

IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

FILED
JAMES BONINI
CLERK

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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS
Case Number:

MS 2 03 - 55

LEWIS WILLIAMS, JR.
Inmate Number 176-623
Post Office Box 788
Mansfield Correctional Inst.
Mansfield, Ohio 44091

and

JOHN GLENN ROE
Inmate Number 183-047
Post Office Box 788
Mansfield Correctional Inst.
Mansfield, Ohio 44091

Plaintiffs,

vs.

ROBERT TAFT, Governor
State of Ohio
77 South High Street, 30th Floor
Columbus, Ohio 43215

and

REGINALD A. WILKINSON, Director
Ohio Dept. of Rehabilitation & Correction
1050 Freeway Drive North
Columbus, Ohio 43229

and

JAMES HAVILAND, Warden
Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699

Defendants.

Judge MAGISTRATE JUDGE KEMP

Magistrate Judge:

REQUEST FOR PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF
AND DECLARATORY RELIEF

IMMINENT EXECUTIONS SET:
L. WILLIAMS SET FOR 1-14-04
J. ROE SET FOR 2-3-04

Plaintiffs' Original Complaint for Injunctive Declaratory Relief,
Attorney Fees, and Costs of Suit Pursuant to 42 U.S.C. § 1983

COMPLAINT

I. Nature of Action

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of Plaintiffs' rights to be free from cruel and usual punishment under the Eighth and Fourteenth Amendments to the United States Constitution, and Plaintiffs' rights to be free from violations of their substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution. Plaintiffs seeks equitable and injunctive relief.
2. In this action, Plaintiffs claim that Defendants' current method of lethal injection can and will, in effect, cause them to be tortured to death. No government within the United States can intentionally or negligently use an excruciatingly painful, arbitrary, cruel, and unreliable method of execution.
3. Defendants intend to violate Plaintiffs' constitutional rights by executing them with drugs that include a paralyzing agent veterinarians will not use for the euthanasia of cats and dogs. This paralyzing drug can and will cast a chemical veil over the excruciatingly painful effects of death by suffocation and heart attack. Defendants' lethal injection protocol includes an unreliable ultrashort-acting anesthetic that can and will leave Plaintiffs conscious but trapped in a paralyzed body wracked with the pain of suffocation and a heart attack. Defendants intend to execute Plaintiffs with unreliable and arbitrary drugs, administered by inadequately trained personnel, who use inappropriate equipment and methods to cause death by lethal injection.
4. This lawsuit is not a successor habeas petition. The fact that Plaintiffs have each fought and lost one full round of habeas corpus litigation does not defeat this civil rights action, because they are not challenging their underlying convictions and death sentences in this present action; nor

are Plaintiffs saying that Defendants could never execute them. Plaintiffs could be executed if (1) no separate legal challenges upend their convictions or death sentences; (2) neither receives executive clemency; and (3) Defendants design a constitutionally acceptable method for executing them.

5. Plaintiffs seek a preliminary and permanent injunction preventing Defendants from executing them by the means currently employed for carrying out an execution by lethal injection in the State of Ohio. Plaintiffs also seek an Order declaring that Defendants' current method for conducting an execution by lethal injection violates the Eighth and Fourteenth Amendments to the United States Constitution.

II. Plaintiffs

6. Lewis Williams, Jr., is a United States citizen and a resident of the State of Ohio. He is currently a death-sentenced inmate in the custody of Defendants, and under the control and supervision of the State of Ohio Department of Rehabilitation and Correction, who have him incarcerated in the Mansfield Correctional Institution in Mansfield, Ohio (Inmate #176-623). The Ohio Supreme Court has ordered that Mr. Williams is to be executed on January 14, 2004. Upon information and belief, it is the intention of Defendants, acting in concert with other state officials not named as defendants herein, to use the lethal injection methods described herein to execute Mr. Williams on January 14, 2004, in the death house located on the grounds of the Southern Ohio Correctional Facility (operated and controlled by the Defendants) in Lucasville, Ohio.
7. John Glenn Roe is a United States citizen and a resident of the State of Ohio. He is currently a death-sentenced inmate in the custody of Defendants, and under the control and supervision of

the State of Ohio Department of Rehabilitation and Correction, who have him incarcerated in the Mansfield Correctional Institution in Mansfield, Ohio (Inmate #183-047). The Ohio Supreme Court has ordered that Mr. Roe is to be executed on February 3, 2004. Upon information and belief, it is the intention of Defendants, acting in concert with other state officials not named as defendants herein, to use the lethal injection methods described herein to execute Mr. Williams on February 3, 2004, in the death house located on the grounds of the Southern Ohio Correctional Facility (operated and controlled by the Defendants) in Lucasville, Ohio.

III. Defendants

8. Defendant Robert Taft is, and at all times relevant was, the Governor of the State of Ohio. He is the final executive authority in the state, statutorily and constitutionally responsible for the execution of all sentences of death in Ohio and the manner in which those sentences are executed.
9. Defendant Reginald A. Wilkinson is, and at all times relevant was, the Director of the State of Ohio Department of Rehabilitation and Correction (DRC), a department of the State of Ohio that was created and is maintained pursuant to Ohio Revised Code Section 5120. As such, Defendant Wilkinson is charged and authorized under Ohio Revised Code Section 5120.01 to prescribe and direct the promulgation of rules and regulations for the DRC, including the rules and regulations for the conduct of prison operations and execution procedures. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.
10. Defendant James Haviland is, and at all times relevant was, Warden of the Southern Ohio Correctional Facility at Lucasville ("SOCF"), a correctional institution of the DRC that was

created and is maintained pursuant to Ohio Revised Code Section 5120.05, and which is the prison at which sentences of death are executed in the State of Ohio. Pursuant to Ohio Revised Code Section 5120.38, Defendant Haviland, as the Warden of SOCF, is charged with management of SOCF and the oversight and conduct of operations there, including the oversight and conduct of executions carried out there. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

11. Defendants, and each of them at all times relevant hereto, were acting in their respective official capacities with respect to all acts described herein, and were in each instance acting under the color and authority of state law. Upon information and belief, unless preliminarily and permanently enjoined, the Defendants, and each of them, intend to act in their respective official capacities and under the authority of state law by executing Plaintiffs by utilizing lethal injection methods that will violate Plaintiffs' constitutional rights.

IV. Jurisdiction and Venue

12. Plaintiffs bring this action to enforce and protect rights conferred by the Eighth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment to the United States Constitution, and to enforce and protect rights conferred by the Fourteenth Amendment to the United States Constitution.

13. This Court has jurisdiction over this matter pursuant to 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 authority, 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, specifically 42 U.S.C. § 1983, which provides a cause

of action for the protection of civil rights; under 28 U.S.C. § 2201(a), in that, one purpose of this action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that one purpose of this action is to secure preliminary and permanent injunctive relief.

14. This Court has supplemental jurisdiction over any state statutory claim asserted by the Plaintiff pursuant 28 U.S.C. § 1367, in that, the state and federal claims are derived from a common nucleus of operative facts.
15. This Court has venue under 28 U.S.C. § 1391(b)(1) in that all of the Defendants are situated within the State of Ohio and each of them resides within the Southern District of Ohio, and under 28 U.S.C. § 1391(b)(2) in that all of the events described herein have and will transpire (absent judicial relief) within this judicial district. Defendant Taft exercises his final authority over the other Defendants in the seat of Ohio's government, located in Franklin County, Ohio; the lethal injection execution procedures were promulgated by Defendant Wilkinson in Franklin County, Ohio; and Warden Haviland has executed other Ohio inmates and intends to execute Plaintiffs in Scioto County, Ohio, by the method of lethal injection described herein.

V. Facts Common to All Claims and Relief Sought

16. Plaintiff Lewis Williams, Jr., is scheduled to be put to death by lethal injection on January 14, 2004 at 10:00 a.m. Plaintiff John Glenn Roe is scheduled to be put to death by lethal injection on February 3, 2004, at 10:00 a.m. Defendants are responsible for carrying out this execution.
17. Defendants intend to execute Plaintiffs by employing the same means and methods of lethal injection as have been used since Ohio resumed executions in 1999. As of 2001, Ohio's sole means of execution has been lethal injection.
18. According to a letter written by Defendant Haviland dated April 19, 2002 (see Exhibit 1), and

a letter written by Vince Lagana dated May 30, 2002 (see Exhibit 2), a staff attorney for the Ohio Department of Rehabilitation and Correction, Defendants have executed others and, upon information and belief, Defendants intend to execute Plaintiffs by the following means. Three drugs will be administered: two grams of thiopental sodium in normal saline concentration; one hundred milligrams of pancuronium bromide in normal saline concentration; and 100 milliequivalents of potassium chloride in normal saline concentration. At least the following equipment will be utilized: Angiocath Abbocath-T; primary IV Set No. 1820 (70 inch); and 0.9% sodium chloride, 1000 ml.

19. According to the letter authored by attorney Lagana (Exhibit 2), Defendants contend that they do not have to release all information descriptive of the lethal injection procedures, including but not limited to information regarding any other equipment used; the personnel involved in the execution procedures; the education, training, expertise and experience of the personnel involved; or any other details surrounding this procedure.
20. Upon information and belief, neither Defendants nor their agents have publicly disclosed all material and relevant details surrounding the process by which Defendants chose the method of lethal injection they use; nor have Defendants or their agents publicly disclosed all material and relevant details pertaining to the personnel involved in the lethal injection execution procedure, including but not limited to any education, credentials, training, expertise, or other factors that qualify or disqualify them from being involved in Ohio's lethal injection execution procedures.
21. Upon information and belief, Defendants and/or their agents simply copied lethal injection procedures from another state or other states without investing meaningful and independent efforts designed to ensure that Ohio's lethal injection execution procedures comply with

contemporary medical standards and long-standing legal standards that forbid the infliction of excruciating, cruel, and unusual pain and punishment.

22. Upon information and belief, Defendants' intended means of executing Plaintiffs are inadequate, unreliable, and arbitrary; and Defendants' lethal injection execution procedures will cause Plaintiffs each to suffer excruciating pain and anguish.

Expert Opinion on Ohio's Lethal Injection Drugs

23. According to the attached affidavit of Mark J.S. Heath (see Exhibit 3—note that due to the press of time and the fact Dr. Heath lives in New York City, Plaintiffs are filing a declaration containing an electronic signature; Plaintiffs will supplement the record with a document bearing Dr. Heath's original signature and that of a Notary Public, which should be filed by January 5, 2004), a medical doctor board certified in anesthesiology, Defendants' lethal injection execution procedure will, upon information and belief, violate Plaintiffs' constitutional rights for reasons that include but are not limited to the following:

A) The letters by Warden Haviland and attorney Lagana state that as part of its protocol for lethal injection Ohio uses the drugs sodium thiopental (also know as "thiopental sodium" and "pentothal"), pancuronium bromide (also know as "pancuronium" and "Pavulon"), and potassium chloride (also known as "KCl"). Heath Affidavit ¶ 6.

B) A major concern about the protocol relates to the use of the drug pancuronium bromide. Pancuronium paralyzes all voluntary muscles, but does not affect sensation, consciousness, cognition, or the ability to feel pain and suffocation. If the thiopental and potassium are to be given in doses sufficient to cause death, then it is my opinion held to a reasonable degree of medical certainty that there would be no rational or medically justifiable place in the protocol for pancuronium. Heath Affidavit ¶ 8.

C) If thiopental is not properly administered in a dose sufficient to cause death or at least the loss of consciousness for the duration of the execution procedure, then it is my opinion held to a reasonable degree of medical certainty that the use of pancuronium places the condemned inmate at risk for consciously experiencing

paralysis, suffocation, and the excruciating pain of the intravenous injection of high dose potassium chloride. Heath Affidavit ¶ 9.

D) Based on the information available to me, it is my opinion held to a reasonable degree of medical certainty that Ohio's lethal injection protocol creates an unacceptable risk that the inmate will not be anesthetized to the point of being unconscious and unaware of pain for the duration of the execution procedure. If the inmate is not first successfully anesthetized, then it is my opinion to a reasonable degree of medical certainty that the pancuronium will paralyze all voluntary muscles and mask external, physical indications of the excruciating pain being experienced by the inmate during the process of suffocating (caused by the pancuronium) and having a cardiac arrest (caused by the potassium chloride). Heath Affidavit ¶ 10.

E) If administered alone, a lethal dose of pancuronium would not immediately cause a condemned inmate to lose consciousness. It would totally immobilize the inmate by paralyzing all voluntary muscles and the diaphragm, causing the inmate to suffocate to death while experiencing an intense, conscious desire to inhale. Ultimately, consciousness would be lost, but it would not be lost as an immediate and direct result of the pancuronium. Rather, the loss of consciousness would be due to suffocation, and would be preceded by the torment and agony caused by suffocation. Heath Affidavit ¶ 11.

F) It is my understanding that Ohio's execution protocol requires the presence of media witnesses to the execution, and permits the presence of witness chosen by the inmate and chosen by the victim's surviving family members. It is my opinion based on a reasonable degree of medical certainty that the use of pancuronium effectively nullifies the ability of witnesses to discern whether or not the condemned prisoner is experiencing a peaceful or agonizing death. Regardless of the experience of the condemned prisoner, whether he or she is deeply unconscious or experiencing the excruciation of suffocation, paralysis, and potassium injection, he or she will appear to witnesses to be serene and peaceful due to the relaxation and immobilization of the facial and other skeletal muscles. Heath Affidavit ¶ 13.

G) Based on my research into issues related to lethal execution, I know that there was a time when pancuronium was an acceptable drug for use by veterinarians in the euthanasia of household pets such as dogs and cats; but that the use of pancuronium is now prohibited by many veterinary guidelines in this and other countries for precisely the reasons outlined above. Veterinary standards forbid creating the risk that household pets would die while pancuronium masks the type of excruciating pain human beings are exposed to in Ohio's execution protocol. The use of pancuronium fails to comport with the evolving "standard of decency" regarding the ending of life in household pets. In my medical opinion, based on a reasonable degree of medical certainty, the use of pancuronium in the lethal injection protocol

for executing human beings violates standards of decency designed to prevent the infliction of excruciating pain and suffering on human beings. Heath Affidavit ¶ 14.

H) Another major concern I have based on what I know about Ohio's lethal injection protocol relates to the use of sodium thiopental. Sodium thiopental is an ultrashort-acting barbiturate with a very short shelf life in liquid form. Thiopental is distributed in powder form to increase its shelf life; it must be mixed into a liquid solution by trained personal before it can be injected. Heath Affidavit ¶ 15.

I) When anesthesiologists use sodium thiopental, we do so for the purposes of temporarily anesthetizing patients for sufficient time to intubate the trachea and institute mechanical support of ventilation and respiration. Once this has been achieved, additional drugs are administered to maintain a "surgical depth" or "surgical plane" of anesthesia (*i.e.*, a level of anesthesia deep enough to ensure that a surgical patient feels no pain and is unconscious for the duration of the surgical procedure). The medical utility of thiopental derives from its ultrashort-acting properties: if unanticipated obstacles hinder or prevent successful intubation, patients will quickly regain consciousness and will resume ventilation and respiration on their own. Heath Affidavit ¶ 16.

J) The benefits of thiopental in the operating room engender serious risks in the execution chamber. Based on the information I have available to me concerning Ohio's execution protocol, a two (2) gram dose of sodium thiopental is apparently administered in a single injection from a single syringe. By contrast, based on my research and the research of others into the procedures for executing human beings by means of lethal injection, the original design of the lethal injection protocol called for the **continuous** intravenous administration of an ultrashort-acting barbiturate. Based on my research and the research of others, the central elements of the lethal-injection procedure used in Ohio is similar to the one adopted many years ago in Oklahoma (which, it appears, many states used as a model without substantive independent research). Oklahoma requires the "continuous intravenous administration of an ultrashort-acting barbiturate" (Oklahoma Statutes, Title 22 Criminal Procedure, Chapter 17 part 1014 A). It does not appear that Ohio's protocol includes this "continuous" requirement. The use of a continuous administration of the ultrashort-acting barbiturate is essential to ensure continued and sustained unconsciousness during the administration of pancuronium and potassium chloride. It is my opinion based on a reasonable degree of medical certainty that the failure to require a continuous infusion of thiopental places the condemned inmate at a needless and significant risk for the conscious experience of paralysis during the excruciating pain of both suffocation and the intravenous injection of potassium chloride. Heath Affidavit ¶ 17.

K) Based on my research into lethal injection, the dose of pentothal described in

the Ohio protocol, 2 grams, is considerably lower than the doses described in the protocols of many states and the Federal Government. It is my opinion based on a reasonable degree of medical certainty that Ohio's relatively low dose of thiopental amplifies the concern relating to the single injection (as opposed to continuous infusion) of this ultrashort-acting barbiturate, thereby further elevating the risk that the condemned person will suffer excruciating pain masked by the pancuronium. Heath Affidavit ¶ 18.

L) Above and beyond my concerns stated above about the drugs used in Ohio, the details of Ohio's lethal injection protocol that I have been made aware of do not account for procedures designed to ensure the proper preparation of the drugs used. I have not seen details regarding the credentials, certification, experience, or proficiency of the personnel who will be responsible for the mixing of the thiopental from powder form, or for the drawing up of the drugs into the syringes. Preparation of drugs, particularly for intravenous use, is a technical task requiring significant training in pharmaceutical concepts and calculations. It is my opinion based on a reasonable degree of medical certainty, and based on my review of lethal execution procedures in states that have disclosed more detailed information that what I have seen about Ohio's procedures, that there exist many risks associated with drug preparation that, if not properly accounted for, further elevate the risk that an inmate will consciously experience excruciating pain during the lethal injection procedures. Heath Affidavit ¶ 20.

M) The information available to me provides inadequate detail regarding the training, credentials, certification, experience, or proficiency of any prison employee, nurse or paramedic who performs the execution procedure. The absence of such detail raises critical questions about the degree to which condemned inmates risk suffering excruciating pain during the lethal injection procedure. It is my opinion based on a reasonable degree of medical certainty that the correct and safe management of intravenous drug and fluid administration requires a significant level of professional acumen, and can not be adequately performed by personnel lacking the requisite training and experience. The great majority of nurses are not trained in the use of ultrashort-acting barbiturates; indeed, this class of drugs is essentially only used by nurses who have significant experience in intensive care units and as nurse anesthetists. Very few paramedics are trained or experienced in the use of ultrashort-acting barbiturates. Based on my medical training and experience, and based upon my research of lethal injection procedures and practices, inadequacies in these areas elevate the risk that the lethal injection procedure will cause the condemned to suffer excruciating pain during the execution process. Heath Affidavit ¶ 22.

N) Based on my research into methods of lethal injection used by various states and the federal government, and based on my training and experience as a medical doctor specializing in anesthesiology, it is my opinion based on a reasonable degree

of medical certainty that, given the apparent absence of a central role for a properly trained medical or veterinary professional in Ohio's execution procedure, it can and should be presumed that the lethal injection procedure Ohio employees creates medically unacceptable risks of infliction excruciating pain and suffering on inmates during the lethal injection procedure. Heath Affidavit ¶ 26.

Firsthand Account of Adverse Effects of Drug

24. Dr. Heath's opinions and observations are corroborated by the experience of persons like eye surgery patient, Carol Weihrer. During Ms. Weihrer's surgery the sedative she received was ineffectual and Ms. Weihrer was conscious of the entire surgery. Due to the administration of a neuromuscular blocking agent like pancuronium bromide, however, she was unable to indicate her consciousness and horrific pain to the doctor removing her eyeball for surgical repair: "I therefore experienced what has come to be known as Anesthesia Awareness, in which I was able to think lucidly, hear, perceive and feel everything that was going on during the surgery, but I was unable to move. It burnt like the fires of hell. It was the most terrifying, torturous experience you can imagine. The experience was worse than death." See Exhibit 4, Affidavit of Carol Weihrer. The combination of the same kinds of chemicals Defendants use during Ohio's lethal injection procedures resulted in Ms. Weihrer's horrifying experience.

Improper Chemical Veil

25. Upon information and belief, using pancuronium in the lethal injection protocol serves no purpose other than to guarantee that Plaintiffs, like Ms. Weihrer, will be forced into a state of "chemical entombment" while they consciously experience suffocation, the pain of potassium chloride, and the pain of cardiac arrest.

26. Upon information and belief, Defendants intend to use pancuronium for the precise (albeit unconstitutional) purpose of wrapping Plaintiffs in chemical veils to hide the ugly convulsions

otherwise evident in human beings fighting suffocation and experiencing cardiac arrest.

27. Upon information and belief, Defendants can offer no rational, non-arbitrary justification for using pancuronium. Defendants use of this drug serves only the purpose identified by Dr. Kris Sperry, M.D., a Medical Examiner for the State of Georgia, who said a neuromuscular blocking agent (like pancuronium) is used during lethal injection “to paralyze all the muscles such that those outwardly aesthetically unpleasant things are not seen and do not occur.” State v. Michael Wayne Nance, Gwinnett County Superior Court, Indictment No. 95-B-2461-4, Tr. 39-40, July 30, 2002. Witnesses viewing the lethal injection procedure and the general public will never realize the cruel fraud perpetrated upon them: instead of witnessing an inmate quiet and motionless, euphemistically thought of as being “put to sleep,” they are in fact witnessing the chemical cover-up of an act of excruciating torture during which the inmate may be fully conscious.

Inadequate Training of Execution Personnel

28. Upon information and belief, Defendants’ lethal injection protocol fails to provide a person with adequate medical training to witness the execution and stand ready to take appropriate steps if and when it becomes evident that the condemned inmate is suffering excruciating pain.

29. Upon information and belief, Defendants’ failure to provide rational, reliable directions or standards for the requisite training, education, and expertise of the personnel who carry out executions by lethal injection in Ohio leads to the conclusion that Defendants’ execution methods violates Plaintiffs’ constitutional rights. Upon information and belief, Defendants’ lethal injection execution procedures provide no answers to critical questions or criteria for essential and foreseeable eventualities, which include, but are not limited to:

- A) the minimum qualifications and expertise required for the different personnel performing the tasks involved in the lethal injection procedure after the catheter is inserted;
- B) the methods for obtaining, storing, mixing, and appropriately labeling the drugs, the minimum qualifications and expertise required for the person who will determine the concentration and dosage of each drug to give, and the criteria that shall be used in exercising this discretion;
- C) the manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;
- D) the manner in which a heart monitoring system shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;
- E) the manner in which the IV catheters shall be inserted into the condemned prisoner, the minimum qualifications and expertise required of the person who is given the responsibility and discretion to decide when efforts at inserting the IV catheters should be abandoned and the cut-down procedure begun, and the criteria that shall be used in exercising this discretion;
- F) the manner in which the condition of the condemned prisoner will be monitored to confirm that proceeding to the next procedure would not inflict severe and unnecessary pain and suffering on the condemned prisoner;
- G) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to order the staff to divert from the established protocols if necessary to avoid inflicting severe and unnecessary pain and suffering on the condemned prisoner, and the criteria that shall be used in exercising this discretion; and
- H) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to ensure that appropriate procedures are followed in response to unanticipated problems or events arising during the lethal injection procedure, and the criteria that shall be used in exercising this discretion.

Comparison to Euthanasia of Companion Animals

30. Defendants intend to execute Plaintiffs by using drugs veterinarians cannot use during the euthanasia of house pets. Specifically, using paralyzing agents violates veterinarians' ethical standards.
31. The leading professional association of veterinarians prohibits the use of paralyzing agents during the euthanasia of house pets. The American Veterinarian Medical Association's (AVMA) year 2000 Report on Euthanasia clearly declares that "A combination of pentobarital [an anesthetic in the same category of drugs as thiopental] with a neuro-muscular blocking agent [like pancuronium] is not an acceptable euthanasia agent." See Exhibit 5 (excerpt from the AVMA report). The method of execution Defendants plan to use to execute Plaintiffs violates the AVMA's standards—veterinarians would not put dogs to sleep the way Defendants execute human beings.
32. Since 1981, many states have passed laws governing the euthanasia of pets that preclude the use of a sedative in conjunction with a neuromuscular blocking agent. Texas, Tex. Health & Safety Code, § 821.052(a); Florida, Fla. Stat. §§ 828.058 and 828.065 (enacted in 1984); Georgia, Ga. Code Ann. § 4-11-5.1 (enacted in 1990); Maine, Me. Rev. Stat. Ann., Tit. 17, § 1044 (enacted in 1987); Maryland, Md. Code Ann., Criminal Law, § 10-611 (enacted in 2002); Massachusetts, Mass. Gen. Laws § 140:151A (enacted in 1985); New Jersey, N.J.S.A. 4:22-19.3 (enacted in 1987); New York, N.Y. Agric. & Mkts § 374 (enacted in 1987); Oklahoma, Okla. Stat., Tit. 4, § 501 (enacted in 1981); Tennessee, Tenn. Code Ann. § 44-17-303 (enacted in 2001). Other States have implicitly banned such practices. *See* Illinois, 510 Ill. Comp. Stat., ch. 70, § 2.09; Kansas, Kan. Stat. Ann. § 47-1718(a); Louisiana, La. Rev. Stat. Ann. § 3:2465; Missouri, 2 CSR

30-9.020(F)(5); Rhode Island, R.I. Gen. Laws § 4-1-34, Connecticut, Conn. Gen.Stat. § 22-344a; Delaware, Del.Code Ann., Tit. 3, § 8001; Kentucky, Ky.Rev.Stat. Ann. § 321.181(17) and 201 KAR 16:090, § 5(1); South Carolina, S.C.Code Ann. § 47-3-420. See Exhibit 6 (chart outlining statutes).

33. These statutory declarations, which embody societal values for the euthanasia of house pets, underscore the inhumanity of Defendants' execution method. Euthanasia techniques banned as cruel to dogs and cats by definition violate standards of decency regarding the execution of human beings. The discordance between standards for pet euthanasia and Ohio's lethal execution procedures proves that Defendants' lethal injection procedures fall far outside contemporary standards of decency. Compare Atkins v. Virginia, 536 U.S. 304, 315 (2002) (Executing those with mental retardation violates contemporary standards reflected in state statutes barring same. "It is not so much the number of these States that is significant, but the consistency of the direction of change.")

Pending Litigation in Other States Relevant to Plaintiffs' Case

34. Defendants' intended means and methods of executing Plaintiffs by lethal injection are materially indistinguishable from the lethal injection procedures at issue in Virginia, where a similarly situated death-sentenced inmate brought a similar lawsuit under 42 U.S.C. § 1983. On December 17, 2003, the Virginia inmate's lawsuit resulted in an Order from the Federal Fourth Circuit Court of Appeals that stayed the execution and held further proceedings in abeyance until the United States Supreme Court adjudicates a similar case out of Alabama. See Exhibit 7, Entry from Reid v. Johnson, case number CA-03-1039-3, Order of December 17, 2003. On December 18, 2003, the United State Supreme Court rejected Virginia's request to overrule that order and

permit Virginia to execute the plaintiff. See Exhibit 8. Johnson v. Reid, 2003 U.S. Lexis 9338. The Alabama case that resulted in the Virginia stay and abey order involves an inmate who filed a similar 42 U.S.C. § 1983 lawsuit to challenge portions of that state's execution procedures (specifically, the "cut down" procedure designed to cut deep enough into a condemned person's body to locate a vein into which lethal drugs could be infused). On October 8, 2003, the United States Supreme Court granted the Alabama inmate a last-minute stay stay of execution. See Exhibit 9 (Nelson v. Campbell, ___ U.S. ___, 124 S. Ct. 383, 2003 U.S. Lexis 7420 (2003)). On December 1, 2003, the United States Supreme Court granted certiorari to the Alabama inmate on the question "Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?" Exhibit 10 (Nelson v. Campbell, 2003 U.S. Lexis 8577 (Case No. 03-6821, Decided 12-1-03)). Plaintiffs here stand in the same substantive and procedural position as the plaintiffs in Alabama and Virginia. Therefore, at bare minimum, Plaintiffs are entitled to a preliminary injunction barring Defendants from executing them until the United States Supreme Court issues its decision in the Alabama case.

35. Viewing Plaintiffs' instant complaint solely on its merits as a complaint invoking rights pursuant to 42 U.S.C. § 1983, Plaintiffs are entitled to a preliminary injunction stopping their executions because (1) there is a significant likelihood that they will prevail on the merits; (2) they will suffer irreparable harm if they are executed; (3) there is a great impact on the public's interest not to have its government behave like those of other nations we roundly condemn for utilizing execution methods that violate our nation's constitutional proscription against cruel and unusual

punishment; and (4) there is a substantial possibility that others under a sentence of death in Ohio will suffer unconstitutional executions unless this Court requires Defendants to design constitutionally execution procedures. Vittitow v. City of Upper Arlington, 43 F. 3d 1100, 1108-1109 (6th Cir. 1995); Basicomputer Corp. v. Scott, 973 F. 2d 507, 511 (6th Cir. 1992).

36. Plaintiffs do not seek injunctive relief under 42 U.S.C. § 1983 as a means of attacking their underlying convictions or death sentences; nor do they bring this suit in some hope of ultimately defeating the death penalty in Ohio. Rather, they simply seek to utilize 42 U.S.C. § 1983 as a legitimate means to stop Defendants from effectively torturing them to death. If Defendants implement execution procedures that do not violate Plaintiffs' constitutional rights, then Defendants will be entitled to execute Plaintiffs barring relief granted to one or both of them through some other judicial or clemency proceeding.

37. 42 U.S.C. § 1983 provides, in pertinent part, for the protection of "any rights, privileges, or immunities secured by the Constitution and laws" against infringement by the states. When these rights are violated, 42 U.S.C. § 1983 creates an action for damages and injunctive relief for the benefit of "any citizen of the United States" against the state actor responsible for the violation. In accordance with the remedial nature of the statute, the coverage of 42 U.S.C. § 1983 must be "liberally and beneficently construed." Dennis v. Higgins, 498 U.S. 439, 443 (1991) (quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 684 (1978)).

In order to effect this liberal construction, the Court has "given full effect to [the statute's] broad language" by recognizing that 42 U.S.C. § 1983 provides a remedy "against all forms of official violation of federally protected rights." Id. at 444.

38. The Eighth Amendment's proscription against cruel and unusual punishment forbids the

infliction of unnecessary pain in the execution of a death sentence. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) (opinion of Reed, J.); Fierro v. Gomez, 865 F. Supp. 1387, 1413 (N.D. Cal. 1994) (execution by lethal gas in California held unconstitutional where evidence indicated “death by this method is not instantaneous. Death is not extremely rapid or within a matter of seconds. Rather . . . inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes their face” and “during this period of consciousness, the condemned inmate is likely to suffer intense physical pain” from “air hunger”; “symptoms of air hunger include intense chest pains . . . acute anxiety, and struggling to breath”), aff’d, 77 F.3d 301, 308 (9th Cir. 1996), vacated on other grounds, 519 U.S. 918 (1996). Further, “[p]unishments are cruel when they involve . . . a lingering death.” In re Kemmler, 136 U.S. 436, 447 (1890). A punishment is particularly constitutionally offensive if it involves the *foreseeable* infliction of suffering. Furman v. Georgia, 408 U.S. 238, 273 (1973), citing Resweber, supra (had failed execution been intentional and not unforeseen, punishment would have been, like torture, “so degrading and indecent as to amount to a refusal to accord the criminal human status”).

39. Under Defendants’ execution procedures for lethal injection, it is not only foreseeable but also predictable that death by lethal injection as it is currently carried out will produce unnecessary pain, torture, and lingering death. Far from producing a rapid and sustained loss of consciousness and a humane death, Defendants’ means and methods of lethal injection can and will cause Plaintiffs to consciously suffer an excruciatingly painful and protracted death.

First Claim: Eighth Amendment Violation

40. Plaintiffs incorporate all preceding paragraphs as if fully rewritten herein.

41. In creating, maintaining and implementing the procedures, practices and customs utilized by Defendants and their agents to execute Ohio inmates by lethal injection in the past, and which are intended for use by Defendants in the execution of Plaintiff Williams on January 14, 2004, and of Plaintiff Roe on February 3, 2004, Defendants have violated and will violate Plaintiffs' constitutional rights to be free from arbitrary, capricious, cruel, and unusually painful punishment, which rights are secured and guaranteed to them by the Eighth Amendment of the United States Constitution, as incorporated by the Fourteenth Amendment of the United States Constitution to limit Defendants' powers while acting individually or under the color and authority of state law.

Second Claim: Fourteenth Amendment Due Process Violation

42. Plaintiffs incorporate all preceding paragraphs as if fully rewritten herein.

43. In creating, maintaining and implementing the procedures, practices and customs utilized by Defendants and their agents to execute Ohio inmates by lethal injection in the past, and which are intended for use by Defendants in the execution of Plaintiff Williams on January 14, 2004, and of Plaintiff Roe on February 3, 2004, Defendants have violated and will violate Plaintiffs' constitutional rights to substantive and procedural due process as secured and guaranteed to them by the Fourteenth Amendment of the United States Constitution, which limits Defendants' powers while acting individually or under the color and authority of state law.

VII. Prayer for Relief


A. Plaintiffs request that this Court grant them injunctive relief by granting a preliminary and permanent injunction barring Defendants from executing Plaintiffs in the manner by which Defendants currently intend to execute Plaintiffs, in order to prevent Defendants from violating

Plaintiffs' federal constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution.

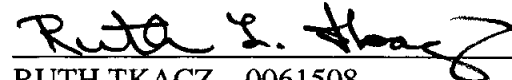
- B. Plaintiffs request that this Court grant them declaratory relief by issuing an Order declaring that the Defendants' current means, methods, practices, procedures, and customs regarding execution by lethal injection violate the Eighth and Fourteenth Amendments to the United States Constitution.
- C. Plaintiffs request that this Court grant Plaintiffs' reasonable attorney fees pursuant to 42 U.S.C. § 1988 and the laws of the United States.
- D. Plaintiffs request that this Court grant such further relief as it deems just and proper.
- E. In the alternative to the above prayers for relief, Plaintiffs request that this Court issue an Order preventing Defendants from executing Plaintiffs, and holding these proceedings in abeyance, until the United States Supreme Court decides the question "Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?" Nelson v. Campbell, 2003 U.S. Lexis 8577 (Case No. 03-6821, Decided 12-1-03).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three true and accurate copies of the foregoing *Plaintiffs' Original Complaint for Declaratory & Injunctive Relief, Attorney Fees and Costs of Suit Pursuant to 42 U.S.C. § 1983*, along with the exhibits, were hand delivered to the attention of Timothy Prichard, Assistant Ohio Attorney General and Chief of the Capital Crimes Section, 30 East Broad Street, Columbus, Ohio, on this 31st day of December, 2003.


COUNSEL FOR PLAINTIFFS