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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA ASSOCIATION OF CRIMINAL)
DEFENSE LAWYERS; AMERICAN CIVIL)
LIBERTIES UNION OF MONTANA;)
MONTANA ASSOCIATION OF CHURCHES;)
MONTANA CATHOLIC CONFERENCE;)
SENATORS BRENT CROMLEY, STEVE)
GALLUS, DAN HARRINGTON, DON RYAN)
AND DAN WEINBERG;)
REPRESENTATIVES NORMA BIXBY;)
PAUL CLARK, GAIL GUTSCHE, JOEY)
JAYNE, AND JEANNE WINDHAM)

Plaintiffs.)

v.)

DIRECTOR MIKE FERRITER; WARDEN)
MIKE MAHONEY; ATTORNEY GENERAL)
MIKE McGRATH; JOHN DOES 1-10,)

Defendants)

Civil No. CV-06-35-H-DWM

FIRST AMENDED COMPLAINT

COME NOW Plaintiffs named above and allege and plead as follows:

I.

Plaintiffs are a collection of organizational and individual persons who either function within or are residents of the State of Montana.

Plaintiff Montana Association of Criminal Defense Lawyers (“MTACDL”) is a non-partisan organization dedicated to the continued improvement of the criminal defense bar, and to preserving, protecting, and defending the adversary system of justice and the constitutional protections found in the Montana Constitution, the U. S. Constitution, and in the Constitutions of the Tribal Nations.

Plaintiff American Civil Liberties Union Foundation of Montana (“ACLU”) is a non-partisan organization, which works to ensure that all people in the State of Montana 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 U.S. Bill of Rights and the Montana Bill of Rights.

Plaintiff Montana Association of Churches (“MAC”) is a non-denominational organization of Christian churches. MAC recognizes the dignity of every human person by promoting human rights and principles of balanced justice.

Montana Catholic Conference serves as the public policy branch of the Catholic Church in Montana, and the liaison for Montana’s Roman Catholic bishops with state and federal government. Inspired by Scripture and Catholic social teaching, the conference is committed to maintaining respect for life, and to promoting the value and dignity of all human lives.

Senators Brent Cromley, Steve Gallus, Dan Harrington, Don Ryan, Dan Weinberg, Mike Wheat, and Representatives Norma Bixby, Paul Clark, Gail Gutsche, Joey Jayne, and Jeanne Windham are all elected Montana officials, currently serving the people of Montana. As elected

representatives, these Plaintiffs have standing to contest potentially cruel and unusual punishment inflicted during their representation. Given a Legislator's inviolate duty to protect and promote fundamental public rights, these Plaintiffs have a heightened interest in ensuring that statutory provisions for the lethal injection protocol are implemented in accordance with Montana's constitutional provisions and the public's expectation that no one will be subjected to cruel and unusual punishment.

Each of these Plaintiffs has a direct interest in assuring that the government operates within the confines of the both the federal and state constitutions. The MTACDL represents criminal defendants accused of capital crimes and their ability to effectively advocates for their clients will be injured and diminished if the State is allowed to proceed and inflict cruel and unusual punishment on criminal defendants.

ACLU of Montana likewise is an advocacy organization working to protect all citizens against unconstitutional actions by state government. The ACLU's advocacy agenda will be diminished and the organization thereby injured if it cannot advocate against the imposition of cruel and unusual punishment in capital cases.

Plaintiffs MAC and Catholic Conference advocate for the respect for and dignity of life. Their advocacy will be directly diminished and the organization thereby injured in the event it cannot advocate against the imposition of cruel and unusual punishment in capital cases.

All three organization will be directly injured if, confronted with substantial evidence the current form of administering lethal injection, the organization cannot challenge the utilization of a process which violates the Eighth Amendment. The injuries are expected to be in the direct

loss of membership since the inability to advocate effectively will cause members of the public to question the organization's competencies and capabilities.

The Legislative Plaintiffs have all taken oaths to uphold the state and federal constitution and if unable to challenge the lethal injection procedure, each Legislator will be directly injured, knowing that they can take no legal steps to prevent and unconstitutional action to occur during their tenure in office.

While Plaintiffs share concerns with the general public about governmental action which are unconstitutional, the Plaintiffs all have separate and distinct concerns, not shared by the general public, making the violation of the constitution damaging as to them. Specifically, either clients will be directly exposed to an unconstitutional procedure; the inability to advocate will create questions of competency and credibility of the organizations or the individuals, namely the Legislators, will be unable to fulfill their requirements of their office.

II.

On July 11, 2006, Plaintiffs filed an original proceeding in the Montana Supreme Court seeking injunctive relief prohibiting the defendants named herein from executing any person under a sentence of death. (Verified Petition, Exhibit 1, attached hereto). The request for this injunction rested on the general allegation that under existing circumstances there is a high degree of probability that Montana's lethal injection protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment.

III.

On July 25, 2006 the Montana Supreme Court issued an order denying the relief requested; however, before relief was denied the Montana Court issued an order requiring that all

the papers in the case be forwarded to and served on Montana death row inmate David Dawson and his attorney Ed Sheehy so that they might have the opportunity to respond. Moreover, in the July 25, 2006 dismissal Order at page 4, (Order, Exhibit 2 attached) the Montana Supreme Court states that “of course, Mr. Dawson’s right must be weighed into our determination of whether to exercise original jurisdiction.” This reference to Mr. Dawson and his rights involves his execution by lethal injection currently scheduled for August 11, 2006 at the Montana State Prison in Deer Lodge, over which Defendant Warden Mike Mahoney and some of the other named Defendants will preside.

IV.

On August 1, 2006 Plaintiffs filed a motion for reconsideration of the July 25, 2006 Order dismissing Plaintiffs’ petition. The request for reconsideration centered on the Montana Supreme Court’s decision to take full account of Mr. Dawson’s “rights” to drop all his appeals and demand execution. Plaintiffs contended that the Eighth Amendment problems with Montana’s Lethal Injection Protocol were categorically not subject to individual waiver by Mr. Dawson or any other single defendant. Importantly, the Eighth Amendment serves as a restraint on the exercise of State power which inures both to the community at large as well as a criminal defendant.

V.

In the Order dated August 2, 2006, the Montana Supreme Court denied Plaintiffs reconsideration request. (Order, Exhibit 3, attached). The Montana Court reinforced its July 25th decision and said that “after consideration of . . . the opinions expressed by Mr. Dawson in his response, we determined that this case was not appropriate for the exercise of original

jurisdiction to entertain such issues.” Plaintiffs’ opportunities to obtain immediate relief from the Supreme Court of Montana has been exhausted.

VI.

The parties filed competing declarations from experts knowledgeable in the field of anesthesiology with the Montana Supreme Court. Those declarations of Dr. Heath (Exhibit 4) and Dr. Dershwitz (Exhibit 5) are attached hereto. Plaintiffs allege that at any hearing on the Eighth Amendment validity of Montana’s Lethal Injection Protocol, the Court would be persuaded by the amount of proof required in the circumstances. The matters outlined in the declaration, supporting Plaintiffs’ position (See Dr. Heath’s Declaration,) are factually correct and warrant the finding that Montana’s Lethal Injection Protocol violates the Eighth and Fourteenth Amendments to the United States Constitution.

VII.

Plaintiffs allege that this Court has jurisdiction to decide this case and enter a temporary injunction prohibiting all executions until this matter is decided under 42 U.S.C. § 1983 and/or 28 U.S.C. § 2201 and/or 28 U.S.C. § 1331.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court will assume jurisdiction over this matter and enter any and all appropriate temporary and/or permanent Orders or Judgments in favor of Plaintiffs.

Respectfully submitted this 7th day of August 2006.

Gough, Shanahan, Johnson and Waterman

/s/ Ronald F. Waterman
Ronald F. Waterman, Esq.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August 2006, the foregoing was duly served upon counsel via facsimile at 9:15 a.m.:

Mike McGrath, Attorney General
Pamela Collins
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401
406-444-3549

Diana Koch
Chief Legal Counsel
Montana Department of Corrections
P.O. Box 201301
Helena, MT 59620-1301
406-444-1494

The foregoing was also duly served upon the following by mailing a true and correct copy, U.S. Mail, first class and postage prepaid, and addressed as follows:

David Dawson
A.O. #25284
700 Conley Lake Road
Deer Lodge, MT 59722

Edmund F. Sheehy
Cannon and Sheehy
P.O. Box 5717
Helena, MT 59604-5717

/s/ Ronald F. Waterman