to take appropriate steps if and when it becomes evident that the condemned inmate is suffering excruciating pain.
28. Defendants’ lethal injection protocol does not include nor require the use of any medical equipment designed to monitor the condemned person’s heart beat, pulse, or brain waves during the execution (*i.e.*, from the point at which the condemned person is strapped to the execution table in the execution chamber until death is pronounced).

Improper Chemical Veil

29. Upon information and belief, Defendants have no medically justified reason for using pancuronium (or any other neuromuscular blocking agent) during the lethal injection procedures.

30. Upon information and belief, using pancuronium or any other neuromuscular blocking agent in the lethal injection protocol serves no purpose other than to place Plaintiffs into a state of “chemical entombment” while they consciously experience suffocation, the pain of potassium chloride, and the pain of cardiac arrest.
31. Upon information and belief, Defendants intend to use pancuronium or any other neuromuscular blocking agent for the sole but unconstitutional purpose of wrapping Plaintiffs in a chemical veil to hide the muscular convulsions otherwise evident in human beings fighting suffocation and experiencing cardiac arrest.
32. Upon information and belief, Defendants can offer no rational, non-arbitrary justification for using pancuronium. At best, Defendants’ use of this drug creates unconstitutional risks in service of the unjustifiable purpose offered by Georgia Medical Examiner Dr. Sperry, who said, when testifying about a similar lethal injection method, that a neuromuscular blocking agent is used “to paralyze all the muscles such that those outwardly aesthetically unpleasant things are not seen and do not occur.” State v. Michael Wayne Nance, Gwinnett County Superior Court, Indictment No. 95-B-2461-4, Tr. 39-40, July 30, 2002. Dr. Sperry may have meant that, even when properly sedated, a condemned person’s body may convulse while dying during an execution by lethal injection, and these convulsions would be “aesthetically unpleasant” for executioners and witnesses. This is not a constitutionally valid purpose.
33. Once paralyzed, neither the Defendants nor the witnesses could tell if the sedative failed, leaving Plaintiffs in horrific but undetectable pain. Witnesses viewing the lethal injection procedure and the general public will never realize the cruel fraud perpetrated upon them:

instead of witnessing an inmate quiet and motionless, euphemistically thought of as being “put to sleep,” they are in fact witnessing the chemical cover-up of an act of excruciating torture.

34. Upon information and belief, Defendants fail to include in their execution methods readily available medical equipment which, if used by properly trained personnel, would alert Defendants and their executioner agents to the fact that the sedative failed but the paralytic agent took effect, thus leaving Plaintiffs conscious but experiencing extreme pain as would be manifest by bodily functions monitored by the medical equipment. Defendants’ methods of execution violate Plaintiffs’ constitutional rights by reason of the failure to put in place procedures for the use of medical monitoring equipment and other such necessary procedures and properly trained execution personnel to respond appropriately to the information revealed by the medical equipment.

Inadequate Training of Execution Personnel

35. Upon information and belief, Defendants’ lethal injection protocol fails to provide a person or persons with adequate medical training to witness the execution and stand ready to take appropriate steps if and when it becomes evident that the condemned inmate is suffering excruciating pain, and/or the drugs are not being properly delivered into the condemned inmate’s body, and/or the drugs are not having their intended effect.
36. Upon information and belief, Defendants’ failure to provide rational, reliable directions or standards for the requisite training, education, and expertise of the personnel who carry out executions by lethal injection in Ohio leads to the conclusion that Defendants’ execution methods violates Plaintiffs’ constitutional rights.

37. Upon information and belief, Defendants' lethal injection execution procedures fail to address all factors necessary to ensure compliance with constitutional requirements, including but not limited to the following factors. If some or all of these factors have been addressed, then Defendants have violated Plaintiffs' constitutional rights by failure to disclose them:

A) the minimum qualifications, expertise, and training required for the different personnel performing the tasks involved in the lethal injection procedure after the catheter is inserted;

B) the methods for obtaining, storing, mixing, and appropriately labeling the drugs, the minimum qualifications and expertise required for the person who will be determining the concentration and dosage of each drug to give, and the criteria that shall be used in exercising this discretion;

C) the manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

D) the manner in which a heart monitoring system shall be installed and utilized to ensure that the inmate is deeply sedated while dying; and the qualifications and expertise required for the person who operates this equipment;

E) the manner in which the IV catheters shall be inserted into the condemned prisoner, the minimum qualifications and expertise required for the person who is given the responsibility and discretion to decide when efforts at inserting the IV catheters should be abandoned in favor of some other constitutionally acceptable procedure; and the manner in which the condition of the condemned prisoner will be monitored to confirm that proceeding to the next procedure would not inflict severe and unnecessary pain and suffering on the condemned prisoner;

F) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to order the staff to divert from the established protocols if necessary to avoid inflicting severe and unnecessary pain and suffering on the condemned prisoner, and the criteria that shall be used in exercising this discretion; and

G) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to ensure that appropriate procedures are followed in response to unanticipated problems or events arising during the lethal injection procedure, and the criteria that shall be used in exercising this discretion.

Veterinarians Cannot Euthanize House Pets with the Drugs Defendants Use to Execute Human Beings

38. Defendants intend to execute Plaintiffs by using drugs veterinarians cannot use during the euthanasia of house pets. Specifically, using a paralyzing, neuromuscular blocking agent violates veterinarians' ethical standards.
39. Using paralyzing agents violates veterinarians' ethical standards. The leading professional association of veterinarians prohibits the use of paralyzing agents during the euthanasia of house pets. The American Veterinarian Medical Association's (AVMA) year 2000 Report on Euthanasia clearly declares that "[a] combination of pentobarbital [an anesthetic in the same category of drugs as thiopental] with a neuro-muscular blocking agent [like pancuronium] is not an acceptable euthanasia agent." (Exhibit 5.) It is not acceptable because the paralytic agent may mask the failure of the other drugs, resulting in a painful death.
40. Since 1981, many states have passed laws governing the euthanasia of pets that preclude the use of a sedative in conjunction with a neuromuscular blocking agent. Texas, 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. 4:22-19.3 (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 implicitly 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. See Exhibit 6 (chart outlining statutes).

41. These statutory declarations, which embody societal values for the euthanasia of house pets, underscore the inhumanity of methods by which Defendants intend to execute Plaintiffs. Euthanasia techniques banned as cruel to dogs and cats by definition violate standards of decency regarding the execution of human beings. The discordance between standards for pet euthanasia and Ohio's lethal execution procedures proves that Defendants' lethal injection procedures fall far outside contemporary standards of decency. Compare Atkins v. Virginia, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States [that have banned executing those with retardation] that is significant, but the consistency of the direction of change.").

Plaintiffs' Counsel Should Have The Right To Witness The Execution

42. Plaintiffs have a right to select three persons who are not confined in any state institution to witness their executions; plus they can ask the clergyperson in attendance to witness their executions. O.R.C. § 2949.25(A)(5).
43. Defendants' execution procedures do not provide an automatic right for counsel for Plaintiffs to be a witness to those parts of the execution process that are seen by those who are witnesses

to an execution. Instead, Defendants' execution procedures permit counsel for Plaintiffs to be a witness to the execution only if Plaintiffs nominate counsel to be one of the three witnesses allotted by O.R.C. § 2949.25(A)(5), and by Defendants' customs and practices governing who actually witnesses an execution.

44. Defendants execution procedures and O.R.C. § 2949.25(A)(2) permit the sheriff of the county where a condemned person was tried and convicted to be a witness to an execution. Defendants practices, routines, and formal and informal procedures and customs governing executions, permit a prosecutor from the county where the condemned inmate was tried and convicted to witness the execution without requiring representatives of the victim to yield one of the three witness positions they are entitled to select pursuant to O.R.C. § 2949.25(A)(6).
45. Plaintiffs should have the right to have their counsel witness their executions, just as representatives of the State, law enforcement, and the prosecuting authority have a right to witness the execution. Plaintiffs should be able to exercise this right without being forced to choose between having their counsel be a witness in lieu of one of the three persons they can otherwise choose to be witnesses pursuant to O.R.C. § 2949.25(A)(5). Plaintiffs are entitled to have their counsel witness Plaintiffs' executions in order to ensure that Plaintiffs have an advocate present to represent their interests in the event something goes wrong during the execution process.
46. Defendants have the power and authority to provide Plaintiffs with the right to have their counsel witness Plaintiffs' executions without forcing Plaintiffs to use one of the three witness slots allotted by O.R.C. § 2949.25(A)(5). The fact that Defendants have this power and authority is illustrated and proven by the fact that Defendants have permitted and/or have expressed a

willingness to permit persons to witness executions even if those persons do not fit squarely into one of the categories described in O.R.C. § 2949.25, including but not limited to allowing a prosecutor from the county where the condemned person was tried and convicted to witness an execution without taking one of the three witness slots allotted to the victim's family by O.R.C. § 2949.25(A)(6); allowing persons to witness an execution on behalf of the victim when they were not chosen to be a witness by an immediate member of the victim's family; and/or allowing persons to witness an execution when those persons were representatives of a victim whose murder did not lead to the death sentence underlying the execution.

Injunctive Relief Warranted

47. Plaintiffs are entitled to a preliminary injunction stopping Defendants from executing them with the methods and procedures described herein because (1) there is a significant likelihood that they will prevail on the merits; (2) they will suffer irreparable harm if they are executed; (3) there is a great impact on the public's interest in making sure our government does not behave like those of other nations we roundly condemn for utilizing execution methods that violate our nation's constitutional proscription against cruel and unusual punishment; and (4) there is a substantial possibility that others under a sentence of death in Ohio will suffer unconstitutional executions unless this Court requires Defendants to design constitutionally acceptable execution procedures. Vittitow v. City of Upper Arlington, 43 F. 3d 1100, 1108-1109 (6th Cir. 1995); Basicomputer Corp. v. Scott, 973 F. 2d 507, 511 (6th Cir. 1992).
48. Plaintiffs do not seek injunctive relief under 42 U.S.C. § 1983 as a means of attacking their underlying convictions or death sentences; rather, they simply seek to utilize 42 U.S.C. § 1983 as a legitimate means to stop Defendants from executing them in a manner that violates their

constitutional rights. If Defendants implement execution procedures that do not violate Plaintiffs' constitutional rights, then Defendants will be entitled to execute Plaintiffs barring relief granted through some other judicial or clemency proceeding.

49. 42 U.S.C. § 1983 provides, in pertinent part, for the protection of "any rights, privileges, or immunities secured by the Constitution and laws" against infringement by the states. When these rights are violated, 42 U.S.C. § 1983 creates an action for damages and injunctive relief for the benefit of "any citizen of the United States" against the state actor responsible for the violation. In accordance with the remedial nature of the statute, the coverage of 42 U.S.C. § 1983 must be "liberally and beneficently construed." Dennis v. Higgins, 498 U.S. 439, 443 (1991) (quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 684 (1978)). In order to effect this liberal construction, the Court has "given full effect to [the statute's] broad language" by recognizing that 42 U.S.C. § 1983 provides a remedy "against all forms of official violation of federally protected rights." Id. at 444.

50. The Eighth Amendment's proscription against cruel and unusual punishment forbids the infliction of unnecessary pain in the execution of a death sentence. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) (opinion of Reed, J.). A punishment is particularly constitutionally offensive if it involves the foreseeable infliction of suffering. Furman v. Georgia, 408 U.S. 238, 273 (1973), citing Resweber, supra (had failed execution been intentional and not unforeseen, punishment would have been, like torture, "so degrading and indecent as to amount to a refusal to accord the criminal human status"). State officials cannot use methods of execution that demonstrate deliberate indifference towards rights protected by

the Eighth and Fourteenth Amendments. See generally Nelson v. Campbell, 541 U.S. ___, 2004 U.S. LEXIS 3680 (2004).

51. It is foreseeable that death by lethal injection under the methods employed by Defendants will cause Plaintiffs to suffer gratuitous pain. Far from producing a rapid and sustained loss of consciousness and a humane death, Defendants' means and methods of lethal injection can and will cause Plaintiffs to consciously suffer a painful and protracted death.
52. Defendants have failed to demonstrate that they have in place procedures and protocols to guard against equipment failure, drug failure, or other things that can and predictably will go wrong during the lethal injection process. Defendants have failed to demonstrate that they have installed equipment to monitor Plaintiffs' bodily functions so that they can immediately detect any failure in the drug regimen used to sedate and then kill Plaintiffs. Defendants have failed to demonstrate that they have chosen and plan to use drugs that will achieve the stated purpose of causing Plaintiffs' deaths in compliance with constitutional requirements.

VI. First Claim: Eighth Amendment Violation

53. Plaintiffs incorporate all preceding paragraphs as if fully rewritten herein.
54. Defendants have created, maintained and implemented lethal injection procedures, practices, customs, and methods that they intend to use to execute Plaintiffs. Defendants' lethal injection methods manifest their deliberate indifference towards Plaintiffs' constitutional rights, both by what Defendants include and what they exclude from their methods of execution by lethal injection. These execution methods will violate Plaintiffs' constitutional rights to be free from arbitrary, capricious, cruel, and unusually painful punishment, which rights are secured and guaranteed to them by the Eighth Amendment of the United States Constitution, as incorporated

by the Fourteenth Amendment of the United States Constitution to limit Defendants' powers while acting individually or under the color and authority of state law.

VII. Second Claim: Fourteenth Amendment Due Process Violation

55. Plaintiffs incorporate all preceding paragraphs as if fully rewritten herein.

56. Defendants have created, maintained and implemented lethal injection procedures, practices, customs, and methods that they intend to use to execute Plaintiffs. Defendants' lethal injection methods manifest their deliberate indifference towards Plaintiffs' constitutional rights, both by what Defendants include and what they exclude from their methods of execution by lethal injection. These execution methods will violate Plaintiffs' constitutional rights to substantive and procedural due process as secured and guaranteed to them by the Fourteenth Amendment of the United States Constitution, which limits Defendants' powers while acting individually or under the color and authority of state law.

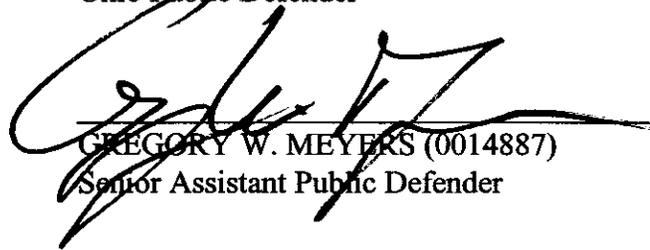
VIII. Prayer for Relief

- A. Plaintiffs request that this Court grant them injunctive relief by granting a preliminary and permanent injunction barring Defendants from executing Plaintiffs in the manner by which Defendants currently intend to execute Plaintiffs, in order to prevent Defendants from violating Plaintiffs' federal constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution.
- B. Plaintiffs request that this Court grant them declaratory relief by issuing an Order declaring that the Defendants' current means, methods, practices, procedures, and customs regarding execution by lethal injection violate the Eighth and Fourteenth Amendments to the United States Constitution.

- C. Plaintiffs request that this Court grant them injunctive relief by granting a preliminary and permanent injunction barring Defendants from executing Plaintiffs unless Defendants first give Plaintiffs the right to choose to have one of their attorneys witness Plaintiffs' executions without forcing Plaintiffs to choose to have counsel witness at the cost of using one of the three witness slots allotted by O.R.C. § 2949.25(A)(5).
- D. Plaintiffs request that this Court grant them reasonable attorney fees pursuant to 42 U.S.C. § 1988 and the laws of the United States.
- E. Plaintiffs request that this Court grant such further relief as it deems just and proper.

Respectfully submitted,

DAVID BODIKER
Ohio Public Defender



GREGORY W. MEYERS (0014887)
Senior Assistant Public Defender



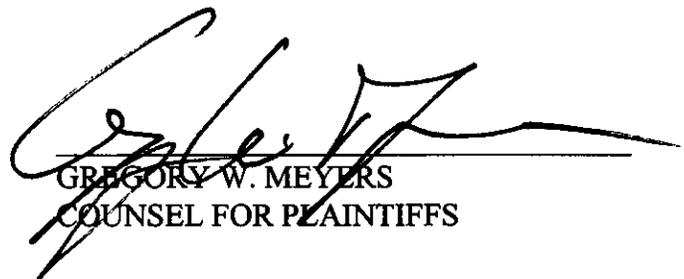
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COUNSEL FOR PLAINTIFFS

**NOTICE OF INTENT TO REQUEST DEFENDANTS TO WAIVE
SERVICE OF SUMMONS PURSUANT TO F. R. Civ. P. 4(d)(2)**

Notice is hereby given that Plaintiffs, through counsel, intend to ask Defendants to waive service of summons pursuant to Federal Rule of Civil Procedure 4(d)(2) . In addition, Plaintiffs, though counsel, will hand deliver a courtesy copy of their complaint and exhibits to the Office of the Ohio Attorney General, attention Senior Deputy Attorney General Timothy D. Prichard, Capital Crimes Section, 30 East Broad Street, 23rd Floor, Columbus, Ohio, on this 10th day of June, 2004.



GREGORY W. MEYERS
COUNSEL FOR PLAINTIFFS