

240 F.R.D. 145  
United States District Court,  
D. Delaware.

Robert W. JACKSON, III, Plaintiff,

v.

Carl C. DANBERG, Thomas L. Carroll, Paul  
Howard, Other Unknown State Actors  
Responsible for and Participating in the Carrying  
Out of Plaintiff's Execution, all in their individual  
and official capacities, Defendants.

<sup>1</sup> The caption has been changed to reflect "Carl C. Danberg" as Commissioner of the Delaware Department of Correction, in place of "Stanley W. Taylor, Jr." The parties are directed to advise the court if any other of the individuals should be changed to reflect the current holders of the positions represented in the caption.

No. CIV.06 300 SLR. | Feb. 22, 2007.

#### Attorneys and Law Firms

\*146 Maureen Kearney Rowley, Chief Federal Defender. Michael Wiseman, Helen Marino and Megan McCracken, Assistant Federal Defenders, Federal Community Defender for the Eastern District of Pennsylvania, Capital Habeas Corpus Unit, Philadelphia PA, for Plaintiff.

Loren C. Meyers, Deputy Attorney General and Gregory E. Smith, Deputy Attorney General, State of Delaware Department of Justice, Wilmington, DE, for Defendants.

#### MEMORANDUM OPINION

ROBINSON, Chief Judge.

#### I. INTRODUCTION

Plaintiff Robert Jackson instituted this 42 U.S.C. § 1983 action challenging aspects of defendants' methods for carrying out lethal injection as violative of the Eighth Amendment of the United States Constitution.<sup>2</sup> (D.I. 2) Before the court is plaintiff's motion for an order certifying a state-wide class pursuant to Fed.R.Civ.P. 23(a),(b)(1) & (2), consisting of all current and future prisoners in the custody of the Delaware Department of Correction who are, or will be, sentenced to death.<sup>3</sup> (D.I. 26) Plaintiff's counsel moves to be appointed as class counsel.<sup>4</sup> Although defendants oppose the motion, they acknowledge that the requirements for class certification have all been satisfied except for "numerosity". (D.I. 28)

Oral argument to address the practical implications posed by plaintiff's motion was conducted on February 8, 2007. (D.I. 30)

<sup>2</sup> Contemporaneously, plaintiff moved for a preliminary injunction to stay his scheduled execution. (D.I. 6) On May 9, 2006, the court entered an order enjoining defendants from carrying out plaintiff's execution until further order. (D.I. 9)

<sup>3</sup> There are 16 inmates presently under a sentence of death. (D.I. 28, fn. 1)

<sup>4</sup> Plaintiff also submitted a proposed "Notice to the Class" to be distributed individually to current class members and to be posted prominently in the facility in which the putative class is incarcerated. (D.I. 26, ex. 1)

#### \*147 II. STANDARD OF REVIEW

<sup>[1]</sup> <sup>[2]</sup> A district court has broad discretion to grant or deny class certification. *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir.1985). The court does not inquire into the merits of the lawsuit when determining whether it may be maintained as a class action. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). However, the court must conduct a limited preliminary inquiry, examining beyond the pleadings, to determine whether common evidence could suffice to make out a prima facie case for the class. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir.2001).

<sup>[3]</sup> The party seeking class certification bears the burden of establishing that certification is warranted under the circumstances. *In re ML-Lee Acquisition Fund II, L.P. Sec. Litig.*, 848 F.Supp. 527, 557 (D.Del.1994). Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements for certification of a class. Four requirements must be satisfied in order for a class to be certified under Rule 23(a). *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). These requirements are: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class. *In re: Warfarin Sodium Antitrust Litigation*, 212 F.R.D. 231, 246 (D.Del.2002). Plaintiff

bears the burden to “establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met.” *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir.1994).

### III. DISCUSSION

#### A. Numerosity

<sup>[4]</sup> <sup>[5]</sup> The factors to consider with respect to the numerosity requirement are (1) the size of the class, (2) the expediency of joinder, and (3) the practicality of multiple lawsuits. *ML-Lee*, 848 F.Supp. at 558. Plaintiff’s putative class would potentially have 16 members. The number of class members is fluid, argues plaintiff, because new members are added (due to new death sentences) and deleted (by death) on a regular basis. (D.I. 27) For example, over the last 12 months, two inmates were added to death row while two other inmates were granted relief that removed them from death row, representing a 25% change in the composition of the class. (*Id.* at 3)

Defendants counter that 16 potential members is an insufficient number of class members to satisfy the numerosity requirement and individual joinder of the other 15 death row inmates to plaintiff’s action is not impracticable. (D.I. 28) Because all putative class members have counsel appointed for representation in their respective post-conviction challenges, defendants assert that these attorneys can assist in filing individual suits similar to plaintiff’s or could intervene in the action at bar.

<sup>[6]</sup> It is clear that there is no rigid minimum number of class members necessary to warrant certification. *In re Daimlerchrysler AG Securities Litigation*, 216 F.R.D. 291, 295 (D.Del.2003); *Manning v. Princeton Consumer Discount Company, Inc.*, 390 F.Supp. 320, 324 (E.D.Pa.1975). And the numerosity requirement has been relaxed in cases like this where injunctive and declaratory relief is sought by the class. *Grant v. Sullivan*, 131 F.R.D. 436, 446 (E.D.Pa.1990) citing *Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir.1984). Accordingly, the court concludes that the putative class of 16 members is sufficient, especially considering that, as long as the death penalty is a viable sanction, the class possesses the potential to increase at random. To that end, although the identity of the members of the putative class may change, the defining characteristics and the parameters of the class will remain the same.

While defendants have opposed this motion primarily based on their assertion that joinder is possible and, alternatively, that each death row inmate can proceed with individual actions on the same claims, the court is not convinced that proceeding in either fashion \*148 will result in consistent adjudications or will be the most

prudent course to conserve scarce judicial resources. Specifically, defendants have not presented any practical reason for the court to deny certification nor have they addressed how to deal with the morass of problems associated with adding and removing parties from on-going litigation at various stages of litigation, nor how to ensure that judicial determinations are consistently and evenly applied. It is likewise dubious that counsel appointed to represent the respective death row inmates for post-conviction relief could be appointed for representation in the civil rights actions. In contrast, plaintiff’s counsel are willing to assume representation of the class without seeking fees or costs.<sup>5</sup>

<sup>5</sup> According to plaintiff, his counsel are “experienced counsel employed by the Capital Habeas Corpus Unit of the Federal Community Defender for the Eastern District of Pennsylvania...[t]hey possess special expertise in capital jurisprudence and with regard to the Eighth Amendment and civil rights issues that will arise in this case.” (D.I. 27 at 11) Defendants do not challenge counsel’s qualifications. (D.I. 28)

#### B. Remaining Requirements of Rule 23(a)

Since defendants concede that plaintiff has satisfied the remaining requirements of Rule 23(a), it is unnecessary to discuss these factors at length. Plaintiff has demonstrated the commonality requirement; the issues before the court are whether aspects of Delaware’s method for carrying out lethal injection violate the Eighth Amendment. These issues will be resolved by a common set of facts. *Baby Neal*, 43 F.3d at 56.

The typicality requirement is satisfied because the injunctive relief sought to stop unconstitutional practices related to lethal injection will benefit the entire class and will not adversely affect the right of any absent class member. *In re Prudential Ins. Co.*, 148 F.3d 283, 311 (3d Cir.1998) (“The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals.”); *Baby Neal*, 43 F.3d at 58 (“Actions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit the mold”).

The representative parties will adequately protect the interests of the class because moving counsel are qualified, experienced in this area of the law, and ably equipped to pursue this class action. Moreover, plaintiff is an adequate representative of the proposed class because he shares the same issues of ensuring a constitutionally sufficient execution and his interests do not conflict with members of the putative class. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir.1975).

**C. Requirements of Rule 23(b)(1) and (2)**

The proposed class passes muster under Rule 23(b)(1) because allowing individual actions would create a risk of inconsistent decisions based on the same facts and law, which could be dispositive of plaintiff's individual rights.<sup>6</sup> Moreover, the putative class satisfies Rule 23(b)(2) because the court's decisions on the lethal injection issues should apply to all sentenced to death.

<sup>6</sup> Defendants "take no position whether maintaining individual actions would create a risk of inconsistent adjudications of the putative class' claims or would be dispositive of a potential plaintiff's rights." (D.I. 28 at 5) Defendants do not dispute that Rule 23(b)(2) is satisfied because the State of Delaware's lethal injection practices apply to any inmate subject to the death penalty.

**D. Notice to the Class**

Plaintiff's proposed Notice to the Class is appropriate and necessary to formally advise the potential class members of their rights in this litigation. There has been no showing that posting this information in an area accessible to death row inmates will pose any problem or concern.

**E. Appoint Counsel**

Michael Wiseman, Helen Marino and Megan McCracken, of the Capital Habeas Corpus Unit, Federal Community Defender Office for the Eastern District of Pennsylvania, are appointed counsel for the class.

**IV. CONCLUSION**

An order consistent with this memorandum opinion shall issue.

**\*149 ORDER**

At Wilmington this 22d day of February, 2007, for the reasons stated in the memorandum opinion issued this same date;

IT IS ORDERED that:

1. Plaintiff's motion (D.I. 26) is **granted**. This case is certified as a class action pursuant to Fed.R.Civ.P. 23(b)(1) & (2).
2. The following are appointed as class counsel with the understanding and agreement that counsel will not petition for fees or costs:  
  
Michael Wiseman, Helen Marino, Megan McCracken  
  
Capital Habeas Corpus Unit  
  
Federal Community Defender Office for the Eastern  
  
District of Pennsylvania  
  
Suite 545 West-The Curtis Center  
  
Philadelphia, PA 19106  
  
215-928-0520
3. Plaintiff's Proposed Notice to Class (D.I. 26, ex. 1) is approved. Class counsel shall provide one copy to each member of the class and a copy or copies will be posted prominently in the area(s) in which the class is incarcerated.