

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

NATIONAL ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED)
PEOPLE)
4805 Mount Hope Drive)
Baltimore, Maryland 21215)

AMERICAN CIVIL LIBERTIES)
UNION FOUNDATION OF)
MARYLAND;)
3600 Clipper Mill Road, Suite 350)
Baltimore, Maryland 21211)

MARYLAND CITIZENS)
AGAINST STATE EXECUTIONS;)
PO Box 39205)
Baltimore, Maryland 21212)

and)

VERNON EVANS, JR.;)
Division of Corrections No. 172357)
Maryland Correctional Adjustment Center)
410 East Madison Street)
Baltimore, Maryland 21202)

Plaintiffs,)

vs.)

Civil Action No. ____

MARY ANN SAAR, Secretary,)
Department of Public Safety and)
Correctional Services)
300 East Joppa Road)
Suite 2000)
Towson, Maryland 21286;)

FRANK C. SIZER, JR., Commissioner,)
Maryland Division of Correction;)
6776 Reisterstown Road)
Baltimore, Maryland 21215;)

Defendants.)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, National Association for the Advancement of Colored People (“NAACP”), American Civil Liberties Union Foundation of Maryland (“ACLU”), Maryland Citizens Against State Executions (“CASE”), and Vernon Evans, Jr., by and through their undersigned attorneys, bring the following complaint against Defendants Mary Ann Saar, Secretary, Department of Public Safety and Correctional Services; and Frank C. Sizer, Jr., Commissioner, Maryland Division of Corrections, in their official capacities.

Introduction

1. The Maryland legislature has enacted legislation that governs executions. Md. Code Ann., Corr. Servs. §§ 3-905 - 3-909 (West 2005) (“Death Penalty Procedures Statute” or “DPPS”). Death sentences are to be carried out by lethal injection, and the Commissioner of the Maryland Department of Public Safety and Correctional Services, Division of Corrections (DOC) is responsible for administering and overseeing the execution process. *Id.* §§ 3-905, 3-906.
2. The DPPS contains explicit instructions for carrying out lethal injections, delineating the types of drugs to be used, *id.* § 3-905 (“Method of Execution”), and setting forth an itemized list of the Commissioner’s various duties and oversight functions, *id.* §§ 3-906-3-909 (requiring that the Commissioner choose a suitable place for the execution, provide all of the necessary materials, and select and train execution staff).

3. The Division of Corrections has promulgated regulations that purport to implement Maryland's Death Penalty Procedures Statute. Upon information and belief, these regulations are set forth in the DOC's Executions Operations Manual, the most recent version of which was adopted in 2004. Department of Public Safety and Correctional Services, Division of Correction, Execution Operations Manual (June 14, 2004) (sometimes hereinafter "Manual").
4. Plaintiffs challenge the validity of these regulations on multiple grounds.
 - a. *First*, several of the regulations conflict with the DPPS. Specifically, they are at odds with the statute's directives regarding the type of drugs to be used, the procedures for administering those drugs, and the training of staff. As such, these specific regulations are invalid.
 - b. *Second*, several of the regulations conflict with the specific directives laid out in the Warrant of Execution filed in the case of Plaintiff Vernon Evans, Jr.
 - c. *Third*, the DOC unilaterally adopted the regulations set forth in the Execution Operations Manual in disregard of Maryland's Administrative Procedure Act ("APA"), Md. Code Ann., State Gov't §§ 10-101 - 10-139, failing, for example, to submit it to the Attorney General for approval, or to publish it for public comment in the Maryland Register. *Id.* This failure to follow the APA's requirements is grounds for invalidating and declaring null and void of all the regulations in the Manual.
5. Defendants' failure to follow Maryland law in adopting its execution protocol deprives the State's citizens the opportunity to ensure that executions that are carried out

in the name of the people of Maryland are performed properly and humanely. This failure significantly increases the risk that those currently on Maryland's death row will suffer unnecessarily during their executions.

6. Defendant's failure to follow Maryland law in designing its execution protocol further deprives the public of its right to comment on regulations, and it undermines the Attorney General's and the General Assembly's oversight of agency action, which are the central goals of the APA.

7. The purpose of the present complaint is not to challenge any particular death sentence or the validity of the death penalty itself, but only to ensure that the procedures adopted by the Division of Corrections comply with Maryland law, including section 3-905 and the State's Administrative Procedure Act.

8. Plaintiffs therefore seek a declaration that the Division of Correction's Executions Manual is invalid because it: (1) ignores the statutory mandates of § 3-905, as well as the directives laid out in the Warrant of Execution in Plaintiff Evans's case; and (2) it was enacted in violation of the Administrative Procedure Act. Such a declaration is authorized by law. Md. Code Ann., State Gov't § 10-125.

9. Plaintiffs further request a temporary restraining order and preliminary and permanent injunctions barring the Defendants from performing any executions in the State of Maryland until the Division of Corrections has come into compliance with its legal responsibilities.

PARTIES

10. Plaintiff National Association for the Advancement of Colored People (“NAACP”) works to eliminate racial prejudice and to remove all barriers of racial discrimination through the democratic process. The NAACP has long opposed the death penalty, and, in particular, opposes the disproportionate impact of the death penalty on African-American criminal defendants.

11. Plaintiff American Civil Liberties Union Foundation of Maryland (“ACLU”) is a non-partisan organization which works to ensure that all people in the State of Maryland are free to think and speak as they choose and are able to lead lives free from discrimination and unwarranted government intrusion. The ACLU is guided in its work by the United States Bill of Rights and the Maryland Declaration of Rights. It has over 12,000 members in the State of Maryland. Capital punishment is a dire, and irreversible, threat to the rights of an individual. Although the Supreme Court in 1976 decided in *Gregg v. Georgia* to reinstate the death penalty in the United States. However, the ACLU continues to oppose capital punishment on moral, practical, and constitutional grounds.

12. Plaintiff Maryland Citizens Against State Executions (“CASE”) is a coalition of groups and individuals united to end the death penalty in Maryland through education, grassroots action, and public demonstration.

13. Plaintiff Vernon Evans, Jr. is a United States citizen and a resident of the State of Maryland. He is currently a death-sentenced inmate in the custody of Defendants and under the supervision of the DOC. His DOC Number is 172357. He is held at the Maryland Correctional Adjustment Center, 410 East Madison Street, Baltimore,

Maryland 21202. On January 9, 2006, the Circuit Court for Baltimore County signed a Warrant of Execution, setting Evans's execution for some time in the five-day period beginning February 6, 2006.

14. All four of the Plaintiffs are affected by the Defendants' unlawful actions in this case. Plaintiffs have an interest in seeing that State officials operate within the boundaries of the law, and all four have an interest in ensuring that executions are not carried out in Maryland in violation of the Constitution or the Maryland Declaration of Rights. In particular, the execution of Plaintiff Evans is scheduled to take place during the week of February 6, 2006, and all Plaintiffs, especially Mr. Evans, wish to make sure that he is not subject to excruciating pain during that procedure.

15. Defendant Mary Ann Saar is the Secretary of the Maryland Department of Public Safety and Correctional Services ("DPSCS"), and is sued in her official capacity.

16. Defendant Frank C. Sizer, Jr., is the Commissioner of the DOC, and is sued in his official capacity.

JURISDICTION AND VENUE

17. This Court has jurisdiction over the subject matter of this action pursuant to Md. Code Ann., State Gov't § 10-125, and Md. Code Ann., Cts. & Jud. Proc. §§ 3-403, 3-406, and 3-409.

18. Venue in this Court is proper under Md. Code Ann., State Gov't § 10-125(a)(2), which provides that "[a] petition under this section shall be filed with the circuit court for the county where the petitioner resides or has a principal place of business." Three of the

four Plaintiffs maintain their principal places of business in Baltimore City; thus, Baltimore City is the proper venue for this action.

BACKGROUND FACTS

19. As noted above, Maryland's Death Penalty Procedures Statute contains explicit instructions as to the proper method for administering lethal injections. Md. Code Ann., Corr. Servs. §§ 3-901 - 3-909. These instructions are unambiguous in their language, and mandatory in nature.

20. The Division of Corrections (DOC), a division of the State Department of Safety and Correctional Services (DPSCS), is responsible for carrying out lethal injections. *Id.*

21. The DOC has prepared a detailed Execution Operations Manual designed to implement the Death Penalty Procedures Statute. It sets forth the procedures to be used in the administration of Maryland's death penalty, governing every step of the execution process, from the drugs to be used, to the types of witnesses that will be allowed to view the execution.

22. The Division of Corrections has refused to release a complete copy of the Execution Operations Manual to the public, citing security concerns. It can be amended at the will of the Division of Corrections, with virtually no public oversight.

23. The procedures were amended twice within the three weeks preceding the June 2004 execution of Steven Oken. Plaintiffs do not know whether they were amended again prior to the December 2005 execution of Wesley Baker.

Compliance with Maryland's Death Penalty Procedures Statute

24. Maryland's Death Penalty Procedures Statute specifies the types of drugs to be used during the lethal injection process, the method of administering those drugs, and the training of personnel who will be involved carrying out executions. These instructions are mandatory, and not open to interpretation: "[t]he manner of inflicting the punishment of death shall be the continuous intravenous administration of" (a) "a lethal quantity of an ultrashort-acting barbiturate or other similar drug;" along with (b) "a chemical paralytic agent." Md. Code Ann., Corr. Servs. § 3-905 (a) (emphasis added). These drugs are to be administered "until a licensed physician pronounces death." *Id.* Furthermore, the execution is to be performed by persons who have been "trained to administer the lethal injection." *Id.* at § 3-906 (c)(1). Notwithstanding the clarity of these instructions, the Execution Operations Manual diverges from the statute in three critical respects.

25. *First*, although § 3-905 expressly calls for the injection of two—and only two—drugs, the regulations set forth in the Execution Operations Manual add a third drug to the mix of chemicals. The DPPS requires the use of "an ultrashort-acting barbiturate" and "a chemical paralytic agent." The DOC however, employs an ultrashort-acting barbiturate (sodium pentothal) and *two* paralytic agents (pancuronium bromide and potassium chloride).

26. This change represents no minor tweaking of the DPPS: the *two* paralytic agents Defendants have chosen to use are both very painful, and in combination, quite dangerous. Potassium chloride, which ultimately paralyzes the heart, affects the nerve fibers lining the veins, and there is universal medical agreement that its administration to an inadequately sedated person is agonizingly painful. Administration of pancuronium

bromide, which paralyzes the skeletal muscles, renders a person unable to move—or to breathe. While suffering the intense, visceral pain of asphyxiation, a person under the effects of pancuronium bromide will be absolutely motionless; he will appear serene.

Thus, Defendants have chosen to employ *two* extremely painful paralytic agents.

Furthermore, as administered by Defendants, pancuronium bromide has no medical purpose; it is potassium chloride that causes death. Thus, Defendants have unnecessarily added to their lethal-injection process a drug which is not only extremely painful, but also masks any feeling or awareness, making it impossible for even a medical professional to assess whether general anesthesia has been achieved and maintained.

27. Because injection of potassium chloride is so excruciatingly painful, the American Veterinary Medical Association prohibits its use as the sole agent effecting euthanasia of animals, and if the chemical is to be used at all, it may only be administered by a practitioner with the skill and training necessary to assure that the subject to be euthanized has reached and maintains a surgical plane of anesthesia. Both the AVMA and Maryland law prohibit the use of neuromuscular blocking agents, such as pancuronium bromide, in euthanasia of animals because of their impact on the ability of those administering euthanasia to ensure that a subject is sufficiently anesthetized.

28. *Second*, the DOC's instructions for administering its selected "ultrashort-acting barbiturate" (sodium pentothal) deviate from the DPPS. The Manual calls for the administration of the sodium pentothal in two separate bursts. This is in complete disregard of the DPPS, which calls for the "continuous intravenous administration of a

lethal quantity of an ultrashort-acting barbiturate” until death. Md. Code Ann., Corr. Servs. § 3-905(a).

29. Again, the DOC’s unilateral decision to deviate from the DPPS is significant. If administered correctly in a continuous stream, ultrashort-acting barbiturates lead the inmate to slip into unconsciousness and experience a relatively painless death. Because the effects of the drug are only temporary, they must be administered continuously, to ensure that they are effective at blocking pain. Applying the drug in two short bursts, as is called for in the DOC’s Execution Operations Manual, rather than in a steady stream, as mandated by the statute, increases the risk that the inmate will be conscious during the execution and feel both the agony of suffocation (caused by the paralytic agent, pancuronium bromide) and/or the searing pain of the potassium chloride (the third drug administered by the DOC).

30. In requiring the use of an additional, unnecessarily painful drug, and by unilaterally altering the statutorily mandated method of administering anesthesia to inmates, the DOC not only increases the risk of unnecessary suffering—it oversteps its legal authority; the DOC’s regulations violate both the letter and the spirit of Maryland’s Death Penalty Procedures Statute.

31. *Third*, Maryland’s Death Penalty Procedures Statute requires the Commissioner to select execution professionals who are “trained to administer the lethal injection.” Md. Code Ann., Corr. Servs. § 3-906(c)(1).

32. Though the Executions Operations Manual does perfunctorily require the hiring of “trained” persons, and calls for “drills,” there are no assurances as to what type of

training is required and what sort of skill sets are involved in the drills. Upon information and belief, the practices and policies the DOC has devised do not include adequate directions for training staff to prepare drugs, do not require participation of qualified personnel in performing critical tasks in the lethal-injection process, do not provide for necessary supervision of personnel, and do not establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection process.

33. For example, only a person adequately trained in the use of intravenous anesthetics should administer sodium pentothal. Sodium pentothal is the only anesthetic drug administered during a lethal injection, and, as such, it is the only barrier that prevents the inmate from unnecessarily experiencing excruciating pain and/or paralysis. A qualified person must be present to assure that the sodium pentothal is working and that the inmate is rendered unconscious. Yet, upon information and belief, none of the procedures for lethal injection employed by the DOC require a trained person to monitor the plane of anesthesia achieved by administering sodium pentothal during an execution. This creates a significant risk that the inmate will remain fully awake and experience both the horror and pain of his death.

34. Similarly, administration of intravenous ("IV") anesthesia requires proficiency at achieving and maintaining IV access. On information and belief, Defendants are not trained and qualified to create and maintain IV access. Again, this increases the risk that the inmate will suffer unnecessarily.

35. Defendants have conceded misadministration of at least one lethal injection—that of Tyrone X. Gilliam. During Gilliam’s execution, the IV line leaked and liquids pooled on the execution room floor. Gilliam’s execution took several minutes longer than four of Maryland’s five other lethal injections and nearly four times as long as its fifth lethal injection.

36. The failure to adopt adequate regulations governing the training of personnel is a direct violation of the Commissioner’s statutory responsibilities.

Compliance With Warrant of Execution

37. On January 9, 2006, the Circuit Court for Baltimore County signed a Warrant of Execution, setting Evans’s execution for some time in the five-day period beginning February 6, 2006.

38. The language of the Warrant quotes the exact language of the DPPS. It provides that Mr. Evans’s sentence of death be carried out, “administering to him a continuous intravenous lethal quantity of an ultrashort-acting barbiturate or other similar drug, in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical practice.”

39. The Warrant is a mandatory court order, which states in unequivocal terms that the Division of Corrections is “**COMMANDED AND CHARGED**” to follow its directives.

40. By information and belief, Defendants plan to violate the terms of Warrant in carrying out the execution of Plaintiff Evans, by using an additional, unnecessary

paralytic agent during the process, and by administering the required barbiturate in two doses, rather than in a steady stream.

Maryland's Administrative Procedure Act

41. The Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-101 - 10-139, governs the adoption of regulations by Executive Branch agencies. It applies to every unit within the Executive Branch, including both the DOC and the DPSCS. Md. Code Ann., State Gov't § 10-102.

42. The APA defines the term "Regulation" as:

[A] statement or an amendment or a repeal of a statement that: (i) has general application; (ii) has future effect; (iii) is adopted by a unit to: 1. detail or carry out a law that the unit administers; 2. govern organization of the unit; 3. govern the procedure of the unit; or 4. govern practice before the unit; and (iv) is in any form, including; 1. a guideline; 2. a rule; 3. a standard; 4. a statement of interpretation; or 5. a statement of policy.

Md. Code Ann., State Gov't §§ 10-101(g)(1).

43. Any statement falling within the definition of a "Regulation" must be adopted according to the procedures laid out in the APA. Specifically, a regulation cannot become effective until it has been: (1) submitted to the Attorney General or unit counsel for approval; (2) reviewed by the Joint Committee on Administrative, Executive, and Legislative Review; (3) published in the Maryland Register (both the proposed and final versions); and (4) submitted for publication in the Code of Maryland Regulations ("COMAR"). Upon information and belief, none of these procedures was followed in adopting the Execution Operations Manual.

44. Furthermore, under Md. Code Ann., Corr. Servs. § 2-109(c), the Secretary of DPSCS is required to adopt regulations that govern the policies and management of the Division of Correction. *See Massey v. Department of Pub. Safety & Corr. Serv.*, 886 A.2d 585, 592-93 (Md. 2005). The Execution Operations Manual was drafted and implemented by the Commissioner, and it is the Commissioner who retains the power to alter the regulations contained in the Manual at will, without any notice to the public or other oversight.

45. The public has a special interest in knowing that executions are conducted without unnecessary pain or suffering. Accordingly, procedures followed in carrying out lethal injections should be subject to public scrutiny, according to the APA's mandates.

46. Because the Secretary failed to comply with the APA in adopting the Manual, and because Plaintiffs have no adequate remedy at law, the continued enforcement of the regulations contained in the Manual should be enjoined.

FIRST CLAIM FOR RELIEF

47. Evans incorporates and realleges the averments contained in paragraphs 1–46 by reference.

48. The Division of Corrections has adopted regulations for the administration of executions in Maryland in violation of the Death Penalty Procedures Statute, Md. Code Ann., Corr. Servs. §§ 3-905 - 3-909, and the Warrant of Execution.

SECOND CLAIM FOR RELIEF

49. Evans incorporates and realleges the averments contained in paragraphs 1–48 by reference.

50. The Division of Corrections has adopted regulations for the administration of executions in Maryland in violation of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-101 - 10-139.

PRAYER FOR RELIEF

Plaintiffs pray that relief be entered against the Defendants as follows:

1. Declaratory judgment stating that DOC procedures, which unnecessarily and dangerously call for administration of *two* exceptionally painful paralytic agents and which fail to provide for continuous administration of anesthetics, or proper training of staff, violate the Maryland Death Penalty Procedures Statute, Md. Code Ann., Corr. Servs. § 3-905 - 3-906.
2. Declaratory judgment stating that the DOC's regulations, as set forth in its Execution Operations Manual, were enacted in violation of the Administrative Procedure Act. Md. Code Ann., State Gov't §§ 10-101-10-139.
3. A temporary restraining order and preliminary and permanent injunctions barring Defendants from carrying out executions until the Secretary has adopted regulations that conform to Section 3-905 and to the mandates of the Administrative Procedure Act.
4. Reasonable attorneys' fees, as well as costs of suit and any further relief that this Court deems just and proper.



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Dated: January 20, 2006

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CERTIFICATE OF ADMISSION

I hereby certify that I was admitted to practice law in the State of Maryland in December, 2002, remain a member in good standing of the Bar of Maryland, and am authorized to practice before the Courts of this State, including the Circuit Court for Baltimore City, Maryland.



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