IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MICHAEL ANTHONY TAYLOR, *Plaintiff*, v. LARRY CRAWFORD, Director, Department of Corrections; JAMES D. PURKETT, Superintendent, Eastern Reception Diagnostic Correctional Center; and JOHN DOES 1-666, Anonymous Executioners, *Defendants*.	)	No. 05-4173-CV-C-SOW JURY TRIAL DEMANDED

VERIFIED
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW the plaintiff, Michael Anthony Taylor, by and through appointed counsel, John William Simon, and—as authorized by 42 U.S.C. § 1983—prays the Court for its declaratory judgment holding that the existing procedure for lethal injection that the State of Missouri and its officials, officers, and employees, acting under color of state law, use in

executions violates the Eighth, Thirteenth, and Fourteenth Amendments, because it would inflict on him cruel and unusual punishment, which would thereby deprive him of life, liberty, or property without due process of law, and would inflict on him a badge of slavery, in that the defendants' selection of a three-chemical sequence—itself unnecessary to bring about the statutory goal of his death—as a means of applying their chosen method of execution (lethal injection) creates a foreseeable risk of the infliction of gratuitous pain, *i.e.*, a specific form of an otherwise lawful method of execution which is more painful than necessary to accomplish the statutory purpose of bringing about the "mere extinguishment of life."[1] In an exhibit submitted with this complaint, the plaintiff shows that a peer-reviewed study of autopsy and toxicology data from executions in the four jurisdictions which did the tests, kept the results, and agreed to make them available to scholarly researchers would indicate this foreseeable risk to be at least 43% likely to occur.

Plaintiff does not in this action dispute whether the State of Missouri can kill him, but rather demonstrates that the way its agents have chosen to do so is unconstitutional. Plaintiff prays the Court for its preliminary

[1] *In re Kemmler*, 136 U.S. 436, 447 (1890).

injunction to prevent the defendants from executing him at all, however, until he has had an opportunity to present his case after discovery and in open court and to receive an adjudication on the merits, and thereafter for its permanent injunction to prevent the defendants from using this form of lethal injection on the plaintiff; for its order granting the plaintiff reasonable attorneys' fees and costs; and for such other relief as the Court finds appropriate.

I. Summary

As set forth in detail in the declarations of anesthesiology professors Mark J.S. Heath, M.D. (Exhibit 1), and David A. Lubarsky, M.D. (Exhibit 2) which are attached to this complaint, the use of a specific succession of chemicals in judicial executions by lethal injection—which the defendants or their predecessors in office have admitted they use—creates a foreseeable risk of the gratuitous infliction of pain and suffering, in that the first of the three chemicals is used by health-care professionals specifically because it wears off when the patient experiences stimuli which produce pain; the second chemical paralyzes the prisoner such that he cannot breathe and he suffers from suffocation, but the prisoner cannot cry out or even flinch, because of the paralysis; the third chemical burns as it works

its way through his veins to the heart, killing him with a heart attack—which to a conscious person is painful. The co-authors of a peer-reviewed study published April 16, 2005, in the world-renowned medical journal THE LANCET found that in 43% of the executions for which four states provided information, the levels of anesthesia were inadequate to render the prisoner unconscious at the time of his death; and ***those*** executions were in jurisdictions which (unlike Missouri) were careful enough to keep records and confident of the humanness of their several practices to share these data with the co-authors. None of the three chemicals are required by Missouri statute; neither any one of them nor the combination of them is necessary to bring about the death of the plaintiff. Defendants could bring about the death of the prisoner by the administration of a single, lethal dose of a single anesthetic, pentobarbital, as their veterinarians would do if they had a pet which they decided to have euthanized. The Eighth Amendment forbids the gratuitous infliction of pain and suffering, and the Fourteenth Amendment applies this guaranty against the states. The Thirteenth Amendment abolishes slavery, of which not only the contemporary infliction of the death penalty but more specifically the use of a form of execution more painful than necessary to bring about the death

of the prisoner is a relic, a vestige, and a badge. Plaintiff is entitled to the relief he seeks.

II. Statement of Exhibits

1. Declaration of Mark J.S. Heath, M.D. with curriculum vitae attached as "Heath Exhibit 1"

2. Declaration of David A. Lubarsky, M.B.A., M.D., with curriculum vitae and LANCET article attached as "Lubarsky Exhibits" 1 & 2 respectively

3. *Johnston v. Kempker*, No. 4:04-CV-1975-DJS, Defendant Gary Kempker's Answers and Objections to Plaintiff's First Set of Interrogatories (E.D. Mo. Dec. 22, 2004)

4. *Johnston v. Kempker*, No. 4:04-CV-1975-DJS, Defendants' Memorandum of Law in Support of Motion to Dismiss (E.D. Mo. Nov. 15, 2004)

5. *Johnston v. Kempker*, No. 4:04-CV-1975-DJS, Exhibit 1 to Plaintiff's Response to Defendants' Motion to Dismiss (E.D. Mo. Dec. 6, 2004)

6. *Johnston v. Kempker*, No. 4:04-CV-1975-DJS, Defendant's Reply to Plaintiff's Response to Motion to Dismiss (E.D. Mo. Dec. 20, 2004)

7. *Jones v. Crawford,* No. 4:05-CV-653-RWS, Transcript of Temporary Restaining Order Hearing (E.D. Mo. April 25, 2005)

8. Informal Resolution Request with Cover Affidavit by Vernon Brown, executed May 6, 2005

9. Affidavit of Stanley D. Payne with Informal Resolution Request and equivocal unsigned statement by staff attached

10. Declaration of Michael Lenza, Ph.D., with curriculum vitae (Exhibit 1)

11. M. LENZA, POLITICS OF DEATH: A STATISTICAL, THEORETICAL, AND HISTORICAL EXAMINATION OF THE DEATH PENALTY IN MISSOURI, University of Missouri–Columbia, 2005 (hitherto unpublished Ph.D. dissertation)

12. John F. Galliher, et al., REPORT TO THE OFFICE OF THE MISSOURI PUBLIC DEFENDER ON PROPORTIONALITY OF SENTENCING IN DEATH-ELIGIBLE CASES, filed by Missouri State Public Defender System in, inter alia, *State v. Parker*[2]

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[2]886 S.W.2d 908 (Mo. 1994) (en banc), *cert. denied,* 514 U.S. 1098 (1995), *citing In re Estate of Danforth,* 705 S.W.2d 609, 610 (Mo. Ct. App., S.D. 1986) (providing for judicial notice of the record resulting in an opinion to determine grounds on which opinion is based). A published work coming after the original Galliher study but before the Lenza et al. study is J.R. SORENSEN AND D.H. WALLACE, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAVIORAL SCIENCES AND THE LAW 61, 75

13. M. Lenza et al., THE PREVAILING INJUSTICES IN THE APPLICATION OF THE DEATH PENALTY IN MISSOURI (1978-1996) (2002), available May 18, 2004, at http://www.umsl.edu/divisions/artscience/forlanglit/mbp/Lenza1.html

14. Denise Lieberman, Legal Director, American Civil Liberties Union of Eastern Missouri, PROSECUTORS: THE FIRST LINE OF OFFENSE—PROSECUTORIAL DISCRETION AND ARBITRARINESS IN ADMINISTRATION OF THE DEATH PENALTY, http://www.umsl.edu/~phillips/dp/ACLUDenise.html (2001)

15. J. SOSS ET AL., *Why Do White Americans Support the Death Penalty?* 65 J. OF POLITICS 397, 409 (2003), *http://www.polisci.wisc.edu/~soss/Research/Articles/JOP_2003.pdf*

16. Affidavit of Michael Anthony Taylor executed May 27, 2005, with Informal Resolution Request attached

17. Missouri Department of Corrections, Department Manual, D5-3.2, Offender Grievance

18. *Brown v. Crawford*, No. 4:05-CV-746, Transcript of Hearing on Motion for Temporary Restraining Order (E.D. Mo. May 13, 2005)

(1995).

III. Parties

1. Plaintiff, **Michael Anthony Taylor, CP-89**, is a citizen of the United States and a resident of the State of Missouri.

2. Plaintiff is a person within the jurisdiction of the State of Missouri.

3. Plaintiff was sentenced to death in the Circuit Court of Jackson County (the Hon. Alvin G. Randall, Circuit Judge; on remand, the late Hon. Michael Coburn) for the kidnapping, rape, and murder of a minor child, A.H., while acting together with Roderick Nunley.

4. Plaintiff is attacking the conviction and sentence of the Circuit Court of Jackson County in at least one pending action before the Missouri Supreme Court, a motion to recall the mandate filed on or about March 25, 2005, in its Appeal No. 85235, but not in this complaint.

5. Plaintiff is incarcerated at the Potosi Correctional Center, 11593 State Highway O, Mineral Point, Washington County, Missouri 63660.

6. The State of Missouri conducts its executions at the Eastern Missouri Reception, Diagnostic & Correctional Center, 2727 Highway K, Bonne Terre, St. Francois County, Missouri 63628.

7. Defendant **Larry Crawford** is Director of the Department of Corrections of the State of Missouri.

8. Defendant Crawford is specifically authorized and directed by state statute to prescribe and direct the means by which the Department of Corrections carries out executions within the statutorily specified methods of lethal gas or lethal injection.[3] Plaintiff does not in this complaint contend that lethal injection is per se unconstitutional.

9. Defendant Crawford is sued in his individual and official capacity for the purpose of obtaining prospective declaratory and injunctive relief.

10. At all times and in all respects referred to in this complaint, defendant Crawford acted and will act under color of state law.

11. Defendant Crawford's office is at 2729 Plaza Drive, Jefferson City, Cole County, Missouri 65109.

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[3]Mo. Rev. Stat. § 546.720: "The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection. And for such purpose the director of the department of corrections is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of a correctional facility of the department of corrections, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection."

12. Defendant Crawford is a resident of the Central Division of the Western Federal Judicial District of Missouri.

13. Defendant **James D. Purkett** is Superintendent of the Eastern Reception, Diagnostic & Correctional Center (ERDCC), in Bonne Terre, St. Francois County, Missouri.

14. Defendant Purkett is "warden" or chief executive officer of ERDCC, and is therefore charged with the management of ERDCC.

15. Defendant Purkett's principal place of business is the Eastern Reception, Diagnostic & Correctional Center (ERDCC), 2727 Highway K, Bonne Terre, St. Francois County, Missouri 63628.

16. Defendant Purkett is a resident of the Eastern District of Missouri.

17. ERDCC is where the State of Missouri began conducting its executions on April 27, 2005.

18. By virtue of his authority over the staff of ERDCC, defendant Purkett is responsible for the way in which executions are conducted in Missouri.

19. Defendant Purkett is sued in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

20. At all times and in all respects referred to in this complaint, defendant Purkett acted and will act under color of law.

21. Defendants **John Does 1-666** are officials, officers, employees, agents, and servants of the State of Missouri who, by virtue of their employment or other status (including independent contractors and volunteers under the supervision of the defendants and their designees), participate in the planning of, purchasing and preparation for, carrying out of, and covering up of details about executions in the State of Missouri.

22. Plaintiff cannot provide the Court the natural names of these individuals because the State of Missouri and its officials, officers, and employees have thus far kept them secret.

23. **John Does 1-666** are sued in their individual and official capacities for the purpose of obtaining declaratory and injunctive relief.

24. Defendants Does 1-666 reside in the Eastern and Western Districts of Missouri.

25. At all times and in all respects referred to in this complaint, defendants Does 1-666 acted and will act under color of law.

26. Each and all of the foregoing defendants Crawford, Purkett, and Does 1-666 at all times relevant to this complaint were acting in their

official capacities with respect to all acts and omissions described in this complaint, and were in each instance acting under color of state law.

27. Unless permanently enjoined against doing so, the defendants and each of them intend to act in their respective official capacities and under color of state law to execute the plaintiff by lethal injection in the manner set forth in this complaint.

IV. Jurisdiction

28. Plaintiff brings this action to enforce and protect his rights under the Eighth Amendment to the United States Constitution, as applied against the states by the Fourteenth Amendment, and also to enforce and protect his rights under the Thirteenth Amendment.

29. This Court has jurisdiction over this cause under 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state law, 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, *i.e.*, 42 U.S.C. § 1983, which provides a cause of action for the protection of rights, privileges, or immunities secured by the Constitution and laws of the United States;

under 28 U.S.C. § 2201(a), in that one purpose of his action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that one purpose of his action is to secure permanent injunctive relief.

30. In addition to the foregoing, this Court has jurisdiction by virtue of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment.

31. Article 1, ¶ 1 of the Convention defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, ***punishing him for an act he or a third person has committed or is suspected of having committed***, or intimidating or coercing him or a third person, or ***for any reason based on discrimination of any kind***, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." (Emphasis supplied.)

32. Article 2, ¶ 1, provides that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

33. Article 1, ¶ 1 adds that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Because the plaintiff invokes the treaty as providing a remedial structure rather than as a source of substantive law, it would be begging the question or beside the point for the defendants to argue that the pain from their specific method of lethal injection is part of a "lawful" sanction. The Eighth Amendment controls on the question whether such an execution is lawful.

34. Consequently, because this Court's jurisdiction does not depend on a federal statute, 42 U.S.C. § 1997e would not bar relief even if the selection of a garrote rather than lethal injection were a "prison condition."

V. Venue

35. Venue is proper in this federal judicial district under 28 U.S.C. § 1391(b)(1)-(3) in that (1) defendant Crawford resides in its territorial jurisdiction; (2) defendant Crawford's decisions regarding the specific means of using lethal injection are made in its territorial jurisdiction, and (3) defendant Crawford may be found in its territorial jurisdiction.

VI. Facts

36. Plaintiff restates and realleges the contents of each preceding paragraph as if fully set forth again.

37. Defendants intend to execute the plaintiff by lethal injection using a succession of three chemicals: sodium pentothal, pancuronium bromide, and potassium chloride.

38. As set forth in greater detail in the declarations of anesthesiologists, Mark J.S. Heath, M.D. (Exhibit 1), and David A. Lubarsky, M.D. (Exhibit 2), the use of this succession of chemicals in judicial executions by lethal injection creates a foreseeable risk of the gratuitous infliction of pain and suffering. The use of this succession of chemicals, or of any one or more of them, is absolutely unnecessary to bring about the death of the plaintiff. (*E.g.*, Exhibit 1, ¶¶ 25, 36, 41 & 45.)

39. Specifically, sodium pentothal, also known as thiopental, is a ultra-short acting substance which produces shallow anesthesia. Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use ***different*** drugs to bring to patient to a "surgical plane" of anesthesia that ***will*** last through the operation and ***will*** block the stimuli of surgery which would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the

long-run, deep anesthesia; the patient is ***supposed*** to be able to wake up and signal the staff that something is wrong. (Exhibit 1 ¶¶ 20-22.)

40. Sodium pentothal is unstable in liquid form. To be effective as an anesthetic, it must be mixed up and administered by a person with the qualifications of a licensed health-care professional. Licensed health-care professionals cannot by law and professional ethics participate in executions. (Exhibit 1, ¶ 26.)

41. Therefore, on information and belief, the sodium penthothal which the defendants administer to condemned persons in Missouri has not been prepared and administered by one who is qualified under Missouri law to do so in the therapeutic environment. This fact increases the risk—if not guarantees the result—that the sodium pentothal will not have the intended anesthetic effect on the condemned person.

42. The second chemical the defendants use in lethal injections is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which prevents any of the voluntary muscles of the body from moving, including those which control breathing, and effectively stops the lungs from functioning. It has two contradictory effects: first, it causes the person to whom it is applied to

suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Exhibit 1, ¶¶ 27-30.)

43. When sodium pentothal is exposed to pancuronium bromide, it precipitates, *i.e.*, returns to the solid condition it was in before the executioner of unknown qualifications or lack thereof mixed it up in preparation for the execution. Once it returns to its solid condition, the sodium pentothal is no longer active as an anesthetic. Any one of a number of mistakes—the type of mistakes that one would ***expect*** to occur when sodium pentothal is prepared and administered by a non-licensed person—or simply bad luck, can cause this abatement of the anesthetic effect toward the beginning of the lethal injection. In the absence of the assurance that the executioners have the same skills as anesthesiologists, nurse-anesthetists, or even veterinarians or their staff, the likelihood is substantial that this will happens in any given execution by lethal injection performed in the State of Missouri.

44. Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. It has the unconscionable effect of creating the possibility that the sodium pentothal will become

ineffective when the prisoner begins to suffer suffocation from the pancuronium bromide. Its only relevant function is to prevent the media and the conscientious staff from knowing when the sodium pentothal has worn off and the prisoner is suffering from suffocation or from the administration of the third chemical. (Exhibit 1, ¶ 41.)

45. That third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it goes through the veins toward the heart. Because the veins are running back to the heart after the arteries have carried it to the extremities, the blood runs more slowly than it does in the arteries. This prolongs the pain the prisoner suffers when the sodium pentothal wears off, as it is selected by surgical anesthetists because it does. (Exhibit 1, ¶¶ 43-44.)

46. When the potassium chloride reaches the heart, it causes a heart attack. If the sodium pentothal has worn off by the time the potassium chloride reaches the heart (as it foreseeably would, given the shallow nature of the anesthesia sodium pentothal is supposed to produce, from the potassium chloride burning its way through the veins), the prisoner feels the pain of a heart attack, but no one but the prisoner can tell, because the pancuronium bromide has paralyzed his face, his arms, and his entire body

so that he cannot express himself either verbally or otherwise. (Exhibit 1, ¶¶ 43-46.)

47. Veterinarians would not use any of these three chemicals in euthanizing animals, because the veterinary profession knows that the first is short-acting and that the second and third are cruel means of bringing about the death of a sentient being; for these reasons it would be illegal to use either of the latter two chemicals in euthanizing a pet. (Exhibit 1, ¶¶ 25, 37-40 & 47-50.) They cause pain and suffering far in excess of what is necessary to bring about the mere extinguishment of life.

48. Veterinarians are forbidden to use these chemicals even though they may personally participate in euthanasia and may also recruit and retain the most qualified available personnel to assist them. By contrast, physicians are forbidden by the Hippocratic Oath and by positive law from participating in executions. (Exhibit 1, ¶¶ 55-58.)

49. A veterinarian would use a lethal dose of pentobarbital, a long-acting anesthetic, to perform euthanasia consistently with professional regulations, positive law, and the values of humaneness which the latter norms reflect. This substance is an alternative to the three-chemical formula the defendants use on other people. Although the plaintiff is

challenging the outstanding sentence of death against him by other judicial means (not in this civil action), and has applied for executive clemency, and is not advocating his own death, he points out pentobarbital as a specific alternative to the three-chemical sequence, with the amount, concentration, and timing, and the qualifications of staff performing and monitoring the execution, to be determined in the course of discovery.

50. On April 16, 2005—the day after the Missouri Supreme Court set the execution date in the *Vernon Brown* case—Dr. David A. Lubarsky and three co-authors published in the world-renowned medical journal THE LANCET the results of their research on the effects of these chemicals in lethal injections in the few states which bothered to conduct autopsies and prepare toxicology reports, and which did not refuse to produce these data for these scholars.

51. This publication is Exhibit 2 to Exhibit 2, the declaration of the plaintiff's expert witness Dr. Lubarsky.

52. The LANCET team found that in 43% of the lethal injections they studied, the prisoner had an inadequate amount of sodium pentothal in his bloodstream to provide anesthesia. (Exhibit 2, ¶ 16.) In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from

pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

53. Another Missouri prisoner under sentence of death, Timothy Johnston, has filed an action before the United States District Court for the Eastern District of Missouri under 42 U.S.C. § 1983 raising a claim which substantially overlaps with the claim that this plaintiff is raising. *Johnston v. Kempker*, No. 4:04-CV-01075-DJS (E.D. Mo. Mar. 31, 2005) (memorandum in support of motion to compel answers filed by plaintiff Johnston's counsel).

54. Represented by the Office of the Attorney General, specifically Assistant Attorneys General Denise G. McElvein and Stephen David Hawke, the defendants in the *Johnston* case—including the predecessor in office of defendant Crawford and also defendant Purkett—have resisted virtually every syllable of discover promulgated by Mr. Johnston's counsel, but have admitted, by their response to interrogatories to defendant Crawford's predecessor in office (Exhibit 3 at 4), that the defendants use the three chemicals identified in this complaint, though the defendants have refused to disclose the amounts or the timing of their injection into the person.

55. Although a Missouri statute specifies that death sentences will be carried out by lethal gas or lethal injection, it does not prescribe any given chemical to be used in either process, but leaves these decisions up to defendant Crawford.[4]

56. In *Johnston v. Kempker*, the defendants have refused to disclose the training or lack thereof which the actual executioners have had. Only blind faith would lead this Court to find that the personnel they have been able to recruit to participate in this activity have the skills of licensed medical and veterinary professionals which would be necessary to administer the chemicals in a minimally competent manner. (Exhibit 1, ¶¶ 55-58; Exhibit 2, ¶¶ 19.f & 21.)

57. One of the defenses the *Johnston* defendants asserted was nonexhaustion of administrative remedies. (Exhibit 4 at 12-13.) Mr. Johnston's counsel filed an Informal Resolution Request (IRR) in which Mr. Johnston had sought to raise the grievance in his complaint, Mr. Jones's, and Mr. Brown's, but the Department of Corrections had not processed the grievance beyond noting in writing that it raised "a non-grievable issue." (Exhibit 5.) Although the Johnston defendants' counsel, Ms. McElvein and

[4]Mo. Rev. Stat. § 546.720.

Mr. Hawke, filed a reply to the response to which this IRR was an exhibit, they did not dispute the plaintiff's showing that because the issue was non-grievable according to the agency which promulgated the grievance policy on which the defense of nonexhaustion relied, the defense was unavailing. (Exhibit 6 at 5 (digitally signed "/s/Denise G. McElwein").

58. On January 21, 2005, the undersigned counsel, while representing Vernon Brown, CP-75, filed a pleading in the Missouri Supreme Court in response to its order to show cause why it should not set an execution date in Mr. Brown's case, raising the grievance with the use of the three-chemical sequence described in the attached declarations, and also arguing that the Missouri Supreme Court should not set an execution date while the defendants' motion to dismiss was pending before the sister district court in Mr. Johnston's case.

59. On April 15, 2005, the Missouri Supreme Court set an execution date on Mr. Brown notwithstanding his pleading as aforesaid, which it had duly filed and to which the Office of the Attorney General (specifically counsel of record for the state, Assistant Attorney General Stephen D. Hawke) filed no response.

60. On April 16, 2005, Dr. Lubarsky (whose declaration is attached to this complaint) and his co-authors published in the world-renowned medical journal THE LANCET the article attached to Dr. Lubarsky's declaration (Exhibit 2) as Exhibit 2.

61. This article confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous infliction of pain on a person being executed.

62. On April 21, 2005, Mr. Brown filed a petition for a writ of habeas corpus under Mo. S. Ct. R. 91 before the Missouri Supreme Court, renewing the grievance Mr. Brown had set forth on January 21, 2005, but with the additional authority of the LANCET article by Dr. Lubarsky and his co-authors.

63. On the same day that Mr. Brown filed his state habeas corpus petition challenging this three-chemical sequence on the new basis of the LANCET article, so did Donald Jones, CP-110, represented by the undersigned court-appointed counsel.

64. The Missouri Supreme Court denied Mr. Jones's petition the next day.

65. Represented by Michael A. Gross—his lead appointed counsel in the federal courts—Mr. Jones filed an action under 42 U.S.C. § 1983 on Monday, April 25, 2005, less than forty-eight hours before his scheduled execution using this sequence of three chemicals.

66. The same day, the Court (the Hon. Rodney W. Sippel, District Judge) held a proceeding at which Mr. Jones was represented by Mr. Gross, and the defendants (including defendants Crawford and Purkett here) were represented by Assistant Attorneys General Denise McElwein, in person, and Andrew W. Hassell, by telephone. (Exhibit 7 is a true and correct copy of the transcript of proceedings in the *Jones* section 1983 action.)

67. Before Judge Sippel, Ms. McElwein (who had signed a pleading in the *Johnston* case recognizing by silence that the issue before Judge Sippel was non-grievable) re-raised the defense of nonexhaustion of administrative remedies:

> . . . even if you look at this as a Section 1983 action, then it is barred under the Prison Litigation Reform Act because the plaintiff has failed to allege that he has exhausted his administrative remedies as required by the PLRA.
>
> And I think the PLRA is pretty clear that no action—it says: "No action shall be brought with

> respect to prison conditions under Section 1983 until such administrative remedies as are available are exhausted."
>
> And according to this circuit in *McAlphin v. Morgan*, 216 F.3d. 680, which is a 2000 Eighth Circuit opinion, states that dismissal is appropriate in the absence of proof of exhaustion.[5]

68. Immediately before retiring to deliberate, Judge Sippel sought to probe the facts regarding prisoners' having raised the issue in Mr. Jones's section 1983 action, in a way that would have disclosed the unavailability of an administrative remedy for Mr. Jones to have pursued:

> THE COURT: Do you all know? I mean, it would be a matter of some significance if there was a claim that the dosage, if you will, was wrong and that the State should re-examine the three-drug treatment and use of the three drugs in what order and how much, strikes me that's something you might know about if that had been an issue.
>
> MS. MCELVEIN: Oh, you mean if he had filed a grievance?
>
> THE COURT: As an officer of the court, can you tell me if you have any knowledge about a grievance to that effect?
>
> MS. MCELVEIN: No, Your Honor, I do not.
>
> THE COURT: Mr. Hassell?
>
> MR. HASSELL: I have no knowledge, Your Honor.

[5]Exhibit 7 at 22-23.

> THE COURT: ***It strikes me that they might have told you about it if that was becoming a big issue in the facility.***
>
> MR. HASSELL: ***I would expect so, Your Honor, but I just don't know.***
>
> THE COURT: Okay. All right. I'm going to take a short recess and give you a sense of where we're going. One way or the other, I suspect you might be in another court tomorrow some way, some how.[6]

69. Judge Sippel went back to chambers with Ms. McElvein's silence in his ears. She knew that Mr. Johnston had filed an IRR, and her clients had held it "non-grievable." We do not presently have evidence that Mr. Hassell knew about it until the undersigned faxed him to that effect while the 1983 was still before the Eighth Circuit; we do have evidence that Ms. McElvein did.

70. After retiring to deliberate under these circumstances, Judge Sippel returned to the courtroom and announced that he was relying on Ms. McElwein's nonexhaustion defense as his first and basic reason for denying relief: "the basis of my judgment will be that the complaint fails to state a cause of action under Section 1983 for failure to exhaust administrative remedies." (Exhibit 7 at 30-31.)

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[6]*Id.* at 28-29 (emphasis supplied).

71. Over a vote of five to two for commutation by the Board of Probation & Parole, the Governor denied executive clemency, and the defendants executed Mr. Jones on April 27, 2005, at or about 12:01 a.m.

72. Later the same morning (after the fact of the execution was public knowledge), the district court (the Hon. Carol E. Jackson) granted Vernon Brown's motion—filed before the Missouri Supreme Court had set an execution date in his case—for leave to proceed ex parte to request funding for expert and investigative services. Thereafter and thereby, Mr. Brown's counsel were able to obtain the services, inter alia, of the senior co-author of the LANCET article published the day after the Missouri Supreme Court set Mr. Brown's execution date.

73. After the sister district court allowed Vernon Brown's counsel to seek funding for expert and investigative services without disclosing their mental impressions to opposing counsel, the Missouri Supreme Court summarily denied Mr. Brown's habeas corpus action raising this issue, with explanation and without ordering the respondents to show cause or otherwise respond.

74. Vernon Brown filed an Informal Resolution Request seeking to raise the issue of the lethal injection chemicals (Exhibit 8), but received a

response different from the one which previous prisoners had received, with the special response in his case suggesting that there were multiple levels he would need to go through in order to exhaust his administrative remedies (Exhibit 9).

75. Counsel filed a verified complaint and accompanying papers on behalf of Mr. Brown as soon as counsel received the attached declarations prepared by the LANCET team (through Dr. Lubarsky) and by Dr. Mark Heath, the leading expert on the underlying mechanism under which the defendants' three-chemical sequence creates a foreseeable risk of inflicting gratuitous pain.

76. Unless the defendants answer several questions that the LANCET team has expressed through Dr. Lubarsky's declaration (Exhibit 2, ¶¶ 19-21), and which are reflected in the plaintiff's discovery, the petitioner is entitled to the inference that because the defendants' practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is ***at least*** the same risk (43%) as in those jurisdictions that he will not be anesthetized at the time of his death. (Exhibit 2, ¶¶ 22-23.)

77.In Mr. Brown's case as aforesaid, counsel learned after filing the complaint in the United States District Court for the Eastern District of Missouri that the lead co-author of a study he had already cited before the Missouri Supreme Court had completed his Ph.D. dissertation and that it included evidence bearing on the claim concerning the lethal-injection chemicals and their administration.

78.By leave of court, counsel filed an amendment by interlineation with memorandum in support raising this additional claim.

79.Likewise in this action, the plaintiff relies on certain facts set forth in the Ph.D. dissertation of Michael Lenza, and in his declaration accompanying this memorandum, which is incorporated herein and marked as "Exhibit 10"; his curriculum vitae is attached to, incorporated in his declaration, and marked as "Declaration Exhibit 1."

80.Plaintiff tendered Dr. Lenza as a witness at the hearing of May 13, 2005, on the motion for temporary restraining order in Vernon Brown's case. Defendants were represented by Assistant Attorneys General Hawke and McElwein, and did not object when the district court declined the plaintiff's offer to present live testimony from Dr. Lenza.

81.Dr. Lenza's Ph.D. dissertation is entitled POLITICS OF DEATH: A STATISTICAL, THEORETICAL, AND HISTORICAL EXAMINATION OF THE DEATH PENALTY IN MISSOURI, University of Missouri–Columbia (2005). It is attached hereto, incorporated herein, and marked as "Exhibit 11."

82.Its central finding is that in the customs and practices of the State of Missouri, there is a strong historical association between the presence of black slavery, the incidence of lynching, and a disproportionate number of death sentences after *Furman v. Georgia*[7] and *Gregg v. Georgia.*[8] It bears not only on the absence of a lawful capital punishment régime—which is beyond the scope of this action—but also on the defendants' selection of lethal-injection chemicals that have an elevated likelihood of inflicting gratuitous pain, when they could use at least one (pentobarbital) which would—as they advertise their current practice, in contradiction to veterinary law and practice—be like putting a dog to sleep.

83.In the research for his dissertation, Dr. Lenza discovered that there is a strong historical association in fact within Missouri between counties that had the heaviest levels of black slavery until the Civil War, the

[7]408 U.S. 238 (1972).

[8]428 U.S. 153 (1976).

incidence of lynching, and an elevated rate of death sentences after *Furman v. Georgia* and *Gregg v. Georgia.* (Exhibit 10.) In the judicial circuits falling into the slave and Southern cultural regions as Dr. Lenza defines them, a homicide case is 286% more likely to be prosecuted as a capital case and taken to trial as such than in the circuits he categories as urban. (Exhibit 11 at 232.) Such a case was 71% more likely to result in a death sentence. (*Id.* at 233.) Whether a case arose in the slave and Southern cultural regions was the most important variable in predicting death sentences even when compared such other reliable predictors to the color of the accused versus the color of the decedent, whether the accused was a stranger to the decedent, whether the homicide was performed with a knife (producing better gruesome photographs to inflame the jury), and whether the accused had prior convictions and was represented by a public defender (both of which are surrogates for lower socio-economic status of the accused). (*Id.* at 233-35.) These data are not samples, but the universe of cases; there is a 92% certainty that the associations Dr. Lenza found did not happen by chance fluctuation in the data. (*Id.* at 235.)

84.Just as 89% of executions occur in states which used to have slavery (Exhibit 11 at 3-5), the practice of the death penalty in Missouri

today is a reflection of the attitudes towards one's fellow human beings which allowed slavery to exist and thrive until put down by force of arms.

85. An underlying explanatory principle is that slavery "vested white citizens with the power of the State to utilize extra-legal violence to maintain the social order," *i.e.*, the supremacy of whites over African-Americans. (Exhibit 11 at viii.) Like all Ph.D. theses, this one finds that more research is called for, but also suggests that the results are consistent with the proposition that the death penalty is "an institutionalized social artifact of slavery, maintaining the racialized social order through violence, carried forth into our present by our social institutions." (Exhibit 11 at 244.)

86. One of the subsidiary themes of Dr. Lenza's dissertation is that greater pain was imposed on slaves and their descendents who were executed—officially or unofficially—than on members of the master race who were executed: this frequently took the form of burning alive (Exhibit 11 at 7, 63, 82, 108, 160-62 & 174-76), for which potassium chloride is as close as the defendants can get away with in the court of public opinion. *See* Exhibit 10, ¶¶ 8-11.

87. Plaintiff does not here contend that the death penalty in Missouri is unlawful because despite the color-neutral statutes, it discriminates

against men of color and on other arbitrary or independently unlawful bases. Plaintiff does, however, plead—as in an intermediate premise in his claim for relief under the Thirteenth Amendment—that the death penalty in Missouri falls disproportionately on African-American residents. Plaintiff pleads this premise in the course of establishing that the specific method of lethal injection the defendants have chosen is a badge of slavery.

88.In support of the intermediate premise regarding disparate impact of the death penalty, the plaintiff relies on four additional attachments, including one which was chiefly co-authored by Dr. Lenza before he completed his dissertation. Because the plaintiff does not advance this premise as a freestanding ground for relief, this Court need not consider whether *McCleskey v. Kemp*[9] need be overruled.

89.In other death-sentenced persons' cases before the Missouri Supreme Court, the Missouri State Public Defender System presented a study by University of Missouri–Columbia Professor John F. Galliher of the reports from Missouri circuit judges that the Missouri Supreme Court itself collected as the statute on proportionality review mandated. The Missouri State Public Defender System filed this study with the Missouri Supreme

[9]481 U.S. 279 (1987).

Court in *State v. Parker.*[10] Plaintiff presents it here as Exhibit 12. There is also available on the Internet a subsequent report based on later and more inclusive data prepared by Professor Galliher's original co-author, Professor David Keys, and others, headed by Dr. Michael Lenza.[11] Plaintiff presents it as Exhibit 13.

90.The original Galliher report was based entirely on the reports of Missouri trial judges in homicide cases that the Missouri Supreme Court gathered in response to Mo. Rev. Stat. § 565.035.6. The report showed that out of 439 death-eligible cases during the period it covered, the prosecutors had waived the death penalty in 212, or 52%. (Exhibit 12 at 1.) The remainder of the report showed that aggravating and mitigating factors played virtually no role in determining whether a person actually got the death penalty for a homicide. (*Id.* at 2-8.) For example, in respect to eight of the fourteen statutory aggravating factors, sentencers were more likely

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[10]886 S.W.2d 908 (Mo. 1994) (en banc), *cert. denied*, 514 U.S. 1098 (1995), *citing In re Estate of Danforth*, 705 S.W.2d 609, 610 (Mo. Ct. App., S.D. 1986) (providing for judicial notice of the record resulting in an opinion to determine grounds on which opinion is based).

[11]M. LENZA ET AL., THE PREVAILING INJUSTICES IN THE APPLICATION OF THE DEATH PENALTY IN MISSOURI (1978-1996) (2002), available May 18, 2004, at http://www.umsl.edu/divisions/artscience/forlanglit/mbp/Lenza1.html. (Exhibit 13.)

to impose life without parole than death if they found that factor;[12] in cases where accused citizens received life without parole, the sentencer found an average of 2.17 statutory mitigating factors, whereas in cases where the accused received a death sentence, the sentencer found 2.2.[13] Whereas the relationship between the total number of aggravating factors and a sentence of death is positive, it is only slightly so. (*Id.* at 2-3.)

91.By contrast, the clearest, strongest predictor of whether a prosecutor would seek the death penalty was whether the accused was a black person and the decedent was a white person. In 89% of the cases in which prosecutors waived the death penalty, the accused and the decedent were the same color, and prosecutors rarely charged whites for killing blacks. (*Id.* at 11.) Prosecutors were radically less likely to waive the death penalty in cases where they charged blacks with killing whites than in any other class of death-eligible cases:

> For black offenders 44 percent of those receiving the death penalty killed a white victim, 44 percent of black offenders sentenced by a jury to life in prison killed a white victim, but only 18 percent of black offenders where the death penalty was waived killed a white victim. These figures indicate that in

[12] *Id.* at 4-5.

[13] *Id.* at 6.

> Missouri the race of the victim makes little difference for the legal outcome of white offenders, but ***for black offenders killing a white victim severely reduces the chances of having the death penalty waived by the prosecution—a reduction from 97 percent of white offenders who had killed white victims to 78 percent of black offenders who had killed white victims.***[14]

92.The Galliher study examined the influence of youth on charging and sentencing decisions, because it is a statutory mitigating factor. The data from the circuit judges collected by the Missouri Supreme Court showed that youth was a mitigating factor for white accused citizens but not for black ones:

> Among cases where the prosecution waived the death penalty 14 percent of defendants were 18 years old or less, and 32 percent were 21 or less with a mean age of 28.2 years. In cases where a jury handed down a life sentence 9 percent were 18 or less, and 25 percent were 21 or less with a mean age of 28.2 years—exactly the same average age as for cases in which the prosecutor waived the death penalty. Those receiving the death penalty were slightly older than others. Prosecutors perhaps correctly perceive the common bias of jurors against imposing the death penalty against the very young.
>
> . . .
>
> The mean age of black offenders sentenced to death is 27.7 years, and for whites the mean age is 35

[14]*Id.* at 11 (emphasis supplied).

> years. Twenty-two percent of black defendants under the age of 21 were sentenced to death, while this was true of only 14 percent of white offenders under 21.[15]

The authors concluded that "young black defendants are in greater jeopardy of a death sentence than are white offenders."[16]

93. Another factor that the Galliher study explored was the reputation of the decedent as a mitigating factor. The data from the circuit judges, as collected by the Missouri Supreme Court, showed that the reputation of the decedent made a difference only if the decedent was white:

> While killing a white person with a bad reputation nearly always saved a defendant from death, it is much less likely to operate in the same fashion in the case of black victims. Perhaps this is true because all black victims were devalued whether or not they were noted to have a bad reputation.[17]

94. Prosecutors waived the death penalty as a rule if the accused was a woman, as long as she was white:

> Prosecutors seem less likely to seek the death penalty against female defendants than juries are to sentence females to death. The application of this apparent chivalry is, however, differentially distributed across races. Among death waived

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[15] *Id.* at 8.

[16] *Id.* at 17.

[17] *Id.* at 13.

> cases 20 percent of white offenders and only 3 percent of black offenders were females. In other words, white females were proportionately nearly seven times as likely to benefit from a waived death penalty as were black females.[18]

95. Dr. Lenza's study included data into 1996, and was not available until 2002. Whereas the Galliher study observed that the reports from the trial judges in the Missouri Supreme Court's database were incomplete, and listed 189 names of persons in the Department of Corrections for death-eligible offenses at the relevant time that were missing from the database,[19] the authors of the Lenza et al. study used FBI Supplemental Homicide Reports to enhance their coverage.[20] They divided capital cases into three stages: (1) the prosecutor's decision whether to charge a death-eligible offense, (2) the prosecutor's decision whether to seek the death penalty for a death-eligible offense, and (3) the result of a penalty phase once the prosecutor had decided to seek death.[21] The first stage accounts for most of the decision-making, as prosecutors charged only 5.8% of homicides (574 out of 9857) as death-eligible cases; the second stage

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[18] *Id.* at 16.

[19] *Id.* at 18 & attached memorandum.

[20] Exhibit 13:4

[21] *Id.* at 4-5.

accounts for the next largest number of decisions, as prosecutors waived the death penalty in 49% of the cases they had charged as death-eligible (270 out of 551).[22] Of the remaining cases, circuit courts sentenced 54% of the accused (152 out of 281) to death.[23]

96. At the first stage, in which the prosecutor decides whether to charge a homicide as "capital murder" or "first-degree murder" (depending on the statutory classification of death-eligible homicide at the time of the case), Missouri prosecutors were almost twice as likely to charge a black who killed a white with death-eligible homicide as they were to charge a white who killed a black:[24]

[22] *Id.* at 4-5. The authors dropped 23 cases due to insufficient data.

[23] *Id.* at 5.

[24] *Id.* at 8.

Accused/Decedent	Capital	Total	Percent
White/Black	274	2945	8.39%
White/White	12	254	4.72%
Black/Black	188	6045	3.11%
Black/White	88	599	14.69%
Missing Cases	12	14	N/A
Totals	574	9857	5.8%

The authors explained that these data confirmed previous studies:

> The percentages of all Missouri homicides charged with capital murder by offender/victim racial characteristics indicates blacks killing whites are 5 times more likely to be charged with capital murder than blacks killing blacks. Whites with black victims are half as likely to be charged with capital murder than whites killing other whites. . . . this pattern confirms the suspicion that whiteness is valued over non-whiteness, predicting that the severest punishment would be visited on cases where the non-white offender kills a Caucasian (-/+) 14.69%, followed by a descending hierarchical structuring of the proportion of cases charged with capital murder based on racial characteristics: whites killing whites (+/+) 8.39%, whites killing blacks (+/-) 4.72%, to the lowest, blacks killing blacks (-/-) 3.11%.[25]

[25] *Id.* at 14 (emphasis supplied).

97. At the next stage of a capital case—the prosecutor's decision whether to waive the death penalty for a death-eligible homicide—the Lenza study found that the color of the accused and the color of the decedent played a strong explanatory role:

> Compared to whites killing whites (W/W) one sees that blacks with black victims (B/B) are 59% less likely to be taken forward to trial, while ***blacks killing whites (B/W) are 56% more likely than (W/W) to be taken to trial.*** In the few cases where whites have killed a black victim and were charged with capital murder, they were 115% more likely to be taken to trial than whites taking the lives of other whites. The last category, whites killing blacks (W/B), represents the only 12 cases in Missouri over 18 years in which white defendants were charged with capital murder for killing an African-American, a mere 2% of the total cases.[26]

98. In contrast to the decisions made by prosecutors, the Lenza et al. study found, the decisions made by judges and juries in the third stage of a capital case—the actual sentence—did ***not*** reflect bias according to the color of the accused or the color of the decedent.[27] The Lenza et al. study found other factors—such as low socio-economic status of the accused and the availability of gruesome photographs to inflame the jury—that were

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[26] *Id.* at 15.

[27] *Id.* at 15-16.

associated with prosecutorial decisions to seek death.[28] For example, whereas juries and sentencing judges did not in fact respond measurably differently to cases involving the use of firearms as opposed to knives, prosecutors were 133% more likely to seek the death penalty in knife cases, such as the instant case, because they produce more gruesome photographs they could use to inflame the jury, as this prosecutor did, regardless of the relative moral blameworthiness of the offense.[29] The conclusions of the Lenza study pointed to prosecutorial discretion as the main cause of racial disparity in the use of the death penalty in Missouri:

> the seat of prosecutorial discretion is also the location of and the mechanism responsible for the greatest racial disproportionality in capital sentencing [in] Missouri. It is those elements of the process, in the hands of prosecutors, who are charged with selecting offenders and crimes for eventual capital consideration and sentencing, that put in place factors which proportionate sentencing has sought to avoid.[30]

99. In 2001, the Executive Director of the ACLU of Eastern Missouri presented data on Missouri death sentences both from the time the state created a central execution process in 1937 until 1965, when the pre-*Furman*

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[28] *Id.* at 17-19 & 20-22.

[29] *Id.* at 17-18.

[30] *Id.* at 22.

moratorium took effect, and then from the post-*Gregg* reinstitution of the death penalty until the date the paper was written in October 2001.[31] This study, which was obviously not available at the time of the plaintiff's consolidated appeal, complements the data the Missouri State Public Defender System had provided the Missouri Supreme Court in *State v. Parker*. Initially this paper emphasizes the variation among counties in the state: several sizable counties had no one under sentence of death, regardless of their homicide rate.[32]

100. From the creation of a centralized state death penalty to the pre-*Furman* moratorium, the split between black and white persons that Missouri executed was 23 to 16 over almost thirty years.[33] The split after *Gregg* was 21 to 30 to one Native American over about eleven years.[34] The

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[31]DENISE LIEBERMAN, Legal Director, American Civil Liberties Union of Eastern Missouri, PROSECUTORS: THE FIRST LINE OF OFFENSE—PROSECUTORIAL DISCRETION AND ARBITRARINESS IN ADMINISTRATION OF THE DEATH PENALTY, http://www.umsl.edu/~phillips/dp/ACLUDenise.html (2001) (Exhibit 14.)

[32]*Id.* at 5-10.

[33]*Id.* at 1-2.

[34]*Id.* at 11.

state achieved this leveling of racial impact by increasing the executions per year by about 300%, and killing more white men:[35]

Period	Black	White	Native American	Total	Years	Annual Rate
1937-65	23	16	0	39	28	1.4
1989-2001	21	30	1	52	12	4.3
Totals	47	43	1	91	40	2.3

101. Although this state is executing more white men, its death penalty continues to fall on black men convicted of killing whites far out of proportion to any other combination of homicide convicts and their decedents. While the death penalty continues to target black men out of proportion to their numbers, it has added white men to the pie of persons executed and has thereby decreased the proportion of blacks.

102. A 2003 article—which is not limited to Missouri data—shows that support for the death penalty among white people tends to vary strongly according to a combination of racial prejudice and the proximity of black residents to the person surveyed:[36]

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[35]*Id.* at 11-12.

[36]J. SOSS ET AL., *Why Do White Americans Support the Death Penalty?* 65 J. OF POLITICS 397, 409 (2003). (Exhibit 15.)

> as the black percentage of a county's population rises, racial prejudice becomes a much more powerful predictor of whether a white person will strongly favor state executions. Indeed, the effect of context on the relationship between prejudice and white support is dramatic. Among white people who live in all-white counties, the largest possible increase in prejudice (from 0 to 100) produces only a 34-point increase in the probability of strong death penalty support (from .52 to .86). By contrast, when the black percentage of the county population stands just below 20%, the same increase in prejudice raises the probability of strong support from fairly unlikely (.29) to a virtual certainty (.95). Thus, the interplay of racial beliefs and racial proximity go far to explain strong white preferences for state executions—but neither factor can be adequately understood in isolation from the other.[37]

103. The case against this plaintiff arose in Jackson County, one with a high proportion of African-American citizens, yet one in which they are a distinct minority. This is exactly the kind of jurisdiction in which the foregoing article would predict a high correlation between racist attitudes and support for the death penalty.

104. As elected officers who retain their positions at the will of the electorate, Missouri prosecutors are presumptively aware of and responsive to the level of support for the death penalty. In its current form, the prosecutorial discretion created by Missouri statutes leads to racial

[37] *Id.* at 411.

discrimination in the imposition of the death penalty. The longitudinal data in the latter two articles cited in this response raise the question whether after *Furman* and *Gregg* have addressed various aspects of fairness at the jury and trial-judge level, it is possible in ***any*** case for there to be a death-***charging*** decision which is free from impermissible attention—one way or the other—to the color of the accused and the color of the decedent.

105. Because the death penalty as practiced in Missouri both before and after *Furman* and *Gregg* is disproportionately applied against African-American men like Stanley Hall, Donald Jones, and Vernon Brown—and this plaintiff—the fact that it is ***more tortuous*** than it need be is consistent with the behavior Dr. Lenza found beginning with the introduction of slavery into the Missouri Territory.

106. The use of a gratuitously painful form of suffocation, followed by the burning through the veins and the heart attack caused by potassium chloride, instead of a single, lethal dose of an otherwise legitimate medication such as pentobarbital is evidence that the state keeps the death penalty around primarily for "them."

107. The proposition that the death penalty itself bears more heavily against blacks than whites is not before this Court as a claim for relief. In

light of this fact, however, the additional fact that the defendants use a special form of lethal injection which creates a foreseeable, completely unnecessary, risk of inflicting gratuitous pain and suffering, when the executions of slaves and their descendants have historically been more painful than the execution of others in a slave jurisdiction such as Missouri, is a badge or vestige of slavery over and above the existence of the death penalty in the abstract and over and above the judicial decision to impose the death penalty in a given case.

VII. Claims for Relief

108. Plaintiff restates and realleges the contents of each preceding paragraph as if fully set forth again.

Claim I

109. Unless this Court stops them, the defendants, acting individually and under color of state law, will violate the plaintiff's right to be free of cruel and unusual punishments secured to him by the Eighth Amendment to the Constitution of the United States as applied against the states by section 1 of the Fourteenth Amendment by executing him using the sequence of three chemicals (sodium pentothal a/k/a thiopental, pancuronium bromide, and potassium chloride) which they have admitted

to be their practice in their discovery responses in *Johnston v. Kempker* as aforesaid, which is unnecessary as a means of employing lethal injection and not required by the statute creating this form of execution in the State of Missouri, and which creates a foreseeable risk of inflicting gratuitous pain and suffering.

Claim II

110. Defendants' chosen use of a specific form of lethal injection which is more painful than necessary to bring about the statutory objective of killing the condemned person is a vestige and badge of slavery, and therefore violates the Thirteenth Amendment as well as the Eighth and Fourteenth, and impinges on the vertical-equity (color and socio-economic status of accused) and horizontal-equity (irrationality of who among the mass of homicide defendants gets the death penalty, even irrespective of color and SES) prongs of Eighth Amendment analysis (applied against the states through the Fourteenth) as well as the severity prong, the latter of which is the focus of Count I.

VIII. Exhaustion of Administrative Remedies

111. Plaintiff has exhausted any available administrative remedy for the issues contained in this complaint, because the selection of chemicals

for lethal injection is not a grievable issue within the meaning of the administrative grievance procedure as adopted and applied by the defendants' actual penological agents as distinguished from the Department's outside counsel in the Attorney General's Office, and these agents have so informed him in response to his attempt to seek administrative remedies. (Exhibit 16.)

112. As noted, in the *Johnston*, *Jones*, and *Brown* litigation, the defendants initially asserted that the plaintiff had failed to exhaust administrative remedies.

113. In *Johnston*, the defendants' clients in the Department of Corrections had admitted, by signed notation on Mr. Johnston's IRR, that the issue of which chemicals the executioners use is "non-grievable." (Exhibit 5).

114. Counsel for the defendants in *Johnston* (who were also counsel for the defendants in *Jones* and *Brown*) recognized this fact by dropping the nonexhaustion point in the reply to Mr. Johnston's response to which the IRR was attached as an exhibit. (Exhibit 6.)

115. The same counsel raised the same defense in *Jones*, knowing that this issue was not grievable according to the Department of

Corrections, in whose favor the exhaustion requirement of 42 U.S.C. § 1997e is supposed to run; the Court relied on her representations; Mr. Jones was executed by the use of the specific chemical sequence which Mr. Johnston's pleadings and Mr. Jones's pleadings showed to create a foreseeable risk of inflicting gratuitous pain and suffering in violation of the Eighth and Fourteenth Amendments.

116. As of the time this claim manifested itself beyond cavil with the publication of the LANCET article, Vernon Brown was not only aware of what happened to Mr. Johnston's grievance but had also heard that when other prisoners have attempted to file IRR's on this issue, the staff of the Department of Corrections have actually refused to give them IRR forms because of the Department's position that the issue was not grievable. (Exhibit 8.)

117. Nonetheless, on the advice of counsel, Mr. Brown filed an IRR, and this plaintiff, Michael Taylor, submits a true and correct copy of it with the above-referenced affidavit by Mr. Brown as Exhibit 8. This filing was expressly made in an abundance of caution and not by way of admission that the issue is grievable notwithstanding the well-established position of the Department of Corrections, reflected both to the federal courts through

counsel and to the prisoners affected by the issue by the staff of the Department.

118. Because the issue which chemicals the state uses in lethal injections is not within the scope of the Department of Corrections grievance policy, this complaint is not subject to the requirement of 42 U.S.C. § 1997e.

119. Parties in privity with the State of Missouri, such as these defendants, are estopped to assert the nonexhaustion of administrative remedies because the Department of Corrections does not consider this issue grievable (and their attorneys know it).

120. In Mr. Brown's case, the staff who responded to Mr. Brown's IRR changed the response from what it had been in *Johnston* and what Mr. Brown had heard it had been to other prisoners under sentence of death, and asserted that Mr. Brown—whose execution date had already been set—had to pursue multiple levels of review in order to exhaust administrative remedies on the issue. (Exhibit 9.)

121. In Mr. Brown's case, the district court relied on these representations to deny a temporary restraining order. A divided United States Court of Appeals for the Eighth Circuit denied a stay of execution, as

did the United States Supreme Court over the dissenting votes of four Justices, and Mr. Brown was executed on May 18, 2005.

122. This plaintiff, Michael Taylor, filed an Informal Resolution Request, and the staff returned it to him with the explanation that he could not file it because the subject-matter of the issue was not grievable but was involved in litigation. (Exhibit 16.) Defendants' counsel are estopped to contradict their clients' correct interpretation of their own administrative regulations in order to avoid this issue once more.

123. After counsel had prepared and circulated a complete draft of this complaint, he received a telephone call from the plaintiff, Mr. Taylor, indicating that the staff had told the plaintiff he could, after all, file an IRR, but that there was no guaranty the result would be any different. Plaintiff is proceeding with the re-filing of an IRR.

124. Pendency of this new IRR need not delay the filing of this complaint. Selection of a specific means of lethal injection is not a "prison condition" within the meaning of 42 U.S.C. § 1997e(a), the source of the requirement of exhaustion of administrative remedies. Selection of a specific means of lethal injection is not a matter of "institutional life" within the meaning of the administrative remedy the Department of Corrections

adopted to take advantage of section 1997e. (Exhibit 17 at 2, ¶ D5-3.2, II.J.) Defendants' agents have admitted the inapplicability of the grievance procedure in *Johnston*. (Exhibits 5-6.)

125. This Court should not allow the defendants to avoid accountability for their actions by invoking section 1997e. Their shift of ground in the *Vernon Brown* case was belied by their attorneys' admissions in the hearing on Mr. Brown's motion for a temporary restraining order. During the hearing, the issue of exhaustion of administrative remedies was discussed at some length. Defendants represented the complete exhaustion of administrative remedies requires three steps: (1) the filing of an IRR, (2) the filing of a grievance, and (3) the filing of a grievance appeal. (Exhibit 18 at 60.) Defendants further represented the grievance is filed with the superintendent of the institution where the prisoner is incarcerated, and the grievance appeal is addressed by "central office," which counsel for the defendants elided with defendant Crawford, the Director of the Department of Corrections. (*Id.* at 61-62.)

126. In Vernon Brown's case, the defendants—who were the same as the defendants in *Johnston* and *Jones*, and one of whom was opposing counsel on this plaintiff's federal habeas corpus petition and on his motion

to recall the mandate of the Missouri Supreme Court—conceded that the corrections classification worker who would address the initial IRR has no authority to change the lethal injection protocol; they further conceded the superintendent of the institution where the prisoner is incarcerated has no authority to change the protocol for the lethal injection. (*Id.* at 61.) They admitted the only person with authority to change the protocol would be defendant Crawford. When asked whether an inmate had the ability to bring an initial grievance before the Director, they conceded there was no procedure for that:

> THE COURT: Okay. Could Mr. [Brown] have bypassed the IRR procedure and the grievance? Since it is clear that no one at the institution had authority to make any changes, could he have bypassed the institutional officials and gone directly to the director with his complaint?
>
> MS. McElvein: No, your Honor. Not that I am aware of. [*Id.* at 62-63.]

127. There is therefore no administrative process available to the plaintiff to grieve this claim. By the defendants' admissions in open court, the Director's role in the normal administrative process is to function as an ***appellate*** decisionmaker, reviewing the disposition of the grievance filed with the ***superintendent*** of the institution where the prisoner is

incarcerated. In this case, the defendants concede that the superintendent of an institution, even of the institution where the executions occur, has no authority—no jurisdiction—to change the protocol for lethal injections. Thus, as the appellate decisionmaker reviewing any decision made by the superintendent, the only role the Director would serve would be to determine whether the superintendent correctly determined the superintendent had no authority to change the chemicals which other personnel use in lethal injections. The Director's appellate role in the administrative grievance process is not the same as his role as the initial decisionmaker. Here, the defendants have conceded there was no administrative grievance procedure available to seek to change the Director's position as the initial decisionmaker, rather than in the role of an appellate decisionmaker reviewing the question whether the superintendent had the authority to determine which chemicals to use, which they concede he does not.

128. It is therefore irrelevant whether the staff of the Department of Corrections adhere to their correct position that the issue in this plaintiff's IRR is not grievable, or attempt to manipulate this Court as they did a sister court in Vernon Brown's case by moving the goalposts.

129. Missouri does not provide an administrative grievance process for presenting this issue, and therefore section 1997e would not apply even if the method of execution were a "prison condition," even if "institutional death" equaled "institutional life," and even if the United Nations Convention Against Torture were not part of "the supreme law of the land" requiring the United States to afford the plaintiff a forum for raising this issue.

IX. Prayer for Relief

130. Initially, the plaintiff seeks a preliminary injunction to prevent the defendants from executing him until the defendants have responded to his discovery (including what appears to be the inevitable time it will take to litigate motions to compel as Mr. Johnson has had to do) and until this Court has adjudicated his underlying claim for relief on the merits (including the time it would take for any appeal from the disposition).

131. Second, the plaintiff seeks a declaratory judgment holding that the defendants' current means, methods, practices, procedures, and customs regarding execution by lethal injection violate the Eighth, Thirteenth, and Fourteenth Amendments.

132. Plaintiff seeks a permanent injunction preventing the defendants from using their current means, methods, practice, procedures, and customs regarding execution by lethal injection.

133. Finally, the plaintiff seeks an order granting him reasonable attorney fees under 42 U.S.C. § 1988 and the laws of the United States; for his costs of suit; and for such other and further relief as the Court deems appropriate.

WHEREFORE, the plaintiff prays the Court for its orders as aforesaid.

Respectfully submitted,

JOHN WILLIAM SIMON, J.D., PH.D.

/s/ John William Simon

Of Counsel
Sindel, Sindel & Noble, P.C.

2683 South Big Bend Boulevard, # 12
St. Louis, Missouri 63143-2100

(314) 645-1776
FAX (314) 645-2125

Attorney for Plaintiff

Affidavit

COMES NOW Michael Anthony Taylor, being duly deposed and sworn, and states on his oath or affirmation all as follows:

1. My name is Michael Anthony Taylor.

2. I am a prisoner of the State of Missouri, under sentence of death.

3. I have reviewed the foregoing pleading with my attorney, John William Simon.

4. I believe that the facts set forth in the foregoing pleading are true and correct.

Further, the affiant saith naught.

I swear or affirm that the foregoing is true and correct.

MICHAEL ANTHONY TAYLOR

STATE OF MISSOURI)
) SS.
COUNTY OF Reynolds)

Subscribed and sworn to before me, a Notary Public, this 27TH day of May 2005.

NOTARY PUBLIC

My commission expires on _____.

ERIC DUNN
Notary Public - State of Missouri
County of Reynolds
My Commission Expires Mar. 13, 2006

Declaration of Verification

COMES NOW the declarant, John William Simon, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is John William Simon.

2. I live in Richmond Heights, Missouri.

3. I am a member of the Missouri Bar (Enrollment No. 34535), and of the bars of the Supreme Court of the United States, the United States Court of Appeals for the Seventh and Eighth Circuits, and of the United States District Courts for the Eastern and Western Districts of Missouri.

4. I hold an A.B. summa cum laude, Phi Beta Kappa, with distinction in Philosophy and Political Science from Boston University; an A.M. and a Ph.D. in Political Science from Harvard University; and a J.D. from the Yale Law School.

5. I taught constitutional law and other subjects in the discipline of political science for eight and one-half years.

6. I have practiced law full-time since my admission to the bar in 1985, having worked as a summer clerk or law clerk from my first summer of law school until my admission.

7. I have handled capital cases in federal habeas corpus and in state court from both sides since 1991, first for the State of Missouri and its privies, and thereafter for persons accused of capital crimes or sentenced to death by the federal government or the State of Missouri.

8. I have personally prepared the foregoing pleading.

9. Insofar as I am a witness to the transactions and occurrences set forth in the foregoing pleading, such as pleadings filed, representations made, and responses and orders received in the cases of Donald Jones and Vernon Brown, the statements in the pleading are true and correct according to my personal knowledge and belief.

10. The documents I have attached to this pleading are true and correct copies of the masters or originals in my possession, custody, and control.

Further, the declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed June 3, 2005

JOHN WILLIAM SIMON

Certificate of Service

I hereby certify a true and correct copy of the foregoing was forwarded for transmission via Electronic Case Filing (ECF) ***or otherwise e-mailed*** this third day of June, 2005, to the offices of:

Stephen David Hawke, Esq.
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
stephen.hawke@ago.mo.gov

/s/ John William Simon
Attorney for Plaintiff

Respectfully submitted,

JOHN WILLIAM SIMON, J.D., PH.D.

s/John William Simon

Of Counsel
Sindel, Sindel & Noble, P.C.

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St. Louis, Missouri 63143-2100

(314) 645-1776
FAX (314) 645-2125

Attorney for Plaintiff

Certificate of Service

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Assistant Attorney General
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Jefferson City, Missouri 65102
stephen.hawke@ago.mo.gov

/s/ John William Simon
Attorney for Plaintiff