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JUL = 8 2005

FRANKLIN CIRCUIT COURT  
JANICE MARSHALL, CLERK

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO 04-CI-01094

**RALPH BAZE**

and

**THOMAS C. BOWLING**

**PLAINTIFFS**

V.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**JOHN REES, Commissioner  
Kentucky Department of Corrections**

and

**GLENN HAEBERLIN, Warden  
Kentucky State Penitentiary**

and

**ERNIE FLETCHER, Governor  
Commonwealth of Kentucky**

**DEFENDANTS**

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This action involves a challenge to the constitutionality of Kentucky's death penalty lethal injection protocol on grounds that it constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Section 17 of the Kentucky Constitution.<sup>1</sup> There are no issues before the Court involving the Plaintiffs' guilt and convictions by jury. Nor are the juries' recommended death sentences at question. The only issue to be decided is the manner in which the Commonwealth of Kentucky will carry out the sentence on the condemned Plaintiffs. A bench trial was

<sup>1</sup> The 8<sup>th</sup> Amendment to the United States Constitution and Section 17 of the Kentucky Constitution state: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

conducted and the parties have submitted post-trial briefs. This Court now makes the following findings of fact and conclusions of law.

### BACKGROUND

In May of 1977, Oklahoma became the first state to adopt lethal injection.<sup>2</sup> Execution through the administration of drugs intravenously was recommended by Dr. Deutsch, then head of Oklahoma's Medical School Anesthesiology Department because lethal injection was "[w]ithout question... extremely humane in comparison to" electrocution and lethal gas.<sup>3</sup> The typical lethal injection consists of three chemicals.<sup>4</sup> The first chemical is an ultra-short acting barbiturate, sodium thiopental (trademark name Sodium Pentathol). The second chemical is pancuronium bromide (trademark name Pavulon), a muscular paralytic agent. The third chemical, potassium chloride, induces cardiac arrest.<sup>5</sup>

Since Oklahoma's adoption in 1977, thirty-seven States have approved lethal injection as a means of execution.<sup>6</sup> However, there is scant evidence that ensuing States' adoption of lethal injection was supported by any additional medical or scientific studies that the adopted form of lethal injection was an acceptable alternative to other methods. Rather, it is this Court's impression that the various States simply fell in line relying solely on Oklahoma's protocol from Dr. Deutsch in drafting and approving a lethal injection protocol. Kentucky is no different.

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<sup>2</sup> Deborah W. Denno, *Symposium Addressing Capital Punishment through Statutory Reform*, 63 Ohio St. L.J. 63 (2002).

<sup>3</sup> *Id.* at 95-96.

<sup>4</sup> Although the original lethal injection protocol from Oklahoma recommended only the first two chemicals, Sodium Pentathol and Pavulon.

<sup>5</sup> *Id.* at 98.

<sup>6</sup> *Stanford v. Kentucky*, 492 U.S. 361, 362 (1989), *abrogated by Roper v. Simmons*, 125 S.Ct. 1183 (2005).

In 1998, the General Assembly of the Commonwealth of Kentucky adopted lethal injection as a method of execution. The relevant statute, KRS 431.220, states in part: "every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death." Thereafter, Phillip Parker, Warden at the Kentucky State Penitentiary, instituted a protocol for the injection of Sodium Thiopental, Pancuronium Bromide, and Potassium Chloride. On May 25, 1999, Eddie Lee Harper became the first and only inmate to date to be executed under Kentucky's lethal injection protocol.

The Plaintiffs in the case at hand, Ralph Baze and Thomas C. Bowling, are both death sentenced inmates under the supervision of the Kentucky Department of Corrections, and held at the Kentucky State Penitentiary in Eddyville, Kentucky. By default, both Plaintiffs have selected the lethal injection method of execution. *See* KRS 431.220(1)(b). The Plaintiffs filed this action in the Franklin Circuit Court pursuant to Civil Rules 57 (declaratory judgment) and 65.01 (injunctive relief) for threatened violations of their right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution.

The Plaintiffs maintain that the Defendants' lethal injection protocol violates their state and federal constitutional rights against cruel and unusual punishment because it utilizes the drug pancuronium bromide (Pavulon), provides only a low dose of a short-acting barbiturate (Sodium Pentathol), and fails to implement adequate execution procedures.<sup>7</sup> The Plaintiffs assert that the chemicals used cause a level and risk of pain

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<sup>7</sup> The Plaintiffs also presented a challenge to the use of a "cut down" procedure to obtain venous access, which is no longer at issue due to Defendants' voluntary removal of the procedure from the lethal injection

that is more than the Constitution tolerates and is unnecessary because readily available alternatives exist that pose less risk of pain and suffering.

The Plaintiffs ask the Court to issue a declaratory judgment that the Defendants' procedures are cruel and unusual because they: (1) use pancuronium bromide during an execution; (2) use potassium chloride during an execution; (3) fail to administer an analgesic; (4) use an ultra short acting barbiturate; (5) fail to ensure that they are delivering an adequate concentration of sodium thiopental; (6) fail to specify the concentration of sodium thiopental; (7) insert a needle into the condemned's neck; (8) spend up to 60 minutes to insert an I.V.; (9) fail to monitor for anesthesia awareness; and (10) lack equipment and trained personnel for resuscitation of life in the event of a stay. Last, the Plaintiffs request a declaratory judgment on the issue of whether the Defendants are violating KRS 431.220 by not providing a continuous administration of the lethal injection chemicals.

The Defendants, Kentucky Department of Corrections Commissioner John D. Rees, Kentucky State Penitentiary Warden Glenn Haeberlin, and Governor Ernie Fletcher maintain that Kentucky's execution protocol by lethal injection passes constitutional muster. The Defendants argue that the Plaintiffs have failed to demonstrate that Kentucky's lethal injection protocol is incompatible with evolving standards of decency or involves the unnecessary and wanton infliction of pain. Rather, the evidence presented proves that there is no unnecessary pain inherent in an execution by lethal injection and chemicals utilized in the protocol according the corresponding dosages would result in a quick and painless death.

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protocol. The Plaintiffs also challenged the constitutionality of electrocution, which this Court dismissed in an order dated October 13, 2004. Neither Plaintiff has elected to be executed by electrocution.

In further support of the validity of Kentucky's lethal injection protocol, the Defendants emphasize: (1) the protocol eliminates any undue risk of consciousness, (2) the protocol allows medical professionals discretion to perform their duties, (3) there is minimal risk of error in reconstituting Sodium Thiopental, and (4) any speculated risk of accident during the execution process does not need to be eliminated in order to survive constitutional review. In sum, the Defendants assert that the Plaintiffs have not demonstrated that Kentucky's lethal injection methodology creates an unreasonable and medically unacceptable risk of subjecting them to undue pain and suffering.

#### **STANDARD OF REVIEW**

This action was filed in accordance with Kentucky Rule of Civil Procedure 57. The Plaintiffs ask the Court for declaratory judgment that Kentucky's lethal injection execution protocol violates or threatens to violate their rights to be free from cruel and unusual punishment. To prevail, the Plaintiffs must establish this constitutional violation by a preponderance of the evidence. *Woods v. Com.*, 142 S.W.3d. 24, 43 (Ky. 2004).

A method of execution is viewed as cruel and unusual punishment under the U. S. Constitution when the procedure for execution creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)(plurality opinion). When considering whether the method of execution violates the Eighth Amendment to the U. S. Constitution prohibition on cruel and unusual punishment, courts must consider whether such is contrary to evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Under Section 17 of the Kentucky Constitution, a method of punishment is cruel and unusual if it shocks the moral sense of all reasonable men as to what is right and proper under the circumstances. *Weber v. Com.*, 303 Ky. 56, 196 S.W.2d 465, 469 (Ky. 1946).

The framework for addressing the constitutionality of an execution method includes a determination: (1) whether the method of execution comported with the contemporary norms and standards of society; (2) whether it offends the dignity of the prisoner and society; (3) whether it inflicts unnecessary physical pain; and (4) whether it inflicts unnecessary psychological suffering. *Weems v. United States*, 217 U.S. 349 (1910).

#### **FINDINGS OF FACT**

Based upon the evidence presented at trial, the Court finds as follows:

1. In 1998, the Commonwealth of Kentucky first drafted a lethal injection protocol.
2. Those persons assigned the initial task of drafting the Commonwealth of Kentucky's first lethal injection protocol were provided with little to no guidance on drafting a lethal injection protocol and were resolved to mirror protocols in other states, namely Indiana, Virginia, Georgia, and Alabama.
3. In developing a lethal injection execution protocol, the Commonwealth of Kentucky, Department of Corrections, did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned<sup>8</sup>. Nor were any medical personnel

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<sup>8</sup> Kentucky appears to be no different than any other state or the Government of the United States. In addition, the Plaintiffs have not presented any scientific study indicating a better method of execution by lethal injection.

- consulted in 2004 when the lethal injection protocol dosage of sodium thiopental (trade name Sodium Pentathol) was increased from 2 grams to 3 grams.
4. The current lethal injection protocol requires the injection of the following drugs in the condemned in the sequence of: Sodium Thiopental (3gm), Saline (25mg), Pavulon (50mg), Saline (25mg), and Potassium Chloride (240 meq). Prior to execution by lethal injection, the condemned will be provided with a therapeutic injection of Valium if requested.
  5. The current lethal injection protocol requires the Warden of the Department of Corrections to reconstitute the Sodium Thiopental into solution form prior to injection. The Warden has no formal training on reconstituting the drug, which requires inserting a syringe into the solution supplied by the manufacturer until the entire solution is drawn from the vial into a syringe which is then injected into the powder and shaken until no precipitate remains. If the manufacturers' instructions for reconstitution of Sodium Thiopental are followed, this Court finds there would be minimal risk of improper mixing, despite converse testimony that a layperson would have difficulty performing this task.
  6. The current lethal injection execution protocol employs certified phlebotomists and emergency medical technicians (EMT) to perform the necessary venipunctures. These persons (I.V. Team) are provided up to one (1) hour to find suitable IV sites and to correctly insert I.V. catheters in the arm, hand, leg, or foot of the condemned. The one (1) hour window is not excessive but rather necessary due to potential problems that may arise when attempting a venipuncture including: failure to find a suitable I.V. site, "blowouts," problems with scar tissue, and problems caused by

nervousness. The possibility that there may be minor difficulty locating a vein does not subject the inmate to offensive punishments the Eighth Amendment prohibits.

*Reid v. Johnson*, 333 F.Supp.2d 543, 551 (E.D.Va., 2004).

7. The current lethal injection execution protocol provides the I.V. team with the option of inserting a catheter into the neck of the condemned, by use of the carotid artery or jugular vein. However, a medical doctor for the Department of Corrections advised against this procedure and would not perform the procedure. The medical staff who would perform this procedure are inadequately trained to do so and there are substantial and unnecessary risks associated with insertion of an intravenous catheter into the carotid artery or jugular vein.
8. Sodium Thiopental is an ultra short acting barbiturate. Three (3) grams of Sodium Thiopental, when administered properly, will render a person unconscious within one (1) minute of injection. Sodium Thiopental is the "humane" component of Kentucky's lethal injection protocol.
9. Pancuronium Bromide (Pavulon) is a muscular paralytic agent. Fifty (50) milligrams of Pancuronium Bromide properly administered will cause the rapid onset of paralysis in the condemned. The use of Pancuronium Bromide in Kentucky's lethal injection protocol serves no therapeutic purpose. Its primary use is to prevent muscular movements in the condemned, involuntary or otherwise, that may result from the subsequent injection of Potassium Chloride. Pancuronium Bromide's secondary purpose in Kentucky's lethal injection protocol is to stop respiration.
10. Potassium Chloride is utilized in Kentucky's lethal injection protocol to ensure death. Proper administration of 240 meq of Potassium Chloride will successfully induce



cardiac arrest in the condemned by disrupting electrical signaling necessary for proper heart function.

11. The contact of Sodium Thiopental with Pancuronium Bromide causes a precipitate, which may cause serious problems in the execution process including clogging of the I.V. line and inadequate dosages of the drugs injected into the condemned. However, there is a minimal risk that a precipitate will form. The lethal injection execution protocol contains the procedural safeguard of flushing the I.V. line with a saline solution after the administration of each drug to prevent residual contact.
12. Kentucky's lethal injection protocol uses an electrocardiogram (EKG) to verify the death of the condemned. Kentucky's lethal injection protocol does not use the EKG during administration of the drugs to monitor for consciousness.
13. Kentucky's lethal injection protocol does not use a blood pressure cuff during administration of the drugs to monitor for consciousness.
14. A BIS (Bispectral Index) monitor is a device that uses algorithms from EEG (electroencephalograph) waves to monitor for consciousness. It is not regular medical standard to use a BIS monitor during surgery to monitor for consciousness. Kentucky's lethal injection protocol does not use a BIS monitor.
15. An automated defibrillator and crash cart are present in the event that a stay of execution is ordered and the condemned is to be revived. There is a medical doctor present that will assist in any effort to revive the condemned prisoner.
16. If there is a stay of execution, it is not probable that a condemned inmate will be revived after injection of the second drug, Pancuronium Bromide (Pavulon).

### CONCLUSIONS OF LAW

Based upon the above findings of fact, this Court makes the following conclusions of law:

1. Kentucky's lethal injection protocol is not in violation of the literal language of KRS 431.220. The protocol provides for a continuous administration of the lethal injection chemicals. The Plaintiffs' argument to the contrary is predicated upon a strained interpretation of the "continuous administration" language in the statute.
2. The Plaintiffs have not demonstrated by a preponderance of the evidence that Kentucky's method of execution by lethal injection deviates from contemporary norms and societal standards in capital punishment. See *State of Connecticut v. Webb*, 750 A.2d 448, 457 (2000) ("Of the thirty-eight states permitting capital punishment, at least thirty-four have adopted lethal injection as a manner of execution. They have done so because it is universally recognized as the most humane method of execution, least apt to cause unnecessary pain.").
3. The Plaintiffs have not demonstrated by a preponderance of the evidence that Kentucky's method of execution by lethal injection offends the dignity of the prisoners and society as a whole.
4. The Plaintiffs have not demonstrated by a preponderance of the evidence that Kentucky's method of execution by lethal injection inflicts unnecessary physical pain upon the condemned. Although evidence was presented that other drugs were available that may decrease the possibility that the condemned may experience pain, the Eighth Amendment and Section 17 of the Kentucky Constitution do not provide protection against all pain, only cruel and unusual pain. Moreover, the fact that other

drugs are available that may further assure that the condemned feels no pain, this Court may not require the legislature (or in this case the Executive Branch) to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

5. The Plaintiffs have not demonstrated by a preponderance of the evidence that Kentucky's method of execution by lethal injection inflicts unnecessary psychological suffering upon the condemned.
6. The Plaintiffs have not demonstrated by a preponderance of the evidence that Kentucky's lethal injection protocol, as it pertains to reviving the Plaintiffs in the event of a stay, is so inept that it deprives the Plaintiffs of due process and fundamental fairness. The New Jersey Superior Court, in *In the Matter of Readoption with Amendments of the Death Penalty Regulations*, 842 A.2d 207, 211 (2004), has stated that "an inmate who is being executed in error because a stay of execution has been issued after the injection is administered is wrongfully deprived of due process and fundamental fairness...if the State does not take every feasible and possible step to correct that error." The standards the Plaintiffs would have this Court apply would require that all executions take place in a trauma center with a team of cardiac surgeons standing by. The Kentucky lethal injection execution protocol takes the necessary steps for revival sufficient to satisfy the due process rights of the Plaintiffs.
7. The Plaintiffs have demonstrated by a preponderance of the evidence that the procedure where the Department of Corrections attempts to insert an intravenous catheter into the neck through the carotid artery or jugular vein does create a substantial risk of wanton and unnecessary infliction of pain, torture or lingering

death. Accordingly, that portion, and only that portion, of Kentucky's lethal injection protocol allowing for this procedure is stricken as violating the Plaintiffs' safeguards against cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution.

### CONCLUSION

The citizens of the Commonwealth of Kentucky, through their elected representatives, have chosen the death penalty as punishment for certain offenses. These elected representatives have also selected lethal injection as the method for carrying out this punishment. While the ultimate responsibility lies with the citizens, the duty of implementing these decisions has been delegated to the personnel who operate the institution where the death chamber is located. Those persons who developed Kentucky's lethal injection protocol were apparently given the task without the benefit of scientific aid or policy oversight. Kentucky's protocol was copied from other states and accepted without challenge until this action occurred.

This action may be the first real public discussion of the lethal injection protocol in Kentucky. During the course of this litigation the protocol has been amended by the Department of Corrections to increase the dosage of the short acting barbiturate, to drop one procedure (the cut-down), and the Department's medical personnel have agreed that any injection in the neck is inappropriate. The unilateral actions by the Department are commendable.

The Department of Corrections should amend the current protocol to eliminate the need to protect its contents from public view. This Court has specifically maintained the confidential nature of the security procedures surrounding an execution for obvious

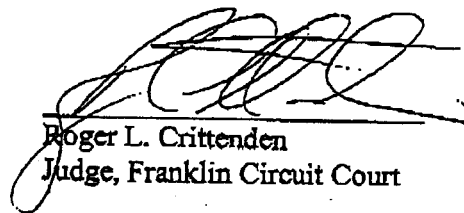
reasons. Since the nature of the drugs used and the method for administering those drugs during an execution have been discussed publicly in this action, there seems to be little reason why the Department of Corrections cannot publish a lethal injection protocol that does not compromise the security of the institution or the personnel involved. The citizens of this Commonwealth are entitled to know the method and manner for implementing their public policy.

There are no methods of legal execution that are satisfactory to those who oppose the death penalty on moral, religious, or societal grounds. And although this Court would prefer that Kentucky's protocol for lethal injection be based upon more independent medical or scientific studies, that is not a current requirement of the U.S. or Kentucky Constitution.

The Defendants are enjoined from utilizing that portion of the protocol which permits injection of lethal chemicals into the neck of the condemned prisoner. The execution protocol adopted by the Commonwealth of Kentucky, with the one exception, complies with the constitutional requirements against cruel and unusual punishment.

SO ORDERED this the 8th day of July, 2005.

This is a final and appealable order.

  
Roger L. Crittenden  
Judge, Franklin Circuit Court

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